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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT OF APPEALS

OF VIRGINIA.

BY PEACHY R. GRATTAN.

VOLUME XXVIII.

FROM NOVEMBER 1, 1876, TO SEPTEMBER 1, 1877.

JUDGES

OF THE

SUPREME COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

R. C. L. MONCURE, PRESIDENT.

JOSEPH CHRISTIAN, FRANCIS T. ANDERSON,

WALLER R. STAPLES, EDWARD C. BURKS.

Attorney General, RALEIGH T. DANIEL,* JAMES G. FIELD.

*Mr. Daniel died on the 16th day of August, 1877.

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CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Howe, Knox & Co. v. Ould & Carrington.

Bartlett & Robins v. Ould & Carrington.

November term, 1876, Richmond.

1. **Negotiable Paper—Delivery.***—Delivery is absolutely essential to the transfer by endorsement of negotiable paper, but such delivery may be either actual or constructive.
2. **Same—Same—Intent.**—Whether a purchaser or endorsee of negotiable paper has acquired such possession actual or constructive as is sufficient for all the purposes of the transfer, must always depend upon the particular circumstances of each case.
3. **Same — Constructive Delivery — Subsequent Attachment.**—S is the owner of the negotiable note of M for $8,000, which he endorses and deposits with the bank as collateral security for a loan of $4,000 obtained upon the discount by the bank of the note of B. S sells the note to O, and gives O an order on the bank to deliver the note to O. On the same day O presents the order at the bank, and is told the president of the bank is
2 absent from town. Some days *thereafter O has an interview with the president at the bank, and is then informed that the debt of S is nearly paid, and that he would deliver to O the note but for the service of attachment upon the bank. The debt of S is afterwards paid in full. Before the sale by S to O, an attachment had been served upon M at the suit of a creditor of S; but of this O had no notice when he purchased the note. After the sale and notice to the bank by O, an attachment was served on the bank by another creditor of S. HELD: The sale by S to O is valid, and he is entitled to the note as against the attaching creditors of S.

These two cases are substantially the same, and were heard together in this court. The subject of controversy in the cases is the note for $8,000 given by Solomon Myers to Samuel Strong, which was one of the subjects involved in the case of Myers *v.* Ould & Carrington, reported in 23 Gratt. 383. In that case it was held that the note was a valid security as against Myers; but whether it was the property of Ould & Carrington under the transfer of it by Strong to them, or was subject under the attachments of his creditors was left to be litigated in the attachment suits of these creditors.

On the 29th of May 1866, Howe, Knox & Co., instituted their action of *assumpsit* against Samuel Strong, in the circuit court of the city of Richmond, to recover the sum of $1,092.43, with interest from the 1st of October 1865; and at the same time they sued out attachments against him as an absent defendant; one of which was served on Solomon Myers on the 31st of May 1866, and the other was served on Betz, Youngaling & Co. on the 29th of May.

Ould & Carrington filed their petition in this suit, claiming that the note for $8,000 executed by Myers to Strong had been transferred to them by Strong, and that they were the holders thereof for value without notice of the attachment of Howe, Knox & Co.

On the trial of the cause, in Decem-
3 ber 1866, between *the plaintiffs and Strong, there was a verdict and judgment in favor of the plaintiffs. The case, upon the petition of Ould & Carrington, was then allowed to lie until their contest with Myers was ended. The case came on for trial in January 1874, when the parties dispensing with a jury submitted the whole matter of law and fact to the court. And the court held that the right of Ould & Carrington to the said note was paramount to that asserted by the plaintiffs under their attachment. And the First National Bank which had possession of the note, admitting they had no claim upon it, was directed to deliver it to Ould & Carrington. To this opinion of the court the plaintiffs excepted; and set out the evidence in their exception. They applied to this court for a *supersedeas;* which was allowed.

The case of Bartlett & Robbins against Strong, was also an action of *assumpsit*, in the same court, brought on the 30th of May 1866, to recover the sum of $3,200. They also sued out attachments, one of which was served on Solomon Myers, on the 31st of May. They sued out another attachment on the 13th of June, which on the same day was served on H. G. Fant, president of the First National Bank of Richmond.

Ould & Carrington filed their petition in this suit, claiming the said note of Myers as theirs, on the same grounds stated in the former case. The same proceedings were had in the case, viz: a judgment in favor of the plaintiffs against Strong, and in favor of Ould & Carrington against the plaintiffs, and an exception by them, and a *supersedeas* allowed. The evidence in both cases is the same, and omitting what has been before stated is as follows:

Solomon Myers had executed his
4 negotiable note to *Samuel Strong, or order, in the words and figures, following, to-wit:

*Negotiable Paper—Delivery.—On the question of the delivery of bills of exchange and promissory notes, see generally, 4 Am. & Eng. Enc. Law (2nd Ed.) 201, 251, 263. See also Grasswitt v. Connally, 27 Gratt. 19; Wright v. Smith, 81 Va. 777.

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Richmond, Virginia, 14th April, 1866.
$8,000.

On the first day of August, eighteen hundred and seventy-six, I promise to pay to Samuel Strong, or order, without offset, negotiable and payable at the National Exchange bank of Richmond, Virginia, eight thousand dollars, for value received.

SOL. A. MYERS.

Endorsed,
SAMUEL STRONG.

Which said note the said Strong had endorsed in blank, and delivered to the First National Bank of Richmond, of which H. G. Fant was president, as collateral security for a loan of four thousand dollars, made by the said bank by discounting for said Strong a note of Betz, Youngaling & Byer, at the time the said note was so pledged, and before the service of plaintiffs' attachment upon said Myers, and that said note is still due and unpaid, and amply secured by deed of trust on real estate in the city of Richmond.

That on the 8th day of June 1866, Ould & Carrington became purchasers for value of said note, without notice of any attachment issued or served upon said Myers or the said bank; that said note was transferred to them in payment or discharge of a debt of two thousand five hundred and fifty dollars due them from Strong; and that after the said transfer they had no claim against said Strong, either by reason of the said Strong's endorsement in blank of said note or
5 on any *account whatever; that at the time of the transfer to them of said note it was held by the bank in pledge for the sum of four thousand dollars lent to said Strong as hereinbefore stated, but that the said debt has since been paid off and discharged; that the plaintiffs in this suit had never caused to be issued or served any attachment whatsoever upon the First National Bank.

That Ould & Carrington, on the 8th day of June 1866, presented or delivered to an officer of the bank, the order of Samuel Strong in their favor for said note, which said order is in the words and figures following, to-wit:

ORDER.

Mr. Fant will please deliver to Mr. Ould the note of Mr. Sol. Meyers, which I left with him as collateral security for notes of Betz, Youngaling & Byer.

SAMUEL STRONG.

June 8th, '66.

That Mr. Ould was then informed by an officer of the bank, that the president, Mr. Fant, was out of town. Some days thereafter, Mr. Ould had an interview with Mr. Fant at the bank, and was then informed that the debt was nearly paid for which the note was pledged, and that he would deliver to him the note, but for the record service of attachment upon the bank. No claim upon said note is now asserted by the bank or Betz, Youngaling & Co.

The Attorney General and *Cannon & Courtney*, for the appellants.

Ould & Carrington and *Page & Maury*, for the appellees.

6 *STAPLES, J. This is a controversy between Howe, Knox & Co., as attaching creditors of Samuel Strong on the one hand, and Ould & Carrington on the other, claiming to be purchasers and endorsers for value of a negotiable note executed by Myers to Strong. The plaintiffs' attachment was served on Myers on the 31st of May 1866. On the 8th of June 1866, Ould & Carrington purchased the note from Strong. They, however, did not then acquire possession of the note, as at that time, and at the time of the service of the attachment, it was held by the First National Bank as collateral security for a debt of about four thousand dollars, which Strong had owed the bank. Strong, however, gave Ould & Carrington an order on the bank for the note, which was on the same day presented or delivered to an officer of the bank. Mr. Ould, by whom the note was so presented, was then informed that the president was out of town. Some days thereafter, in an interview between that officer and Mr. Ould, the former told the latter, that the debt for which the note was pledged was nearly paid off, and that he would deliver up the note, but for the service of an attachment on the bank. It seems that this latter statement was founded on a misapprehension, and that in fact in this case no attachment was ever served on the bank. The balance of the debt for which the note was pledged has been long since paid, and the bank asserts no claim to the note.

It is conceded that Ould & Carrington are *bona fide* purchasers of the note for value; that they made the purchase without notice of the attachment issued or served upon Myers, or the bank; and it is fair to presume they did not acquire such notice until the interview with the president of the bank; which was several days after the first pre-
7 sentation of the order *to an officer of that institution. It must be admitted that this is a strong equity in favor of Ould & Carrington. It is insisted, however, that this is not sufficient. In order to defeat the lien of the attachment, they must have something more: they must, it is said, have the legal title as endorsees for value. This ground, it is contended, they do not occupy; because at the time of the purchase, no delivery was made to them. They did not and could not even obtain control of the note, as it was then in possession of the bank as collateral security for a debt. Now it may be conceded as well settled under the law merchant, that delivery is absolutely essential to the transfer by endorsement of negotiable paper. The authorities leave no room for doubt or controversy on this point. The cases are, however, not agreed in respect to the acts necessary to constitute a delivery. Notwithstanding an occasional *obiter* opinion to the contrary, it is very clear that an actual manual delivery is not absolutely essential to a title by endorsement. "Holder" is a general word applied to any one in actual or constructive possession of the bill, and entitled at

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law to recover or receive its contents. This is the rule as laid down in Byles on Bills. In a note to the same authority it is said, "It is conceived that if an agent, a banker for example, hold a bill transferable by delivery, a direction given to him by the owner to hold it for another, it is a sufficient transfer by deliverey." Sixth edition, page 235.

Here the note was endorsed in blank by Strong, and was transferable by delivery. A written direction was given by Strong to the bank to deliver it to Ould & Carrington; and notwithstanding a small balance of the debt for which the note was pledged, was still due, the bank was perfectly
8 willing to surrender the note *to Ould & Carrington, and would have done so but for the supposed existence of the attachments.

We have the right to infer at least that such was the fact. The president of the bank so stated, and the correctness of that statement was never denied or questioned by the bank or its officers or attorneys. The amount due the bank was at the time insignificant, and that was amply secured. There is no question therefore, no just reason to doubt, that the bank was willing *to surrender* the note to Ould & Carrington, as stated by the president.

In Edwards on Bailments, page 225, the author lays it down "that the pawner retains the right to negotiate or collect the note provided he discharge the lien of the pledge before judgment; he may transfer the note to a third person, who may maintain an action on it *as evidence in his own name.*"

This language is directly applicable to the present case, and the doctrine is fully sustained by the authorities.

The case of *Fisher* v. *Bradford*, 7 Greenl. R. 28, in many of its features bears a strong resemblance to the case in hand. There the note had been pledged as collateral security to a bank, and it was insisted, whilst so held, it could not be negotiated to a third person, so as to give him a right of action in his own name. In answer to this objection, WESTON, Judge, said: "The bank had a special property, which, accompanied as it was by possession of the instrument, would have justified and enabled it to sue and recover thereon. But the general owner may sue, although liable to be defeated in his action *if the bank, not being otherwise satisfied,* thought proper to retain the note to its own use. And so may any other person, authorized to sue by the general owner, be subject to the same
9 contingency. *The arrangements between the bank and the payee afford no defence to the maker. The pledge having been given up, it is as to him as if it had never existed. He is not liable to the bank; and when he has paid and satisfied the plaintiff, he is completely discharged from the note; and no one who is or ever was interested in it can have any cause of complaint."

The case of *Richardson* v. *Lincoln*, 5 Metc. R. 201, sustains the same doctrine of a constructive delivery. There CHIEF JUSTICE SHAW, who it will be agreed is good authority, said: "In this case the note was in the keeping of Mr. Williams, as the attorney of the promisee, and he was then his agent. But when Richardson, the promisee, negotiated the note to his daughter, and left it in Mr. Williams' custody for her use, he thereby consented to hold it for her, and became her agent, and brought an action on it in her name, which she sanctioned by original order or subsequent ratification. This is abundant proof of actual transfer and constructive delivery, and makes her holder and endorsee of the note, although she never saw it." An in another place the learned chief justice says: "A constructive delivery is sufficient; and even in case of the sale of goods deposited in the hands of a third person, a contract of sale, with an order on the depositary to deliver them to the vendee, is a good constructive delivery.

In *Mitchell* v. *Byrne*, 6 Rich. R. 171, the controversy was between attaching creditors on the one hand, and certain plaintiffs claiming to be holders of the bill for value on the other. The important question was to determine when the plaintiffs became such holders. The bills had been mailed to the plaintiffs, but had not reached them on the day of levying the attachment, the 5th December 1850. The supreme court of
10 South *Carolina held, that so soon as the bills were mailed to the plaintiffs they became the owners thereof, with immediate right of action thereon, and that it was not necessary that the plaintiff, at the time of commencing his action, should have the possession of the bill. It is *sufficient that he is the owner.*

If in that case the court, at the instance of the attaching creditors, had interfered and prevented the plaintiffs getting possession, it can hardly be supposed that this act would defeat a title previously acquired. If by the mailing the plaintiffs become the owners, then no act of a third person could defeat the rights thus acquired. The case of the *King* v. *Lambton et als.*, 5 Price 428, 444, 2 Eng. Exch. R. 276, affirms the same doctrine as the South Carolina decision.

The case of *Lysaght* v. *Bryant*, 67 Eng. C. L. R. 46, is, perhaps, a stronger authority upon the same subject. There Lysaght & Smithell carried on business in partnership. Being indebted to Lysaght, the elder, one of the firm, who acted as agent of the creditor, with the concurrence of his partner, endorsed a bill of exchange in the name of the firm, and placed it amongst the securities which he held for the creditor; but the fact was never communicated to the creditor. He was not informed either of the indorsement or of the deposit of the bill among securities held for his benefit; and yet it was decided that this was a good endorsement by the firm to the creditor. This decision was made by the unanimous opinion of the judges of the common pleas.

Numerous decisions in reference to deeds show the reluctance of the courts to permit mere technicalities with respect to delivery to defeat the intent of the parties, and the

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manifest justice of the case. Thus in *Hedge* v. *Drew*, 12 Pick. R. 141, it was held
11 that a delivery *of the deed by a father to a third person for the use of a daughter, and her subsequent assent to it, was a good delivery to pass real estate.

In *Dargan* v. *Richardson*, 1 Cheves' Law R. 197, the plaintiff, as security for one Long, had paid money on his account. Long being about to leave the state, addressed a letter to the plaintiff making an assignment to him of all his goods as an indemnity. After the date of the letter, but before it reached the plaintiff, attachments were levied upon the goods. It was held that the assignment was good against the attaching creditors.

And in *Hutchinson & wife* v. *Rust*, 2 Gratt. R. 394, the deed was acknowledged before a justice, but retained in the possession of the grantor. And yet this court held it a good delivery, it being manifest that the grantor intended to hold it for the benefit of the grantee. According to all the authorities the delivery of a deed is complete when the grantor has parted with his dominion over it, with intent it shall pass to the grantee, if the latter assents to it by himself or his agent. I do not say there is a perfect analogy between deeds and negotiable instruments. But as between the endorsee for value, or one claiming to be such, and a third person, asserting a mere statutory lien, substantially the same rules should apply to both classes of instruments.

The transfer of negotiable paper is not by force of any statute, but is regulated purely by usage, and that usage is founded on convenience. The reasons, or one of the reasons for requiring the delivery of such securities in order to confer a perfect title, is that it would be very inconvenient to separate the evidence of ownership from the bill or note itself. The maker, upon paying the same, has the rights to demand the surrender
12 *of the bill or note, for his own protection. Otherwise he could never pay with entire safety. Besides he would never know whom to pay where the possession is separate from the title. It will thus be seen that one ground of the rule is the security of the maker. Another is the unrestricted circulation of such paper, so that the *bona fide* holder for value may be secure in his title and his possession. These rules of the law merchant requiring delivery are of course moulded to suit the convenience and necessities of mankind. When the reason for requiring actual delivery ceases, the rule no longer applies. If, for example, the note is in possession of one as an agent or attorney, who acknowledges the title of another, the owner may negotiate it as effectually as though he had the actual possession, and the transferee will acquire a perfect title although he may never see the note. No one will contend that in such case a loss of the note by robbery, or by fire, or even by the adverse claim of another, would defeat the title of the transferee. It is his note that is stolen, or destroyed, and not that of the seller. Whether, therefore, the purchaser or endorsee has acquired such possession, actual or constructive, as is sufficient for all the purposes of the transfer, must always depend upon the particular circumstances of each case.

If, in the case before us, Strong had gone with Ould & Carrington to the bank and requested the latter to hold the note for the benefit of the former, the note would have been fully negotiated. There is no doubt but the owner may pledge the bill or note, and then negotiate it, subject only to the lien of the pledge. The transferee must of course have the possession or control of the paper when payment is demanded or a recovery is had. As already stated the bank as-
13 serted *no claim to the note at the time; it recognized the transfer and the title of the purchaser. So that the case presented is one in which the pledgee so far from asserting a lien waives it in favor of the endorsee. How then does the mere existence of an attachment prevent the operation of these principles of law. It certainly cannot effect the result as between Ould & Carrington and the maker. The latter cannot complain. By the terms of his contract he is answerable to the payee or to his order, and according to its legal effect to the order of any other holder. His obligation is to pay the holder, whoever he may be, at the maturity of the note in 1876. Besides, the maker has had his day in court, and is no longer concerned in the decision. The transfer of title is complete as to him, as to Strong, and as to the bank, and was so complete on the 8th of June 1866, the day of the transfer. If the transaction between these parties on that day was complete, leaving nothing to be done as between them to vest the title, the existence of the attachment could not affect the title unless Ould & Carrington at that time had notice of it. They would have obtained actual possession of the note long ago but for the interference of the court at the instance of the attaching creditor. In determining the rights of the parties, however, one must look not to what has since occurred, but to the facts as they existed on the day the transfer was made, and the bank notified. The attaching creditors cannot by invoking the aid of the court to wrest the note from the bank, and thus prevent its recovery by the endorsee, change the rights and obligations of the parties as they previously existed. My opinion therefore, is, that Ould & Carrington were, on the 8th of June 1866, endorsees for value without notice of the attachment.
14 However *much we may differ upon this point, we are all agreed that if they occupy that position they are entitled to the note as against the lien of the attachment. By the law of the instrument, by the terms of the contract, the person in possession of the note at the time of its maturity, is entitled to the payment. This is the obligation of the maker. This he is bound to do, and he is not required to do more. The suing out and service of an attachment cannot change these results.

Another interesting and important question was discussed at the bar with much

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learning and ability; and that is, whether a negotiable note, whilst it is still current, is properly the subject of levy by attachment at all. It is unnecessary to express any opinion upon this question. If we should hold that it is not, such a decision would of course be fatal to the pretension of the attaching creditors. If we should hold, on the other hand, that such a note may be the subject of attachment and process of garnishment, the result would be the same, inasmuch as Ould & Carrington being endorsees for value had title paramount to that acquired by the levy.

BARTLETT & ROBBINS, v. STRONG *et als.* } STAPLES, J.

This case is substantially the same as the preceding one. Here the attachment was issued on the 30th May 1866, and served on Myers on the 31st of that month, but it was never served on the bank. The second attachment was issued on the 13th of June 1866, and served on the bank on the same day, but never served on Myers. If the plaintiffs rely upon the first attachment, they occupy the precise position of the creditors in the preceding case. If
15 they rely on *the second, both attachment and levy are subsequent to the transfer to Ould & Carrington, and of course confer no lien or title. If we consider both attachments together, and give the plaintiffs the benefit of the levy on the bank, if was after the purchase by Ould & Carrington, and of course could not affect any rights previously acquired. Whether service on the bank before the transfer would have had such effect, it is unnecessary now to inquire. I think this case must take the same course as the other.

JUDGMENTS AFFIRMED.

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16 *Fairfax v. City of Alexandria.

January Term, 1877, Richmond.

1. Confiscation—Notice to Property Owner—Void Judgments.*—In a proceeding to confiscate property of a person charged to be in rebellion, the directions of the attorney general are, that the method of seizure of the property shall be conformed as nearly as may be to the state law, if there be such. When therefore the proceeding is to confiscate debts due from a municipal corporation, the notice to the debtor must be upon the mayor or other officer named in the Virginia statute; and notice given to the auditor of the corporation is of no effect; and the judgment based upon such notice is null and void.

2. Same—Failure to Enter Appearance.—On such a proceeding against F, the counsel of F does not enter an appearance for him, because in three cases against the same party, before the same judge, he was informed by the judge from the bench, that it was the rule of his court not to allow an appearance and defence by rebels and traitors; and in these cases the appearance and defence were stricken from the cases; and this a short time before the last case was acted on. The counsel was not in default for failing to enter an appearance for F; and the decree of confiscation is void and of no effect.

This is a writ of error to a judgment of the circuit court for the city of Alexandria, rendered on the 25th day of May 1875, in an action of covenant, wherein the plaintiff in error, Orlando Fairfax, was plaintiff, and the defendant in error, The City Council of Alexandria, was defendant.

The action was brought upon four bonds of the said corporation, amounting together to the principal sum of $8,700, which bore interest at the rate of *six per centum per annum*, payable half yearly, of which princi-
17 pal the sum of $3,500 was redeemable *on the 10th day of July 1861, and the residue, $5,200, was redeemable on the 1st day of January 1870. The only issues joined in the case were upon the pleas of "covenants performed" and "covenants not broken," to which the plaintiff replied generally; and the parties waiving a trial by jury of the issues joined, and submitting the cause to the determination of the court upon a statement of agreed facts filed and made a part of the record in the cause, and the matters of law arising thereon being argued, it seemed to the court, upon the whole matter therein contained, that the law was for the defendant, and judgment was rendered accordingly.

The defence to the action was, that the said bonds, or the principal and interest of the debt due thereon, were confiscated under the act of congress of July 17, 1862, by the sentence of the district court of the United States for the eastern district of Virginia.

The agreed statement of facts is substantially as follows:

In February 1864, Dr. Orlando Fairfax, the plaintiff in this suit, was residing in Richmond, Virginia, the capital of the Confederacy, and had been living there since the commencement of the war, having, up to said commencement, been a citizen and resident of the city of Alexandria, Virginia. He lived in Richmond till the close of the war, and

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***Confiscation — Notice to Parties—Void Judgments.**—In Blanton v. Carroll, 86 Va. 541, the court says: "When the record shows in any court, whether superior or inferior, that the court has proceeded without notice, any presumption (of validity) is at an end, and it (the judgment) may not only be reversed as erroneous but be impeached and set aside collaterally as void. Foster v. Glazener, 27 Ala. 391; Moore v. Starks, 1 Ohio St. 369; Hollingsworth v. Barbour, 4 Pet. 475. The rendition of a judgment against a party not before the court in any way will be as utterly void as though the court had undertaken to act when the subject matter was not within its cognizance. Bordon v. Fitch, 15 Johns. 121. This is the rule with reference to all courts, with only this difference, that the jurisdiction of a superior court will be presumed until the contrary appears, whereas an inferior court and those claiming under its authority, must show that it had jurisdiction. Probst v. Meadows, 13 Ill. 157." An interesting case upon the question is the case of Underwood v. McVeigh, 23 Gratt. 409. See also Lancaster v. Wilson, 27 Gratt. 624; Connolly v. Connolly, 32 Gratt. 657, citing also the principal case. See on the subject, Gray v. Stuart, 33 Gratt. 351 and *note*, citing the principal case. Webb v. City Council of Alexandria, is the sequel of the principal case. See also Boggs v. Com., 76 Va. 989; Haymond v. Camden, 22 W. Va. 180.

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whilst thus in Richmond, continuously during the period mentioned within the Confederate lines he held four bonds, or evidences of indebtedness of the city of Alexandria, one for $2,000, one for $500, one for $1,000, and one for $5,200, all bearing interest at the rate of *six per centum per annum* on their face, the first three being due and payable on July 10th, 1861, the last one ($5,200) being due and payable January 1, 1870.

18 *At no time during the war were these bonds or evidences of indebtedness out of the personal possession and custody of Orlando Fairfax, the plaintiff in this cause in the city of Richmond, Virginia. The bonds aforesaid, the declaration mentioned, were the words and figures following: (A copy of the bonds and endorsements is set out in the record as part of the facts agreed; but it is unnecessary to set out the same here.)

Three of which bonds had been regularly and properly assigned and transferred to Dr. Orlando Fairfax, the plaintiff in this cause, on the books of the corporation for value, and had passed into his possession and ownership on the 23d day of November 1858, and the fourth one for $5,200, due January 1st, 1870, and bearing interest from July 1st, 1858, and numbered 35, was made and executed and delivered to him in his own name by the defendant for value received.

That, on the 30th day of November 1866, the said plaintiff served a notice on the auditor of the said defendant, who was authorized as agent of the said defendant to pay the interest on said bonds whenever it fell due, not to pay any interest which should thereafter accrue to any but himself or his authorized attorney. That prior to the commencement of this suit, and subsequent to January 1st, 1870, the plaintiff by his authorized attorney and agent, John Johns, jr., repeatedly demanded of the defendant the payment of the principal of said bonds, and the accrued interest thereon, and payment of the same was refused by defendant, and the said amounts have never been paid to the plaintiff.

That, on the 25th day of July 1865, the plaintiff received and accepted the
19 pardon of the president of the *United States. (A copy of which pardon is set out in the record, but need not be repeated here.)

That between March 14th, and April 11th, 1864, an attorney at law appeared before JNO. C. UNDERWOOD, judge of the district court of the United States for the district of Virginia at Alexandria as counsel, and endeavored to procure from him a reversal of the decree of confiscation entered in favor of the United States against Dr. Orlando Fairfax's (the plaintiff in this cause) house and lot situated on Cameron street, in the city of Alexandria. The judge, the honorable JOHN C. UNDERWOOD, informed the attorney from the bench that he could allow no appearance for any "rebel" or "traitor;" that this was the rule of his court as before that publicly announced, and that he had in every case ordered the appearance of counsel for, and the answer of "rebels," to be stricken from the files. The records of three confiscation cases, tried in the United States district court, for the district of Virginia, before the said JOHN C. UNDERWOOD as judge, between March 10th, 1864, and May 4th, 1864, in which the United States was plaintiff, and Dr. Orlando Fairfax (the plaintiff in this cause) was defendant, show that in each case the above rule and practice of the court, as proven by said attorney, that is to allow no appearance for any "rebel" or "traitor," was carried out against Dr. Orlando Fairfax, the defendant in these cases, and the plaintiff in this, and that the appearance of his attorney, and his answers in those three cases, tried and determined between March 10th, 1864, and May 4th, 1864, were, by order of said United States district court at Alexandria, stricken from the files, on the ground that said Dr. Orlando Fairfax was within the Confederate lines, and a rebel.

That the aggregate or principal of
20 said bonds is *$8,700, upon which interest has accrued as to $3,500 thereof from January 15, 1867, and on $5,200 thereof from July 1, 1867, on each sum at the rate of *six per centum per annum*. That on the 4th day of May 1864, the United States district court, for the district of Virginia, in a cause in confiscation therein pending (but not one of the confiscation causes heretofore referred to) in the name of the "United States against all the right, title and interest of Dr. Orlando Fairfax in and to eighty-seven shares of the stock of the corporation of Alexandria, in the eastern district of Virginia, together with all the monies due him and becoming due from the said corporation for dividends upon said stock," passed a sentence of condemnation condemning said stock as forfeited to the United States, the record of which sentence is in the words and figures following, to-wit: (Here follows the said record, which will not be set out here in full, but only the substance of such portions as seem to be material to be here stated.)

The libel of information was filed on the 24th of February 1864, by L. H. Chandler, United States attorney for the eastern district of Virginia, in behalf of the government of the United States, against all the right, title and interest of Dr. Orlando Fairfax in and to eighty-seven shares of the stock of the corporation of Alexandria, together with all the monies due him and becoming due from the said corporation for dividends upon said stock, and against all persons lawfully intervening for their interest therein. The said libel contains nine articles, charging the said Fairfax with being the owner of the said stock, and with having forfeited the same by violating, as therein mentioned, the provisions of the act of congress approved on the 17th day of July 1862, entitled "an act
21 to suppress insurrection, *punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes, and by disregarding the proclamation of the president of the United States, issued on the 25th day of July 1862, "warning all persons within the contemplation of the sixth section of the said act of

congress to cease from participating in, aiding, countenancing and abetting the existing rebellion against the government of the United States." The last two of the said articles are in these words:

"VIII. That the said property herein described has been seized by the United States marshal for the district of Virginia, in compliance with instructions issued by the attorney general to district attorneys of the United States, and by virtue of the fifth section of the act approved on the 17th day of July, in the year of our Lord 1862, entitled "an act to suppress insurrection, to punish treason and rebellion, to seize tnd confiscate the property of rebels, and for other purposes."

"IX. That by reason of the premises, the property herein described became and was forfeited to the United States, and ought to be condemned to their use.

And the conclusion of the libel is in these words: Wherefore prayer is hereby made to your honor that process of monition may issue against the owner and owners of the property herein described, and against all persons interested or claiming an interest therein, warning them at some early day to be therein named to appear and answer this libel of information; and the owners of said property being absent and non-resident, prayer is further made for order of publication in the usual form, and for such further and other relief as to law and justice may appertain, and as this court is competent to give in the premises.

L. H. CHANDLER, *U. S. Attorney.*"

22 *The seizure referred to in the eighth article of said libel was made under a warrant of the said attorney, dated on the 22d of February, 1864, addressed "To the marshal of the United States for the eastern district of Virginia," directing him "to seize all the right, title and interest of Dr. Orlando Fairfax in and to eighty-seven shares of the stock of the corporation of Alexandria in the eastern district of Virginia, together with all the monies due him and becoming due from the said corporation for dividends upon said stock, together with all the improvements, buildings, rights, privileges, appurtenances and other hereditaments to the same belonging, or in any wise appertaining, and all right, title, interest and estate of Dr. Orlando Fairfax therein, as proceedings are to be instituted to secure the confiscation of the same to the use of the United States under the above entitled act," and directing him to report the said seizure to the said attorney when the same shall have been made. A return was made on said warrant in these words:

"UNITED STATES MARSHAL'S OFFICE,
Alexandria, Va., Feb. 23rd, 1864.

I certify that I have seized the within described property, and given notice to R. Johnson, Esq., auditor of the corporation of Alexandria, as within directed.

JOHN UNDERWOOD, *U. S. Marshal.*"

The said warrant and return were filed with the libel, and on the 26th of February 1864, an order was made in the cause, which, after setting out the style of it, is in these words:

"On reading and filing the libel in this case, the court orders that process of monition issue as prayed, and appoints the first Mon-
23 day in April 1864, and the *court room in the custom-house, in the city of Alexandria, as the time and place of trial of this cause; and also orders that notice of said time and place of trial, and of the substance of the said libel, be given by publication thereof in the *Virginia State Journal,* a newspaper published in the city of Alexandria, and also by posting up the same at the court-house door; and that proclamation of the pendency of this suit be made by the marshal at the court-house door two times weekly, until the day of trial.

JOHN C. UNDERWOOD, *District Judge.*"

Process of monition was accordingly issued on the same day by the clerk of the said court, directed to the marshal of said district, who made his return thereon, dated April 4, 1864; that he had "caused the notice to be published, posted and proclaimed as within commanded." Copies of said process and return, and of the evidence of the publication and posting thereof, were made a part of the record. And afterwards, to-wit: on the 4th day of May 1864, a judgment of confiscation was entered in the cause, which, after setting out the style of it, is in these words:

"The papers in this cause having been theretofore returned, the usual proclamation having been made, the default of all persons being duly entered, and due deliberation being had on the pleadings, it is thereupon, on motion of L. H. Chandler, attorney for the United States, ordered, adjudged, sentenced and decreed by the court that the personal property mentioned and described in the libel in this cause be, and the same accordingly is, confiscated and condemned as forfeited to the United States. And upon like motion it is further ordered, adjudged and decreed that the clerk of this court issue a writ of *venditioni exponas,* &c."

24 *The said writ was accordingly issued by the clerk and returned by the marshal, showing the gross amount of sale to be $1,737, which was paid to the clerk by the marshal.

The papers and proceedings aforesaid constitue the record of the sentence of condemnation aforesaid, of which an official copy is made a part of the case agreed, after the insertion of which the agreed case proceeds:

The said eighty-seven shares of stock mentioned and described in said record are the shares or bonds evidenced by the certificates or bonds which are heretofore set forth, and which form the basis of the present action. Under said sentence of condemnation the said stock was sold by the marshal, and by him the stock so sold was transferred on the books of the auditor of the corporation to the purchaser respec-

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tively. Said transfers are in the words and figures following. (They are set out in the case agreed, but need not be here inserted.) The said transfers have been recognized by the defendant as valid transfers of said stock, and the defendant has issued to said confiscation purchasers, or to their assigns, certificates of stock of like tenor and amount, which are still outstanding. The several charters of the town and city of Alexandria, Virginia, and the ordinances of said town and city are made part of this agreed statement, the same as if embodied herein at length.

"And it is further agreed, that if from the facts stated above, the law shall be in favor of the plaintiff, the court shall enter judgment for the amount and interest above stated. But if the court shall determine that the law is for the defendant, judgment shall be entered accordingly."

The circuit court having determined, as before stated, that the law upon the
25 fact agreed as aforesaid *is for the defendant, and rendered judgment accordingly, the plaintiff applied to this court for a writ of error to the said judgment; which was awarded accordingly.

Wattles and *Johns*, for the appellants.
Beach and *Stuart*, for the appellee.

MONCURE, P., delivered the opinion of the court.

If the district court had no jurisdiction to render the decree of confiscation, relied on as a defence by the defendant in this case, then it is admitted by the counsel on both sides, and is clearly shown by authority, that as the proceeding in this case is be so regarded, even in a collateral proceeding such as this is.

It is also admitted by the counsel on both sides, and is clearly shown by authority that as the proceeding in this case is *in rem*, to give the court jurisdiction of the case, the *res* must have been brought by *seizure* within the power and control of the court.

Was it so brought?

"By the seizure of a thing," said the supreme court in *Pelham* v. *Rose*, 9 Wall. U. S. R. 103, 106, "is meant the taking of a thing into possession, the manner of which, and whether actual or constructive, depending upon the nature of the thing seized. As applied to subjects capable of manual delivery, the term means caption, the physical taking into custody."

"In the case at bar," further said the court "a visible thing, capable of physical possession, is the subject of the libel. It is the promissory note of Pelham which constitutes the *res*, against which the proceeding is instituted, and not a 'credit' or debt,
26 which *the note is supposed by the defendant's counsel to represent. Whether by any proceedings, under the act of July 1862, the indebtedness of a maker on a negotiable promissory note, before its maturity, could be reached without the possession of the note itself, is not a question presented for our consideration. It is sufficient that the object of the present libel is to reach the note itself. This appears at every stage of the proceedings," &c. "To effect its seizure, as required by the act, it was therefore necessary for the marshal to take the note into his actual custody and control." See also *Pelham* v. *Way*, 15 Id. 196.

That a credit was liable to "seizure." within the meaning of the act of July 17th, 1862, clearly appears, not only from the express language of the act itself, but also from various adjudications upon it by the supreme court of the United States.

First, as to the express language of the act. The fifth section enacts: "That to insure the speedy termination of the present rebellion, it shall be the duty of the president of the United States to cause the seizure of all the estate and property, money, stocks. *credits* and effects of the persons hereinafter named," &c. And the sixth section makes it the duty of the president "to seize and use as aforesaid all the estate, property, moneys, stocks and credits of persons within any state or territory," &c.

Secondary, as to the decisions of the supreme court upon the subject: they are, *Miller* v. *United States*, 11 Wall. U. S. R. 268; *Brown* v. *Kennedy*, 15 Id. 591.

But as a credit is incapable of being *actually* seized, it must be *constructively* seized, if seized at all.

How may it be constructively seized?

The act of congress does not prescribe the mode, as it might have done; and,
27 if it had done so, no doubt *a seizure in that mode would have been sufficient, and perhaps the only seizure that would have been sufficient.

But the act of congress, as we have seen, makes it the duty of the president of the United States to seize, or cause the seizure of, all the estate, property, monies, stocks and credits, &c., as aforesaid; thus, as it seems, making it his especial duty to prescribe rules in regards to seizure where doubt or difficulty might arise on the subject. Accordingly, it is stated in 11 Wall., pp. 273 and 274, that "In order to carry out these acts of August 6th, 1861, and July 17th, 1862, the president charged the attorney general with the superintendence and direction of all proceedings under them, and authorized and required him to give to the district attorneys and marshals such instructions and directions as he might find needful and convenient touching all seizures, proceedings and condemnations under them." Accordingly, on the 8th of January 1863, the attorney general issued general instructions on the subject to district attorneys and marshals. Among these instructions the following were given with regard to the seizure of property:

"All seizures will be made by the marshal of the proper district, under written authority to be given him by the district attorney, specifying with reasonable certainty the property to be seized, and the owner whose right is sought to be confiscated.

"When the marshal has seized any property under such authority, he will, without

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any unnecessary delay, make a true return thereof in writing to the district attorney.

"Where the state law directs the method of seizure, it shall be conformed to as nearly as may be consistently with the objects of the acts of congress. If the *thing to be seized be *personal* property, it ought to be *actually seized and safely kept;* if real estate, the marshal ought to seize all the right, title, interest and estate of the accused party, giving notice in writing of the seizure to the tenants in possession, if any; if stocks, or other intangible property, the marshal ought (if there be no specific method prescribed by the state law) to describe the property as plainly as he can in his return, and leave the court to determine the sufficiency of the seizure."

The subject of the proceeding in this case, viewing it most favorably for the defendant, was a "credit." The method of seizure of such a subject, as directed by the state law, is that prescribed by the law in regard to attachments; and where the debtor is a corporation, as in this case, notice of the seizure ought to be given to the person, on whom by law process against the corporation is required to be served.

By the state law, Code of 1860, chapter 151, section 7, page 647, it is enacted that an attachment "shall be sufficiently levied in every case by a service of a copy of such attachment on such persons as may be designated by the plaintiff in writing, or be known to the officer to be in possession of effects of, or to be indebted to, the defendant; and as to real estate, by such estate being mentioned and described by endorsement on such attachment." See also sections 12 and 13 of the same chapter, Id. page 648. In regard to the execution of process on a corporation, it is enacted in section 7 of chapter 170, page 707 of the same Code, that "it shall be sufficient to serve any process against, or notice to, a corporation, on its mayor, rector, president, or other chief officer, or in his absence from the county or corporation in which he resides, or in which is the principal office of the corporation against or to which *the process or notice is, if it be a city or town, on the president of the council, or board of trustees, or in his absence on the recorder, or any aldermen or trustee."

The method of seizure in this case ought therefore to have been that prescribed by the state law as aforesaid—that is, the marshal ought to have served a copy of the warrant of the district attorney on the mayor of the city of Alexandria, or in his absence on the president of the council of said city, or in his absence on the recorder or any alderman of said city. The marshal knew, or might easily have known, this method of seizure prescribed by the state law, and ought to have been informed of it if necessary by the district attorney.

Instead of pursuing that course, the marshal pursued the course named in his return, which is in these words: "I certify that I have seized the within described property, and given notice to R. Johnson, Esq., auditor of the corporation of Alexandria, as within directed."

In other words, instead of serving a copy of the warrant on the mayor, or in his absence on the next chief officer of the city, who might have been present as aforesaid, he gave notice of it (whether orally or in writing is not stated), to "R. Johnson, Esq., auditor of the corporation of Alexandria."

What are the duties of this auditor we know not. They may be important in regard to the debt of the corporation, and notice to him may in fact have been as apt to be communicated to the plaintiff as notice to the mayor. But it is enough to say that the law has made the mayor, &c., and not the auditor of the corporation, the agent thereof to receive such a notice, and service of notice upon him has no more effect in *binding the corporation than service on any stranger would have had.

In *Miller* v. *United States,* 11 Wall. U. S. R. 268, the seizure was of stocks in railroad companies in Michigan, was made by giving notice of seizure to the president of one and vice president of the other of said companies, and was held to be a good seizure, having been recognized to be good by the court in which the proceeding was had and the judgment of confiscation pronounced. But the law of Michigan prescribed no mode of seizure of the stock of a corporation, and the court had prescribed none in that case. The court therefore held that the mode of seizure pursued in that case was reasonable and sufficient. But even in that case, the seizure was considered insufficient by the three dissenting judges.

The act of congress in question is extremely penal in its effect, and ought therefore to be strictly construed, and a rigid compliance with all its requirements ought to be exacted. The means of defence which it afforded to those who were affected by it, were exceedingly limited, and the mode of giving notice to them was necessarily very imperfect. It is all important, therefore, that they should have the full benefit of any defect in the *ex parte* proceedings had against them under that act. The objection goes to the want of jurisdiction in the court to pronounce the judgment complained of, and if the objection be a good one, it makes the judgment null and void, even in a collateral proceeding. While presumptions are made in favor of the judgment of a court of competent jurisdiction, they are not made in favor of jurisdiction, when that is the question in controversy, and especially is that the case when the court whose jurisdiction is in controversy, is one of limited *jurisdiction, such as are the district and circuit courts of the United States. It cannot be presumed, therefore, in favor of the jurisdiction of the court in this case, that the marshal seized the property described in the warrant in the mode required by law, and especially can it not be presumed in the face of his return, which shows that the only mode of seizure was by giving notice to R. Johnson, auditor of the corporation of Alexandria, which, as

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we have seen, was not a legal mode of seizure.

Then the *res* in this case was not brought by seizure within the power and control of the court which rendered the decree of confiscation in this case, which decree is therefore null and void, and the judgment of the court below must on that ground be reversed and annulled.

But the decree of the district court is void for another reason; and that is, the plaintiff in error was deprived by a rule of the said court of his legal and constitutional right to appear and defend himself in said court against the charge on which the proceeding to confiscate his property as aforesaid was founded. According to the agreed statement of facts in the case, "between March 14th and April 11th, 1864, and attorney at law appeared before JOHN C. UNDERWOOD, judge of the district court of the United States for the district of Virginia at Alexandria, as counsel, and endeavored to procure from him a reversal of the decree of confiscation entered in favor of the United States against Dr. Orlando Fairfax's (the plaintiff in this cause) house and lot, situated on Cameron street in the city of Alexandria. The judge, the HON. JOHN C. UNDERWOOD, informed the attorney from the bench, that he could allow no appearance for any 'rebel' or 'traitor'; that this was the rule of his
32 court as *before that publicly announced, and that he had, in every case, ordered the appearance of counsel for, and the answer of, 'rebels' to be stricken from the files. The records of three confiscation cases tried in the United States district court for the district of Virginia before the said JOHN C. UNDERWOOD as judge, between March 10th, 1864, and May 4th, 1864, in which the United States was plaintiff, and Dr. Orlando Fairfax (the plaintiff in this cause) was defendant, show that in each case the above rule and practice of the court, as proven by said attorney, that is to allow no appearance for any 'rebel' or 'traitor,' was carried out against Dr. Orlando Fairfax, the defendant in those causes, and the plaintiff in this, and that the appearance of his attorney, and his answers in those three causes, tried and determined between March 10th, 1864, and May 4th, 1864, were, by order of the United States district court at Alexandria, stricken from the files, on the ground that said Dr. Orlando Fairfax was within the Confederate lines, and a rebel."

The judgment for the confiscation of the stock or bonds held by Dr. Orlando Fairfax, and the money due to him thereon by the city of Alexandria, was rendered by the said district court on the 4th day of May 1864, after the trial of the other three confiscation cases against the same defendant referred to in the said agreed statement of facts, in which cases his other estate, or most of it, was confiscated, and was in form a judgment by default, in the following words: "The papers in this cause having been heretofore returned, the usual proclamation having been made, the default of all persons being duly entered, and due deliberation being had on the pleadings, it is thereupon, on motion of L. H. Chandler, attorney for the United States, ordered, adjudged,
33 sentenced and decreed by *the court, that the personal property mentioned and described in the libel in this cause be, and the same accordingly is confiscated and condemned as forfeited to the United States." And then followed an award of a writ of *venditioni exponas* for a sale of the said property.

Whether the defendant, Fairfax, offered to appear and make his defence in said case, and was refused permission to do so, or refrained from doing so vain a thing by the rule of the court, which had just been enforced against him in three other confiscation cases, does not appear. No doubt he would have so appeared and made his defence in the said case but for the said rule. If he had so appeared and made his defence, and afterwards, before the hearing of the case, the appearance and defence had been stricken from the files on the ground that he was a "rebel" or a "traitor," there can be no doubt but that the judgment afterwards rendered in the case as by default would have been reversed by the supreme court of the United States. It was so expressly and unanimously decided by that court in *McVeigh* v. *United States*, 11 Wall. U. S. R. 259, in which MR. JUSTICE SWAYNE, delivering the opinion of the court, said: "In our judgment the district court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It
34 would be *contrary to the first principles of the social compact and of the right administration of justice." Accordingly the judgment of the district court in that case was reversed, and the cause remanded to the circuit court with directions to proceed in it in conformity to law.

In *Underwood* v. *McVeigh*, 23 Gratt. 409, it was unanimously held by this court, that even in a collateral proceeding between other parties the judgment of the district court referred to in *McVeigh* v. *United States, supra,* having been rendered in the absence of McVeigh, was a nullity, and the deed of the marshal passed no title to the purchaser. JUDGE CHRISTIAN, in delivering the opinion of the court, said: "The sentence of condemnation and sale was a nullity—void *in toto.* It was rendered absolutely void by the act of the court in refusing to permit McVeigh to appear and be heard. The authorities on this point are overwhelming, and the decisions of all the tribunals of every country, where an enlightened juris-

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prudence prevails, are all one way. It lies at the very foundation of justice, that every person who is to be affected by an adjudication should have an opportunity of being heard in defence, both in repelling the allegations of fact and upon the matters of law; and no sentence of any court is entitled to the least respect in any other court, or elsewhere, when it has been pronounced *ex parte* and without opportunity of defence." "A tribunal which decides without hearing the defendant, or giving him an opportunity to be heard, cannot claim for its decrees the weight of a judicial sentence. See Smith's Leading Cases, vol. 1, part 2, ed. 1872, pp. 1118, 1119 and 1120, and the numerous cases there cited."

Such is the settled law where the defendant's appearance and answer are stricken
35 from the files, and the *court then goes on to decide the case in the absence of the defendant, and without being willing to hear him. In that case the judgment is not only void, but may be reversed on error by an appellate court.

But what difference can it make that the defendant's appearance and answer were first received and then stricken from the files if he was not permitted to appear? It may make this difference to be sure; that, in the latter case, the refusal of the court to permit him to appear, not being matter of record in the case, he can obtain no relief by writ of error to an appellate court. But that difference strengthens the reason for giving him relief in a collateral proceeding, which is his only remedy. Surely he is entitled to some remedy for the grievous wrong which is done him by not permitting him to appear and defend himself against a criminal charge which is made against him. It is not his fault that he has no remedy by writ of error. He had no power to appear against the rule of the court to the contrary. He could not therefore make the refusal of the court a matter of record in the case. The judgment is therefore absolutely null and void, and must be so regarded in a collateral proceeding. The defendant is in effect not a party to the proceeding, and a judgment cannot be conclusive against a person not a party.

The defendant's right to appear and defend himself against the criminal charge made against him in the libel is manifest from the nature of the act of congress, and all the proceedings against him in the confiscation case. The act was not made for the confiscation of property, merely because it was enemy's property, but because the owner of it had been guilty of certain criminal acts defined in the law. His guilt of these criminal acts is the foundation of the judgment
36 of confiscation *against him, and his right to defend himself against the charge of these acts is just as clear as would be his right to defend himself against a charge of murder or any other crime. Almost every step in the proceedings recognizes the right of the defendant to appear and make his defence. In the conclusion of the libel, prayer is made that process of monition may issue against the owner of the property therein described, and against all persons interested, or claiming an interest therein, warning them, at some early day to be therein named, to appear and answer this libel of information; and the owner of said property being absent and non-resident, prayer is further made for order of publication in the usual form, &c. And to the same effect are the subsequent proceedings in the case. As for instance, the order of court awarding the monition, appointing a time and place for the trial of the cause, and directing notice of such time and place, and of the substance of the libel to be given by publication thereof in a newspaper published in the city of Alexandria, and also by posting up the same at the court-house door; and that proclamation of the pendency of the suit be made by the marshal at the court-house door twice weekly until the day of trial. All of these directions appear by the record to have been complied with.

What a mockery, in the face of all these proceedings designed to notify the defendant of the charges made against him and to afford him an opportunity of appearing and making his defence, was the application to his case of the rule of the court to "allow no appearance for any 'rebel' or 'traitor'!" thus assuming his guilt of the crime charged against him, which charge he was summoned to answer.

That he was prevented by this rule
37 thus announced *from appearing and making his defence, is manifest. He had appeared and made his defence in several other confiscation cases against him tried just before the trial of this one, and his appearance and defence in those cases had been stricken from the file, under the operation of the rule which was then announced to his attorney. He had precisely the same reason for appearing and making his defence in this case as in those cases; and he would, no doubt, certainly have done so, but for the rule which barred the court against him. It was certainly not necessary for him to do so vain a thing as to knock at the door of the court after it was barred, and when he knew it would not be opened to him. It can hardly be necessary to cite authority in support of views which seem to be self-evident. The cases of *Dean* v. *Nelson*, 10 Wall. U. S. R. 158; *Lasere* v. *Rochereau*, 17 Id. 437; and *Tacey* v. *Irwin*, 18 Id. 549, strongly sustain them; but it is unnecessary to do more than refer to them.

Upon the whole, the court is of opinion that the judgment of the circuit court is erroneous, and ought to be reversed and annulled; that the law, upon the facts stated in the case agreed, is for the plaintiff, and that judgment ought to be rendered accordingly.

Since writing the foregoing opinion, we have received and read the opinion of the supreme court of the United States in the case of *Windsor* v. *McVeigh*, recently decided in that court and not yet reported. We entirely concur in that opinion, and think the principles established by it fully sustain the views expressed by us, in the latter branch of the foregoing opinion. That decision entirely accords with the decision of

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this court in *Underwood* v. *McVeigh*, 23 Gratt. 409; the facts of the two cases
38 being precisely alike. *We have endeavored to show in the foregoing opinion, that there is at least as much reason in this case as there was in that, for considering the judgment of confiscation void, on the ground that it was "a sentence of a court pronounced against a party, without hearing him, or giving him an opportunity to be heard." Such a sentence "is not a judicial determination of his rights, and is not entitled to respect in any other tribunal;" according to the opinion of the supreme court in the case above cited. We deem it unnecessary to say anything further than to express our gratification, that the principle which seems to us to be so just, has thus received the emphatic sanction of that high tribunal.

The case was argued at the last term of the court, and before the election of JUDGE BURKS; but he concurs in the opinion.

JUDGMENT REVERSED.

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39 *Lucado & al. v. Tutwiler's Adm'x & als.

January Term, 1877, Richmond.

A canal boat, which plied between R.chmond and a point in Fluvanna county, was owned by one Tutwiler, who resided in said county. He sold the boat to Cox, who lived in Richmond, and took a mortgage thereon to secure the purchase money, which mortgage he forthwith recorded in Fluvanna county, and within twelve months thereafter in the city of Richmond. Between the dates of the recordation of the mortgage in the two places, judgment creditors of Cox issued, *fieri facias*, under which the boat was seized at Richmond. Upon a bill filed by Tutwiler's administratrix to assert her (alleged) prior lien—HELD: That the mortgage in favor of her intestate was properly recorded, and she therefore had priority.

The facts are stated by JUDGE CHRISTIAN in his opinion.

Marshall and *Johns*, for the appellants.
Guy & Gilliam, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

The controversy in this case arises between execution creditors and the personal representative of a mortgagee, and grew out of the following state of facts:

The appellees' intestate, W. C. Tutwiler, residing in the county of Fluvanna, being the owner of a canal freight boat known as "Cora Lee," sold the same to
40 *W. P. Cox, of the city of Richmond, for the sum of $975.

On the 31st of January 1871, Cox executed a paper-writing, in the nature of a mortgage, on said boat, to secure the payment of the purchase money, in which it was stipulated that one-third of the purchase money should be paid "in cash, which was to be paid when said boat was delivered, the residue upon six and twelve months' credit, to bear interest from date in equal instalments." It was further stipulated that, in default of prompt payment of the deferred instalments as they became due, Tutwiler should sell the boat after giving reasonable notice of such sale, and after paying the full amount of the balance due him, of principal and interest, he shall pay over the residue, if any, to W. P. Cox; and it was further expressly stipulated that the title to said boat should be retained in Tutwiler until the whole of the purchase money should be paid. This paper being duly signed, sealed and acknowledged by Cox, was recorded in the county of Fluvanna, on the 27th of March 1871. It was also recorded in the office of the chancery court of the city of Richmond; but not until the 1st December 1871.

On the 16th June 1871, after the recordation of the mortgage in the county of Fluvanna, and before its recordation in the city of Richmond, Cox confessed judgments in favor of the appellants, Lucado and Jordan, for the sum of $583, and $300 respectively, which were duly entered up in the clerk's office of the circuit court of the city of Richmond. Executions were issued on these judgments, and levied on the boat "Cora Lee."

Upon a bill filed by the administratrix of the mortgagee, and upon the pleadings and evidence in that case, the question pre-
41 sented to the chancery *court of the city of Richmond (and the question we now have to decide) was whether the mortgagee in the mortgage securing the purchase money, or the execution creditors, had the prior lien on the boat "Cora Lee." The chancery court was of opinion that the mortgage in favor of the plaintiff had priority over the executions in favor of the defendants, Lucado and Jordan; and accordingly decreed, that unless the balance of the purchase money was paid by Cox, or some one for him, within thirty days from the date of the decree, that then the sheriff of the city of Richmond should take possession of the canal boat Cora Lee, and after ten days' notice sell the same at public auction for cash, and report his proceedings to the said chancery court. From this decree an appeal was allowed by one of the judges of this court.

The court is of opinion that there is no error in the said decree of the said chancery court of the city of Richmond.

The recordation of the mortgage, in the county of Fluvanna, before judgments confessed by Cox, and in the city of Richmond within twelve months after the boat was removed to Richmond by Cox, was a sufficient compliance with the provisions of the fifth, seventh and eighth sections of chapter 114, Code of 1873, so as to effect creditors and subsequent purchasers with notice of the lien attaching to the boat for the payment of the purchase money.

The provision of the statute which declares that every deed of trust or mortgage conveying real estate or goods and chattels, shall be void as to creditors until and except from the time it is duly admitted to record "in the county or corporation wherein the property embraced in such contract or deed

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42 *may be,"* certainly *cannot be said to mean, by any proper construction, that the deed or mortgage must be recorded in that county or corporation where the chattel *may happen to be at the moment* the sale is consummated. Especially would such construction be incongruous and absurd when applied to such a chattel as a *canal boat*, the very use of which makes its locomotion necessary. Ordinarily the *locus* of the owner fixes the *locus* of the chattel. If it be temporarily out of his actual possession and in another county or corporation, it is still, in contemplation of law, in the county or corporation where the owner resides. The residence of the owner is the *place* where the property "*may be*" in contemplation of the statute, and it is *there* that the mortgage is to be recorded. After the ownership is changed, and the property is removed to another county or corporation, then the mortgage must be within twelve months recorded in that county or corporation, in order to affect creditors, with notice. In the case before us Tutwiler, the owner of the boat, lived in Fluvanna. The boat at the time of the sale was plying on the canal between Scottsville and Richmond. The fact that the boat at the time of the sale and mortgage was lying in the basin at Richmond, or was in motion on the canal, or lying at any of the landings in the several counties through which the canal passes, can make no difference. The *locus* of the boat was then in Fluvanna, and that was the place under the statute for the recordation of the mortgage. After the boat was delivered to Cox at Richmond, or carried by him to Richmond, its *locus* became Richmond, and there the mortgage was to be recorded in Richmond within twelve months. So that all the requisites of the statute were strictly complied with.

43 *The court is therefore of opinion that there is no error in the decree of the chancery court of the city of Richmond declaring that the mortgage in favor of the plaintiff had priority over the executions of the defendants, Lucado and Jordan; and that the same be affirmed.

DECREE AFFIRMED.

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44 *Gibson v. Gibson & als.

January Term, 1877, Richmond.

The following papers were offered for probate:

No. 1. "I, Elizabeth S. Holmes, do make the following as my last will and testament. I give all my estate, both real and personal, to my two sisters, Margaret and Sally. Written and signed by me this 16th day of April, 1851." About an inch below, and on the same sheet of paper, is written No. 2. "As Margaret is dead, I give her share to my niece, Lizzie Leigh Gibson."

"Dec'r 31, 1871." "E. S. HOLMES."

No. 1 is not in the hand-writing of the decedent, nor signed by her. The body of No. 2, and the signature thereto, are wholly in the hand-writing of the decedent—HELD: Neither No. 1, nor No. 2, nor both together, can be established as a will under the Virginia Statute of Wills. Code of 1873, ch. 118, § 4.

The facts sufficiently appear in the opinion of ANDERSON, J.

Bernard & Jones and *Conway Robinson*, for the appellant.

Donnan & Hamilton, for the appellees.

ANDERSON, J. Lizzie Leigh Gibson, the plaintiff in error, offered for probate as the last will and testament of Elizabeth S. Holmes, deceased, three several paper writings. No. 1 is as follows, to wit:

"I, Elizabeth S. Holmes, do make the following as my last will and testament.

45 *I give all my estate, both real and personal, to my two sisters, Margaret and Sally.

Written and signed by me this 16th day of April, 1851."

The foregoing is not in the hand-writing of decedent, nor subscribed. About an inch below it on the same sheet of paper, is written what is designated as No. 2, as follows:

"As Margaret is dead, I give her share to my niece. Lizzie Leigh Gibson.
(Signed) E. S. HOLMES.
December 31st, 1871.

The foregoing, and the signature, are wholly in the hand-writing of decedent. She died in the city of Petersburg, Virginia, on the 16th of March 1875, leaving both real and personal estate in said city.

The foregoing paper was found on the day, and within a few hours after the death of decedent, in a cloth pocket, which, during health, she was accustomed to carry about her person, and during her last sickness she kept constantly under the pillow of her bed, in which she lay during her sickness, and on which she died. In the same cloth pocket there were found other valuable papers belonging to decedent, and it was her habit to keep all her valuable papers in it. At the date of No. 1, April 16, 1851, decedent had two sisters, named respectively Margaret and Sarah Holmes, sometimes called Sally; and she was known by that name as well as Sarah. She is now Sarah F. Gibson, one of the defendants in this cause. Said decedent had also a brother named George F.

46 Holmes. *Margaret died in the year 1869 without issue. George F. Holmes died the same year, leaving as his sole heirs two children, George B. and Elizabeth S. Holmes, who are defendants. Sarah F. Gibson, now unmarried, and the said two children of George F. Holmes, are the only heirs and distributees of Elizabeth S. Holmes, deceased.

The paper-writing, No. 3. seems not to have been offered in proof, and need not be further noticed.

In order to the validity of a will, the statute requires (Code of 73, ch. 118, § 4), that it shall be in writing, and signed by the testator, or by some other person in his presence, and by his direction in such manner as to make it manifest that the name is intended as a signature; and unless it be wholly written by the testator, the signature shall be made, or the will acknowledged by him in

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the presence of at least two competent witnesses present at the same time, who shall subscribe the will in the presence of the testator.

If the writing is signed by the testator in such manner as to make it manifest that the name is intended as a signature, and is wholly written by him, it is a valid will, though it be unattested by witnesses.

The writing, No. 1, not being wholly in the hand-writing of the testatrix, nor attested by witnesses, as required by the statute, is not taken separately and by itself a valid will. Though it was formerly held that an unattested will could not derive validity from a codicil duly attested, though the codicil expressly referred to and confirmed the will, that doctrine is exploded; and it seems now to be well settled that "where a codicil is written on the same sheet of paper with a will, the attestation of the codicil, by the requisite number of witnesses, establishes the will, though it be not duly attested." (1 Lomax on Ex'ors, top p. 70, 71, marg. 32.)

47 *In Jarman on Wills, 1 vol., top p. 128, 129, side p. 79, 80, 81, the cases of *De Bathe* v. *Lord Fingal*, 16 Ves. R. 167, *Doe de Williams* v. *Evans*, 1 Cromp & Mees. R. 42, are cited, where it was held that a codicil duly attested gave validity to the will which was not duly attested. In referring to them the author says: "In both the preceding cases the attested codicil referred to the unattested document; but this is not essential, where both are written on the same sheet of paper." Again on side, p. 81, he speaks of the effect of their being united in the same paper, as only being to render unnecessary any express reference to the unattested document for the purpose of identifying it.

If, therefore, the writing, No. 2, which is but a codicil to the will, No. 1, had been duly attested by the witnesses, according to the doctrine as thus declared, the two writings, No. 1 and 2, would be a valid will. And I apprehend if No. 1 was wholly in the hand-writing of testatrix, even though it had not been signed by her, according to the requisitions of the statute, No. 2, being wholly written and signed by testatrix, would be a confirmation of No. 1 as her will, and together would constitute a valid testamentary disposition of her estate. But No. 1 not being in the hand-writing of the testatrix, could not be made the will of decedent, because, though taken in connection with No. 2, it would not be in conformity with the requirement of the statute, "wholly written by the testator."

Though No. 1 could not be probated as the will of decedent, I was inclined to the opinion that No. 2 might be, that being on the same paper with No. 1, which had been carefully kept and preserved by decedent until the hour of her death. No 2 must be regarded as referring to it, and to the bequest made by it to her sister Mar-

48 garet, by the language, "Margaret *is dead, I give her share to my niece, Lizzie Leigh." Though No. 1 is not authenticated under the statute as a valid will, it is in evidence, and I thought might be referred to, to show who was meant by "Margaret," and what was meant by her share. And if it is proper evidence for that purpose, it shows plainly that she was the Margaret to whom the invalid devise had been made, and that her share was a moiety of the estate, real and personal, of the decedent, which, by the writing No. 2, signed and wholly written by the testatrix, she gave to Lizzie Leigh Gibson, and this upon the principle, that "a testator may so construct his disposition as to render it necessary to have recourse to some document (as to any other extrinsic matter) in order to elucidate or explain his intention" (1 Jarm. on Wills, top p. 130, side p. 83); and that such reference is proper, although the document referred to is not in the hand-writing of the testator, nor attested as a will. Ibid & Lomax. *ubique*. I cannot say therefore that Elizabeth S. Holmes died intestate as to the moiety of her estate, which she gave to her niece, Lizzie Leigh Gibson.

But my brethren regarding No. 2 as too vague and indefinite to be established as a will by itself, and that it cannot be taken in connection with No. 1, as that is not in the hand-writing of decedent, do not concur in this view, and are of opinion that neither No. 1 nor No. 2, nor both taken together, is a valid will under the statute, and that the judgment of the court below must be affirmed.

The other judges concurred in affirming the judgment.

JUDGMENT AFFIRMED.

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49 *Hord's Adm'r v. Colbert & als.

January Term, 1877, Richmond.

Absent, BURKS, J.*

I. H recovers a judgment against M, and dies. Subsequently M conveys land, &c., to C, to secure two bonds held by W, and this deed is recorded. The administrator of H files a bill against C and W, in which he charges that C and W had notice of the judgment of H when the deed was executed, and that the debts secured by the deed are not *bona fide*. C and W answer, denying the notice, and insisting the debts are *bona fide*. C and W are examined as witnesses in their own behalf, and C is cross-examined on all the issues by the plaintiff, with a knowledge at the time of the objection to his competency; and after the testimony of C and W is ended, plaintiff excepts to the competency of each of them, on the ground that H was dead—HELD:

1. Witnesses—Competency—Time to Object.†—The plaintiff having cross-examined C on

*The case was argued at the November term.

†**Witnesses—Competency—Time to Object.**—In Pillow v. Improvement Co., 92 Va. 144, the court, citing the principal case, lays down the rule that "objection to the competency of a witness ought to be made, where his incompetency is known, before he is examined in chief; at least, it cannot be made after cross-examination." Smith v. Proffitt, 82 Va. 832, also affirms the principle and in addition is authority for the rule that if the witness were competent when he deposed, his deposition cannot become inadmissible by later events. See also Simmons v. Simmons, 33 Gratt. 451 and *note;* Morrison v. Bausemer, 32 Gratt. 225 and *note;* Neilson v. Bowman, 29 Gratt. 732; Keran

all the issues in the cause, that was a waiver of the objection to his competency; and it cannot afterwards be made.

2. **Quære.**—QUÆRE. If permitting the examination of W in chief without objection before it is done, is a waiver of the objection to his competency.

3. **Notice of Judgment—Proof.**—The charge of notice of the judgment being expressly denied by C and W, the proof of notice must be very clear and conclusive to establish it.

4. **Issue out of Chancery—Discretion of Chancellor.**†—Though the evidence is contradictory, if the chancellor is satisfied that the weight of evidence is on one side he is not bound to direct an issue.

By deed bearing date the 3rd of July 1866, Robert L. Martin and wife conveyed
50 to Joseph W. Colbert, *Jr., several tracts of land in the county of Fauquier, his household and kitchen furniture, horses, cattle, &c. and farming utensils, in trust to secure two bonds, held by William S. Colbert. One of these bonds bore date on February 1st, 1866, and was payable one day after date to Robert L. Colbert, for $3,150.54, and assigned by him to Wm. S. Colbert; and the other was dated January 1st, 1862, payable one day after date, to William S. Colbert, for $4,500. This deed was admitted to record in the clerk's office of the county court of Fauquier on the 17th of August 1866.

Previous to the execution of this deed, viz: on the 5th of November 1865, Enos Hord recovered a judgment against Robert L. Martin for $900, with interest from the 20th of March 1861, and costs. This judgment was not docketed until the 1st of November 1867. At the same term of the court John S. and N. A. Clopton recovered a judgment against Martin for $3,452.37, with interest from the 17th day of November 1860, and costs. And this judgment was docketed on the 28th of September 1867. There were a number of other judgments, three of which for small amounts, were docketed before the deed was recorded; but the others were either recovered or docketed afterwards.

In June 1869 Hord's administrator instituted his suit in equity in the circuit court of Fauquier county against the Colberts, Martin and wife, the Cloptons and Martin's assignee in bankruptcy. In his bill, after setting out the judgment of Hord against Martin and his deed of trust to Joseph W. Colbert, and referring to the judgment of Cloptons, he charges that Joseph W. Colbert had notice of the judgment recovered by Hord against Martin before the execution of the deed aforesaid, and Wm. S. Colbert had
51 constructive *if not actual notice thereof; and he insisted that therefore the lien of the deed was to be postponed to that of his judgment. He further charged that the deed was intended to hinder, delay and defraud the creditors of Martin; that Martin never was indebted to either of the Colberts as set out in the deed; or if at all indebted, to a much less amount than is therein claimed. He insists that the deed is therefore null and void as to *bona fide* creditors of Martin. And he prays that the deed may be set aside as to creditors, and that a commissioner may be directed to ascertain and report the priorities of the liens by judgments and deed of trust; and whether the Colberts or either of them had notice of the judgments at the time of the execution of the deed; whether or not there was fraud in it, or whether there was any purpose to hinder, delay or defraud the creditors of Martin.

William S. and Joseph W. Colbert answered separately. They both deny any notice or knowledge of the plaintiffs judgment before or when the deed was executed and recorded. They insist that the debts secured

v. Trice, 75 Va. 690. In Hill v. Postley, 90 Va. 200, it was held that objection to competency of a witness was not necessarily waived unless made before the examination in chief, citing as authority Warwick v. Warwick, 31 Gratt. 70, and distinguishing the principal case. See generally, 29 Am. & Eng. Enc. Law 648.

***Notice of Judgment—Fraud—Proof.**—In Houghton v. Graybill, 82 Va. 580, the court says: "The doctrine that fraud will not be presumed, but must be distinctly charged and the grounds specified, and must be clearly and conclusively proved as alleged, to justify the court in granting relief against and setting aside a contract, and especially a contract executed by the delivery of deeds by and between the contracting parties, is familiar and well established by the authorities on equitable jurisprudence; and by the decisions of this court as laid down by the opinion of JUDGE RICHARDSON in Rixey v. Moorehead, 79 Va. 576, and in the case of Crebs v. Jones, 79 Va. 381 and in Hord v. Colbert, 28 Gratt. 49." See also Engleby v. Harvey, 93 Va. 445, citing the principal case and Herring v. Wickham, 29 Gratt. 628; Gregory v. Peoples, 80 Va. 355; Insurance Co. v. Cottrell, 85 Va. 865, citing the principal case; Matthews v. Crockett, 82 Va. 394; Vest v. Michie, 31 Gratt. 149 and *note;* White v. Perry, 14 W. Va. 87; Shurtz v. Johnson, 28 Gratt. 657; Nash v. Nash, 28 Gratt. 686; Whittaker v. Imp. Co., 34 W. Va. 222; Jones v. Degge, 84 Va. 685; Luddington v. Renick, 7 W. Va. 273; Burt v. Timmons, 29 W. Va. 441; 14 Am. & Eng. Enc. Law (2nd Ed.) 191.

†**Issue out of Chancery—Discretion of Court.**—In Williams v. Blakey, 76 Va. 259, the court, after expressly approving the rule laid down in the principal case in regard to the discretionary powers of the chancellor in directing an issue, adds: "But as a general rule, where the credit and accuracy of the witnesses are impeached, or where the evidence is clashing and conflicting, rendering it necessary to weigh the character and credibility of witnesses, or where the evidence is so equally balanced on both sides that it becomes doubtful which scale preponderates, an issue ought properly to be directed," citing Wise v. Lamb, 9 Gratt. 294. See also Robinson v. Allen, 85 Va. 725; Carter v. Carter, 82 Va. 624; Keagy v. Trout, 85 Va. 390; Setzer v. Beale, 19 W. Va. 289, citing the principal case and Nice v. Purcell, 1 H. & M. 372; Rohrer v. Travers, 11 W. Va. 146; Arnold v. Arnold, 11 W. Va. 449; Anderson v. Cranmer, 11 W. Va. 562; Jarrett v. Jarrett, 11 W. Va. 584; Nease v. Capehart, 15 W. Va. 299; Stannard v. Graves, 2 Call 369; Beverley v. Walden, 20 Gratt. 154; Rowton v. Rowton, 1 H. & M. 93; Smith v. Betty, 11 Gratt. 752; Pairo v. Bethell, 75 Va. 825; Ford v. Gardner, 1 H. & M. 72. See generally, 4 Hurst's Dig. 525 *et seq.*, 11 Enc. Pl. & Pr. 619.

by the deed are justly due from Martin; and Joseph W. Colbert, who was the active party in the adjustments of the debts with Martin and in obtaining the deed, states the consideration of the debts, and why it was that though both bonds were executed at the same time, viz: in February 1866, one is dated January 1st, 1862—that being the time at which the accounts on which it was based terminated, and Martin was not willing to have the interest added to the principal, so as to carry interest.

The cause came on to be heard in September 1869, when the court referred it to a commissioner to enquire and report the debts due by Robert L. Martin;
52 *and that he especially enquire and report as to the respective priorities of the liens on the real estate of the said Martin by judgments, and the said deed of trust.

In September 1870, the commissioner returned his report. He reported the debts due by Martin, constituting liens on his real estate, calculating the interest up to September 1st, 1870, at $18.400.94; and he was of opinion that Joseph W. Colbert, the trustee, had no notice of the judgments other than those docketed, prior to the recordation of the deed of trust; and therefore they were given priority over all the other judgments, including those of Hord's adm'r and Cloptons. The report was excepted to by the counsel for Hord's adm'r and Cloptons; and the commissioner returned with his report all the evidence which was before him. This evidence was very voluminous. A number of depositions were taken by both parties, and both Joseph W. and William S. Colbert were examined for the defendants; and their evidence was excepted to by the plaintiffs, on the ground that Hord being dead, they were incompetent to testify. It appeared, however, that the exception was not taken to either of them until his testimony had been concluded; and that in the case of Joseph W. Colbert, he had been subjected to a very extended cross-examination on all the issues involved in the cause.

The cause having been removed to the chancery court of Richmond, came on to be heard on the 21st of June 1873, when the court overruled the exceptions to the report, and confirmed the same; and commissioners were appointed to sell the land in the proceedings mentioned, upon terms stated in the decree. And thereupon Hord's administrator applied to this court for a appeal; which was allowed.

53 **Meredith* and *Blackwell*, for the appellant.

Neeson, Spilman, Ould & Carrington and *Marshall*, for the appellees.

STAPLES, J. This suit was instituted in the circuit court of Fauquier, by the administrator of Enos Hord against Robert Martin and William S. and Joseph W. Colbert. The bill charges that a deed of trust executed by Martin on the 3rd of July 1866, for the benefit of William S. Colbert, is fraudulent and void; and further that at the time of executing the deed both William S. Colbert and the trustee Joseph W. Colbert had notice of an undocketed judgment held by Hord against Martin. The defendants answered the bill, positively denying all the allegations in respect to fraud and notice. At the September term 1869, a decree was entered, directing one of the commissioners "to take an account of Martin's debts, and also to inquire and report as to the respective priorities of the liens by judgment and the deed of trust." Under this decree other judgment creditors came in, and proved their debts before the commissioner, and numerous depositions were taken bearing upon the questions at issue.

The commissioner reported in favor of the deed of trust; giving it priority over the plaintiff's judgment and the other judgments against Martin not regularly docketed.

This report was excepted to by the creditors; and the same coming on to be heard at the June term 1873 of the chancery court of Richmond, to which it had been removed, the chancellor rendered a decree overruling the exceptions to the commissioner's report, sustaining the deed of
54 trust, and directing a sale *of the land.

From that decree an appeal was taken by Hord's administrator to this court.

Before considering the case upon its merits, it is necessary to dispose of a preliminary question raised by the exceptions to the depositions of Joseph W. and William S. Colbert. These exceptions are based upon the ground that Enos Hord, the plaintiff's intestate, being dead, the defendants are incompetent to testify in this cause. One of them, Joseph W. Colbert, was cross-examined at great length by the counsel for Hord's administrator, upon all the issues involved; and when the whole examination was concluded, the objection was then for the first time made to the competency of the witness. It does not appear that the attention of the court below was called to the objection; nor does it appear whether that court considered the deposition in rendering its decree of the June term 1873. It is very certain that the counsel making the objection was aware of it, as well before as after the cross-examination was commenced and concluded. The question is, has it not been waived by this manner of proceeding. Is an adverse party with knowledge of the alleged incompetency, permitting to extract whatever he can from a witness upon a rigid and protracted cross-examination; and if the testimony is favorable to his side insist upon its being read, if unfavorable have it excluded? Upon this point the authorities leave no room for doubt. They hold that if the party be aware of the existence of the interest, he will not be permitted to examine the witness and afterwards to object to his competency if he should dislike his testimony. The writers on the law of evidence go further and declare that in the common law courts, where the examination is conducted orally, the objection on the ground of interest, if
55 known, *must in general be taken before the witness is examined in chief, for otherwise the objection might be sup-

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pressed for the purpose of obtaining an unfair advantage. Formerly, indeed, it was considered necessary to raise the objection on the *voir dire;* and if once the witness is sworn in chief, he could not afterwards be objected to on the ground of interest. But this rule has been relaxed in modern times; and now it is allowable to make the objection after the witness is sworn in chief, but before the examination is commenced; and where the interest is incidentally disclosed for the first time in the course of the trial the evidence may then be excluded. See 1 Starkie on Evidence 134; 1 Greenl. Evi., sec. 421. This last author (Greenleaf) says the rule in equity is now the same as at law; and the principle applies with equal force to testimony given in a deposition in writing and to an oral examination in court.

Whether as a general rule the objection on the ground of interest must in the common law courts be made before the examination in chief, and whether the same rule prevails in equity, are questions not necessary now to be decided; and no opinion is intended to be given on that subject. It is sufficient for the purposes of this case to say, that when the party cross-examines upon the issues involved, with a knowledge of the interest of the witness, he will not be permitted afterwards to make the objection. Having made the objection however in due season, he may then proceed to cross-examine without prejudice to his right to move to suppress the deposition at the hearing. *Jacobs* v. *Laybom,* 11 Mees. & Welsby R. 684; *Moorhouse* v. *De Passon,* 19 Ves. R. 432; *Harrison* v. *Courtauld,* 5 Eng. Ch. R. 428; *Donelson* v. *Taylor,* 8 Pick. R. 390; *Graves* v. *Graves,* 2 Paige R. 62, 3 Paige
56 240-554; *1 Payne C. C. R. 400; 1 Phillip on Evidence 789.

It may be said that the rule here stated has no application to parties examined as witnesses. Under the former practice, in the chancery courts of this state, when a special commission was issued to take the deposition of a party, saving all just exceptions, the duty devolved on the court to take notice *ex officio* of objections to the competency of the witness arising from his interest in the event of the cause. And in such a case an appellate court will consider and decide upon the question of competency, although the deposition may have been read in the court below without objection. Such was the decision in *Beverley* v. *Brooke & als.* 2 Leigh 425. The court was of opinion there that the question would have presented more difficulty had the deposition been taken under a general commission.

Whatever may have been the distinction formerly between parties and other witnesses, that distinction has been entirely abrogated by the statute, which declares that no witness shall be incompetent to testify because of interest; and in all actions, suits, and other proceedings of a civil nature, at law or in equity, the parties thereto shall, if otherwise competent to testify, and subject *to the rules of evidence, and of practice applicable to other witnesses,* be competent to give evidence. Code of 1873, page 1109. Under this provision it is very clear the rule in respect to objections for incompetency on the ground of interest is equally applicable to parties examined as a witness as to those who are not parties. For these reasons I am of the opinion, if there was any valid objection to the testimony of Joseph W. Colbert, that objection has been waived, and he must now be treated as a competent witness.

57 *In the case of William S. Colbert, when his deposition was taken, the counsel of the plaintiff was present at the examination in chief; but did not cross-examine. When the deposition was completed an exception was then taken for the first time to the testimony on the ground already stated. Whether this action constituted a waiver of the objection is a question already adverted to, not decided nor intended to be decided here. The case may be decided without reference to the evidence of William S. Colbert, and it is better perhaps so to decide it than to settle an important principle of practice upon a slight and cursory examination.

Having thus disposed of the question relating to the evidence, we are now to consider the merits of the controversy. And first as to the question of fraud: Is the deed of trust fraudulent? This involves an inquiry into the consideration of the two bonds secured by that deed. Upon this point it is only allowable to examine a few of the more prominent facts established by the evidence. It cannot be expected that this court is to exercise the functions of a commissioner in chancery, settle an account, and undertake to ascertain how far each item is sustained by the evidence. Our inquiry is with the charge of fraud: Is it established by the testimony? And here it must be borne in mind that the law does not presume fraud. It is not to be assumed on doubtful evidence, or circumstances of mere suspicion. The party alleging the fraud must clearly and distinctly prove it. The *onus probandi* is upon him to prove his case as charged in the bill. If the fraud is not strictly and clearly proved as it is alleged, although the party against whom relief is sought may not have been perfectly clear in his
58 dealings, *no relief can be had. Kerr on Fraud and Mistake 382-4.

JUDGE STAPLES here went into a critical examination of the evidence upon the question. The conclusion he arrived at was, that the testimony so far from establishing the existence of fraud, tended strongly to show that the bonds, which are the subject of controversy, are founded upon a *bona fide* indebtedness from Martin to the Colberts.

Having concluded his review of the question of fraud. JUDGE STAPLES then proceeded to consider the testimony in relation to the alleged notice. Upon this branch of the case he also concurred with the chancellor, who pronounced the decree, that the notice is not satisfactorily or sufficiently proved.

The consideration of this subject involved a very careful and detailed examination of the testimony in all its aspects. The dis-

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cussion however being one purely of fact, and very extended, is omitted by the direction of JUDGE STAPLES. In conclusion he said:

These creditors were required by the plain terms of the statute to docket their judgments in order to preserve their liens. The whole tendency and spirit of modern legislation is to impose upon creditors and purchasers the duty of putting upon the record the evidences of their rights. It is the registration that is to be looked to as furnishing the notice. It is very true an exception is made in the case of a purchaser with notice. The reason is, he is deemed guilty of a fraud in taking a conveyance with knowledge of a better right in another. It is therefore held, that the notice in such cases must be very clearly proved. This is peculiarly so when the notice is sought to be established against the positive de-
59 nials of the defendant; *for the result is to convict the latter of perjury as well as fraud. Here the creditors have neglected a plain duty in failing to docket their judgments; they seek to substitute in place of the record certain oral admissions alleged to have been made by the defendants years before, to be proved exclusively by the creditors themselves and their counsel. However high the source from which such evidence emanates—however incorruptible we may suppose some of the witnesses by which it is given—such evidence must, nevertheless, be received with the greatest caution. "Consisting as it does (evidence of mere verbal admissions) in the mere repetition of oral statements, it is subject to much imperfection and mistake, the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens also that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party did say." This is the language of a very accurate and learned author. 1 Greenleaf, sec. 200. And he is fully sustained by the most eminent writers and judges. See cases cited, and also 1 Starkie on Evidence, page 462. I repeat, this caution cannot be too strongly observed when the alleged notice is to be established upon the testimony of parties and counsel against the positive denials of the answers, and those answers strongly supported by independent evidence and corroborating circumstances.

The learned counsel for the appellant has pressed upon us the propriety and even necessity of an issue at least to be tried by a jury; and he has cited a number of the decisions of this court in support of that practice. The law upon this subject is too clear for
60 *controversy. Its application to particular cases is the great difficulty. The chancery court often directs an issue where the evidence is so contradictory as to render an open cross-examination of the witnesses before a jury necessary and proper. Not unfrequently the evidence is so equally balanced on both sides it is difficult to say which scale preponderates; and in such case an issue is of advantage, and proper to satisfy the conscience of the chancellor. But it does not follow that an issue is necessary and proper in every case where the evidence happens to be conflicting. If this was the rule the chief time of the chancery courts would be occupied with trials before juries, or in considering their verdicts. The circuit courts and the judges of this court are constantly called upon to decide questions of fact upon testimony of a very conflicting character. In *Nice* v. *Purcell*, 1 Hen. & Mun. 372, it was held that a court of equity is not bound to direct an issue on the mere ground that the evidence is contradictory; but it may judge of the weight of evidence; and if its conscience is satisfied, decide without a jury.

The decision in *Samuel* v. *Marshall & wife*, 3 Leigh 614, is to the same effect. See also *Wise* v. *Lamb*, 9 Gratt. 294; 2 Daniel Ch. Pr. 1073.

As the issue is directed exclusively for the information of the court, if it is satisfied upon the evidence, there is of course no ground for the intervention of a jury.

In the case before us, so far as the question of fraud is concerned, the plaintiffs have utterly failed to prove it. In regard to the notice the case is not so free from difficulty. But the preponderance of facts and circumstances is with the defendants. As has been seen, the whole case turns upon the
61 effect of certain admissions *alleged to have been made by the defendants. In my judgment a court is as competent, and perhaps more so, to decide upon the weight to be given to these admissions as any jury of twelve men to be selected according to the practice and mode of proceeding in trials by jury as now prevailing in the country.

My opinion is therefore to affirm the decree of the chancery court.

MONCURE, P., and CHRISTIAN, J., concurred in the opinion of STAPLES, J.

ANDERSON, J., was inclined to think it was a case for an issue; but after hearing the opinion of STAPLES, J., he could not dissent.

DECREE AFFIRMED.

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62 *Hauensteins v. Lynham, Escheator.

January Term, 1877, Richmond.

Statement of Case.—H, of foreign birth, bought real estate in 1856 and 1859, and died in 1861, seized thereof, without known heirs. The said real estate was escheated to the commonwealth, and in May 1876, persons, natives of and living in Switzerland, instituted proceedings for the recovery of the real estate—HELD:

1. **Real Estate—Aliens—Escheat.**—The law as it was at the death of H must govern the case, and under the act of April 7, 1858, Sess. Acts of 1857-'58, ch. 42, § 44, Code of 1860, ch. 115, p. 557, persons, natives of another country, and living there, are not entitled to the real estate.
2. **Treaties — Statute Authorizing.** — The treaty of November 1855, between the United

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States and the Republic of Switzerland, 11 U. S. Stat. at Large, p. 590, Article 5, clause 3, by its terms depends for its operation and effect upon the legislation of the state in which the real estate lies; and no right in real estate in Virginia will vest in a citizen of that republic under said treaty, there having been at the death of H no statute authorizing it.

This was a petition filed in the circuit court of the city of Richmond, by Henry Hauenstein and others, claiming to be the heirs and next of kin of Solomon Hauenstein, deceased, seeking to recover certain real estate of which the said Solomon Hauenstein had died seized, and which had been escheated to the commonwealth. Pending the proceeding the real estate was sold by the escheator, which the approval of the petitioners; and they asked that they might receive the proceeds of the sale. The circuit court dismissed the petition, and the petition-
63 ers applied to a judge of this *court for an appeal; which was allowed. The case is sufficiently stated by JUDGE MONCURE in his opinion.

Johnson & Royall, for the appellants.

The Attorney General and *Lynham,* for the appellee.

MONCURE, P., delivered the opinion of the court.

This is an appeal from a decree of the circuit court of the city of Richmond, rendered on the 20th day of October 1876, in a suit in said court in which the appellants were plaintiffs and John A. Lynham, escheator for the commonwealth of Virginia, was defendant. Solomon Hauenstein, a citizen of Switzerland, had emigrated to Virginia, and settled here many years ago; had continued to reside here until his death; had acquired, by purchase and conveyance at different times, in the years 1856 and 1858, and from different persons, quite a large real estate, of which he continued to be seized and possessed until and at the time of his death; and he died in 1861 or '2, intestate, unmarried and without issue. Having no known heirs, it was supposed that his estate devolved on the commonwealth for defect of heirs. There was an inquisition of escheat, which found accordingly; and the said estate came to the hands of the said Lynham as escheator, who was proceeding to sell the same in the execution of his duties as such, when the appellants, citizens of Switzerland, claiming to be the next of kin, or their representatives, of the said intestate, and to be entitled as such to his said estate, or the proceeds of the sale thereof, filed their petition for the recovery of the same, under the Code of 1860, chapter 113, section 8, page 547, which enacts
64 *that "when the verdict on such inquest is for the commonwealth, any person claiming any interest in the lands (escheated), whether legal or equitable, may, before the sale thereof, petition the said circuit court (to which the inquisition is directed to be returned), for redress. To such petition the escheator shall be a defendant. He shall file an answer, stating the objections to the claim. And the cause shall be heard without ny unnecessary delay, upon the petition, answer and the evidence."

In the petition, the petitioners expressed their willingness to unite in a sale of the property by the escheator. To this petition, the escheator accordingly filed an answer, stating the objections to the claim. Evidence was taken and filed on both sides, but chiefly on the side of the petitioners, and as especially to prove that they were, in fact, they claimed to be, the next of kin of the said intestate, or their representatives. On the 20th day of October 1876, and during the same year in which the petition was filed, the cause came on for final hearing; when the court, being of opinion that the plaintiffs had no claim upon the fund arising from the sale of the real estate disposed of by the escheator (but without deciding whether the petitioners were the next of kin, or their representatives, of the intestate, as they claimed to be), therefore dismissed the petition, and decreed that the petitioners pay to the defendant his costs by him about his defence in that behalf expended. From that decree the petitioners applied to a judge of this court for an appeal, which was accordingly allowed, and which is the case now to be disposed of by this court.

We proceed at once to enquire whether the appellants are entitled to the estate of the intestate Solomon Hauenstein, or
65 the proceeds of the sale thereof, *even if they be in fact, as they claim to be, his next of kin, or their representatives, which latter question will not be decided, unless its decision be rendered necessary for the decision of this case by our opinion on and decision of the question first above propounded.

If the appellants, who are citizens of Switzerland and aliens to the commonwealth of Virginia, be entitled to the estate, or the proceeds of the sale thereof, which they claim (even admitting them to be in fact the next of kin of the said intestate), they must be so entitled either first under the common law; or, secondly, under some statute law of the state of Virginia; or, thirdly, under some treaty between the United States and the Republic of Switzerland.

1st. Are they entitled under the common law? Certainly not. Under the common law an alien is incapable of taking real estate by descent. 1 Rob. Pr. (new) 125, and cases cited; 2 Kent's Com., 53 marg.

2dly. Are they entitled under any statute law of the state? If there was any such law in existence at the time of the intestate's death, in 1861 or 1862, it is embodied in the Code of 1860; for no law on the subject was enacted before his death and after the publication of the said Code. There is but one provision in that Code which can have any bearing on the subject; and that is the sixth section of chapter 115, page 557, which is in these words: "When by any treaty now in force between the United States and any foreign country, a citizen or subject of such country is allowed to sell real property in this state, such citizen or subject may sell and

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convey the same, and receive the proceeds thereof within the time prescribed by such treaty; and when by any treaty now in force between the United States and any foreign country, citizens of the United States are allowed to inherit, hold, sell
66 and *convey real property lying in such foreign country, the citizens or subjects of such foreign country may inherit, hold, sell and convey real property lying in this state: provided, however, that such purchase, sale and inheritance, hereinbefore mentioned, shall apply only to real estate, hereafter purchased and acquired by a citizen or subject of such foreign country."

The former part of this section, down to the words, "by such treaty" inclusive, constituted the corresponding section of the same chapter of the Code of 1849, when it was engrafted for the first time in our statute law at the suggestion of the revisors who compiled that Code, for reasons set forth in a note to their report, pp. 587-8. In that form the section remained in force, until it was amended and re-enacted, as it stands in the Code of 1860 by an act passed April 7, 1858, acts of 1857-8, chap. 42, p. 44. The said former part of the section does not, and the corresponding section of the Code of 1849 did not, apply to such a case as this, in which there is no treaty in force between the United States and the foreign country of which the claimants are citizens, prescribing any time for their selling and conveying any real property in this state, and receiving the proceeds thereof. And the latter part of the said amended section does not apply to the case by reason of the *proviso,* which expressly limits its application to real estate purchased and acquired by a citizen or subject of such foreign country after the enactment of said amended section—Whereas, all the real property in this state which was ever purchased and acquired by Solomon Hauenstein, was so purchased and acquired before such enactment. We do not mean to say, however, that it would apply to the case, even if there had been no such proviso; but it is unnecessary to decide that question.

67 *The appellants, then, are not entitled under the statute law to what they claim; and the only remaining inquiry is:

3dly. Are they entitled under any treaty between the United States and the republic of Switzerland? If they are, it is under the treaty between the two countries which went into operation on the 9th day of November 1855, and has ever since remained in force, and so was in force at the time of the death of Solomon Hauenstein, in 1861 or '62. It may be found in the 11th volume of the Statutes at Large of the United States, page 590.

If they are entitled under this treaty, it is under article V, which is in these words:

"The citizen of each of the contracting parties shall have power to dispose of their personal property within the jurisdiction of the other, by sale, testament, donation or in any other manner; and their heirs, whether by testament or *ab intestato,* or their successors, being citizens of the other party, shall succeed to the said property, or inherit it; and they may take possession thereof, either by themselves or by others acting for them, they may dispose of the same as they may think proper, paying no other charges than those to which the inhabitants of the country wherein the said property is situated shall be liable to pay in a similar case. In the absence of such heir, heirs, or other successors, the same care shall be taken by the authorities for the preservation of the property, that would be taken for the preservation of the property, of a native of the same country, until the lawful proprietor shall have had time to take measures for possessing himself of the same."

"The foregoing provisions shall be applicable to real estate situated within
68 the states of the American *Union, or within the cantons of the Swiss confederation, in which foreigners shall be entitled to hold or inherit real estate."

"But in case real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the state or canton in which it may be situated, there shall be accorded to the said heir or other successor, such term as the laws of the state or canton will permit, to sell such property; he shall be at liberty at all times, to withdraw and export the proceeds thereof without difficulty, and without paying to the government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which the real estate may be situated."

The first clause of this article relates only to personal estate, about which there is no difficulty; aliens being capable of requiring, holding and transmitting movable property in like manner as our own citizens, without any enabling statute or treaty for that purpose. 2 Kent's Com. 62, marg. Though there is a statutory provision to that effect in the Code of 1860, p. 557, . 5. There is no personal property involved in this controversy.

The second clause relates only to real estate situated in those states of the American Union, or cantons of the Swiss confederation, in which foreigners shall be entitled to hold or inherit real estate. Whenever they are so entitled, the same reason exists for the application to such real estate of the provisions made by the first clause in regard to personal property. There were, no doubt, states in the American Union, at the time of the making of that treaty, in which foreigners were entitled to hold or inherit real
69 estate situated in *such states. But such was not the case in this state at that time, nor at the time of the death of Solomon Hauenstein, in 1861 or '62. Though by a statutory provision since made, and to be found in the Code of 1873, ch. 4, § 18, p. 130, it is enacted, that "any alien, not an enemy, may acquire by purchase or descent, and hold real estate in this state; and the same shall be transmitted in the same manner

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as real estate held by citizens." But that provision has no relation to this case, which must of course be governed by the law which was in force at the time of such death.

The second clause has no relation to the real estate mentioned in the first and second sections of chapter 115 of the Code of 1860, page 557, by which any alien, being a free white person, and not an enemy, who shall before some court of record of this state, declare on oath that he intends to continue to reside therein, is authorized, if he be actually resident therein, and upon such declaration being entered of record, to inherit or purchase, and hold, as if he were a citizen of this state. For although the second section declares, that "any such alien may convey or devise any real estate so held by him, and if he die intestate it shall descend to his heirs, and any such alienee, devisee or heir, whether a citizen or an alien, may take under such alienation, devise or descent," yet it is, in said section, expressly "provided he shall, if an alien, come or be in this state within five years after the alienation, devise or descent, and, before some court of record thereof, declare on oath that he intends to reside therein." Now the second clause of the treaty was certainly not intended, and cannot have the effect, to abrogate such a provision as the one above mentioned, but was only intended to apply to a case in which the disability of alienage in regard to holding or inher-
70 iting *real estate, was simply removed by statute; as is done by the 18th section of chapter 4 of the Code of 1873, p. 130, before referred to. Almost always, if not always, when an alien makes the declaration on oath mentioned in the first section of chapter 115 of the Code of 1860, he intends to be come a citizen of the state, besides becoming a permanent resident and owner of real estate therein. There was no occasion for saying anything in the section about his being naturalized, especially as it belongs to congress, under the constitution of the United States, "to establish a uniform rule of naturalization." The fifth section of the same chapter provides for the case of an alien who intends to reside in the state for a temporary period only, and authorizes him, if he reside therein, to "take and hold any lands for the purpose of residence or of occupation by him or his servants, or for the purpose of any business, trade or manufacture for a term of years not exceeding twenty-one."

This case therefore depends entirely on the true construction of the third clause of the fifth article of the said treaty: "But in case real estate," &c. Under this clause are the appellants, supposing them, as they claim to be, the next of kin, or their representatives, of Solomon Hauenstein, entitled to sell the real estate in Virginia, of which he died seized, and to withdraw and export therefrom the proceeds of such sale, unless there be some statute law of the state authorizing them to do so? Is not this clause of the treaty dependent for its operation and effect upon such state legislation, so far as this case is concerned? We think that it is, and was intended so to be, by the framers of the treaty. Such seems to be the plain meaning of the language used in the clause: "There shall be accorded to the said
71 heir or other successor such term *as the laws of the state or canton *will permit* to sell such property." These words, "will permit," seem to be wholly inconsistent with the idea of *obligation* on the part of the state to prescribe some period for such a sale, or of any *right* on the part of the person claiming to be such heir or successor, to sell such property in a reasonable or any other time, in case the state should not choose to permit such sale, and to prescribe a period for making it. The right contemplated in the said third clause was intended to be given, if at all, by the concurrent act of the treaty making power, and the state. Otherwise, no doubt the term or time during which the sale should be made, would have been prescribed by the treaty itself, as had been done by the treaty between the same powers of May 4, 1848. By that treaty it was expressly provided that "a term of not less than three years shall be allowed to" the claimant "to dispose of such property, and to collect and withdraw the proceeds thereof." Why was not a similar provision made in the treaty of November 9, 1855? Obviously, because it was intended that the consent and co-operation of the state should be necessary to give effect to that part of the treaty.

By the constitution of the United States, article VI, section 2, it is declared that "this constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding." Code of 1860, page 21. Great effect is thus given to these treaties, although they are not acts of congress, but are made by the president by and with the advice and consent of the senate, provided
72 *two-thirds of the senators present concur. Id., p. 19, Const. U. S., art. 11, section 11, clause 2. A treaty, like an act of congress, must be in pursuance of the constitution, and certainly not in conflict therewith. The territory of a state is peculiarly a subject for state legislation; and when it is acted on by federal power, the constitutionality of the action ought plainly to appear. In regard to provisions contained in some of the treaties between the United States and foreign countries, giving to aliens a right to claim land in the states by descent, or the proceeds of the sale thereof, and allowing them a certain term for selling the same, and withdrawing the proceeds of such sale, a question was raised by the revivors of the Code of Virginia in 1849 as to the constitutionality of such provisions, and to avoid a conflict between the two governments, state the federal, the revisors recommended the adoption of two sections in the Code, which were adopted accordingly. See their note to their report, page 587, chap. 113, § 18. In 1 Rob. New Pr., pp. 131-133, the same views

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contained in the note are again presented. While we do not express any opinion on this question in this case, because it is not necessary to do so, may we not suppose that the framers of the treaty of 1855 intended to avoid the exercise of at least a doubtful power by omitting such a provision as is contained in the treaty of 1848, giving to the alien claimants a right to sell the real property of a decedent and withdraw the proceeds of sale in a limited period, and by inserting in its stead such a provision on the subject as is contained in the subsequent treaty of 1855? At all events, ought we not to construe the latter treaty according to the plain import of its words, rather than strain the words, for the purpose of arriving at what is
73 called a liberal construction, *in reference to the claimants. These treaties are authorized to be made for the benefit of the states; and the power to permit or not to permit an alien heir to sell the property and remove the proceeds of sale during a limited period may very safely be left to the discretion of the states.

We are therefore of opinion that under the treaty of 1855, the appellants, supposing them to be the next of kin of Solomon Hauenstein, or their representatives, are not entitled to the proceeds of the sale of his real estate, the laws of the state not having permitted them to sell such property or to withdraw or export the proceeds thereof; and that the decree of the court below ought to be affirmed.

The evidence in this case strongly tends to prove that the appellants are, as they claim to be, the next of kin, or representatives of next of kin, of Solomon Hauenstein; and as it seems to be just and right that generally a man's next of kin, whether citizens or aliens, should succeed to his estate, real as well as personal, at his death intestate, it would have afforded us pleasure to have decided this case in favor of the appellants; but of course we were bound to decide it according to law, which, in our opinion, is against them. We are pleased to know, however, that it is competent to the legislature to afford them any relief to which they may be justly entitled, which we doubt not will be done.

CHRISTIAN, J. I am constrained to express my unqualified dissent from the opinion of the court in this case.

I am of opinion that it is clearly proved in the record that the plaintiffs in error are the heirs at law of Solomon Hauenstein.
74 *This is not denied in the opinion of the court, but conceding this fact, it is held that they are not entitled to receive the proceeds of the real estate in the hands of the escheator Lynham, because the legislature of Virginia has failed to *fix the period* within which the heirs of an alien Swiss, who has acquired real estate in this state, may be permitted to sell the same.

In my view the whole question in this case must turn upon the true construction to be given to the treaties between the Swiss confederation and the United States, interpreted with reference to the constitution of the United States.

The second section of the sixth article of the constitution of the United States is as follows:

"Article VI, section 2. This constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

This clause only declares a truth, which flows immediately and necessarily from the constitution of a national government. The laws made in pursuance of the constitution must of necessity be supreme. A law, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association.

So too in regard to treaties, there is equal reason why they should be held when made to be the supreme law of the land.

Treaties constitute solemn compacts of binding obligation among nations, and
75 unless they are enforced *with strict fidelity, the gravest complications with foreign nations would ensue, affecting not only the commercial prosperity but the peace and honor of the nation. It is therefore indispensible that they should have the obligation and force of a law, that they may be executed by the judicial power, and be obeyed like other laws. After these solemn compacts have been entered into, and while they subsist they ought to have a positive binding efficacy as laws upon all the states and all the citizens of the states. The peace of the nation, its good faith and moral dignity indispensably require that all state laws should be subjected to their supremacy.

It is notorious, as a matter of history, that treaty stipulations were grossly disregarded by the states under the confederation. It was probably to obviate this very difficulty that this clause was inserted in the constitution; and its renowned authors must forever be held in honored veneration, because among other declared principles of constitutional government they have brought treaties with foreign nations within the sanctuary of justice of laws or supreme obligation. See 2 Story on the Constitution, 4th ed., §§ 1838; and cases there cited; *Ware* v. *Hylton*, 3 Dal. R. 270-277.

In *Foster* v. *Neilson*, 2 Pet. R. 253, 314, the supreme court said, "A treaty is in its nature a contract between two nations, not a legislative act. It does not *generally* effect of itself the object to be accomplished, especially as far as its object is infra-territorial; but is carried into execution by the sovereign powers to the instrument.

In the United States *a different principle is established. Our constitution declares a treaty to be the supreme law of the land. It is therefore to be regarded by courts of justice as equivalent to an act of the legislature.*"
76 See also 5 *Marshall's Life of Wash.

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ch. 8, p. 652; 1 Waite's State Papers 45, 47, 71, 81.

"A treaty," said Mr. Jefferson, "made by the president, with the concurrence of the senate, is the law of the land, and a law of a supreme order, because it not only repeals former laws, but *cannot itself be repealed by future ones.*"

Now bearing in mind this interpretation of the constitution with reference to the obligatory force and acknowledged supremacy of the treaties made by the United States with foreign nations, let us now consider the terms of the treaties entered into between the Swiss confederation and the United States with respect to the rights secured to the subjects of the respective governments, to remove the proceeds of real estate, in cases where by the laws of the respective countries they cannot inherit such estate.

The treaty of 1847 contained the following provisions:

"Art. II. If by the death of a person owning real property in the territory of one of the high contracting parties such property (*i. e.*, real estate) should descend, either by the laws of the country or by testamentary disposition, to a citizen of the other party, who, on account of his being an alien, could not be permitted to retain the actual possession of such property, a term of not less than three years shall be allowed to him to dispose of such property and to collect and withdraw the proceeds thereof, without paying to the government any other charges than those which in a similar case would be paid by an inhabitant of the country in which such real property may be situated."

It is plain if this treaty was now subsisting between the Swiss confederation
77 and the United States, there *could not be the shadow of a doubt, that if within three years after the death of Solomon Hauenstein, the plaintiffs in error, had applied for the proceeds of this real estate, the state of Virginia would have been powerless to have resisted their claim under the treaty of 1847. And they would have had the unquestioned right to receive and remove the proceeds by the express terms of the treaty. This must be, and is, conceded. But it is said that the *treaty of* 1855 governs this case, and that under *that treaty* the plaintiffs in error are deprived of their right to recover and remove the proceeds of the said real estate. Is this so? Can it be so? Now when the two treaties are compared it is plain that the only difference, in this respect to this subject, is this—while the treaty of 1847 by its terms *fixed the time,* at three years, within which the property or its proceeds may be removed, the treaty of 1855 fixed *no time* but left it to the states of the Union and the cantons respectively, to fix the period within which this privilege may be exercised. The language of the treaty of 1855 (article 5) is this,—"*there shall be accorded* to the said heir, or other successor, *such term* as the laws of the state or canton will permit to sell such property; he shall be at liberty at all times to withdraw and export the proceeds thereof without difficulty, and without paying to the government any other charges than those which in a similar case would be paid by an inhabitant of the country in which the real estate may be situated."

Now it is said that because the legislature has *failed to fix the period* within which the rights of the parties under this treaty may be exercised, these rights have been lost—and though these rights arise and are vested under a treaty which the constitution declares to be the supreme law of the land, yet they are
78 destroyed *by the mere *non-action* of the legislature. Now it must be conceded that *no law* of the legislature antagonistic to the rights of the plaintiffs in error under this treaty, could be maintained in any court, state or federal, because the treaty is the supreme law of the land, "anything in the constitution or laws of the state to the contrary notwithstanding." If, then, the rights of the plaintiffs in error vested in them by a solemn treaty cannot be divested by the constitution or laws of a state, if they cannot be touched by positive enactments, how can they be divested by *mere non-action* of the legislature in failing to fix a period within which the right may be exercised.

It is a solecism to say that *treaties shall be the supreme law of the land,* if they may be defeated, or the rights of parties be divested by action or *non-action* of the state legislature. If the states may each, by the action or non-action of its legislature, hamper, impede and destroy rights vested under treaties, why should the general government make any treaties at all? If the states at last are to confer, in their discretion, the rights which the constitution secures by treaty, why should any treaty be made at all by the general government?

The province of the constitution would be idle and nugatory if the states may fix the rights of parties, notwithstanding solemn treaty stipulations.

To my mind it is plain that the treaty of 1855 simply gave to the state the power, if it chose to exercise it, of *fixing the period* within which the right of removal of the proceeds of real estate might be exercised. The mere failure of the state to *fix the term,* certainly cannot deprive parties of rights vested under solemn treaties, which are declared to be the supreme law of the land. I
79 should rather say that *the non-action* *of the legislature was a *waiver* of its right to fix the period for removal of the proceeds of real estate by the Swiss claimants, and that in the absence of such legislation it may be done at any time after the death of the alien. I am therefore for reversing the judgment of the circuit court, and directing the executive to pay over the proceeds of the real estate of Solomon Hauenstein to his heirs at law.

DECREE AFFIRMED.

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80 *Moorman v. Smoot & Wife & als.

January Term, 1877, Richmond.

I. There were nine children tenants in common of slaves subject to the life-estate of their mother. One of them, J, by his will gives to his brother K cer-

tain lands, plantation utensils, "and all the interest I may have in an undivided dower estate." J's widow marries T, and T buys the shares of six of the children, one of them K, and he buys of the husband of N, one of the children, her share; but her husband dies in the lifetime of N, and her mother. K dies, and gives his interest under the will of J to Y. T sells two of the slaves to M, and M afterwards sells them and the increase of one of them for $960. T and his wife have removed from the state. After the death of the life tenant, S, who had not sold her interest in the slaves, files her bill against M, making N and Y defendants, setting out the facts, and claiming her interest in the slaves sold to M—HELD:

1. **Co-Tenant—Liability for Sale of Common Property.***—M not producing the slaves, he must account for the price at which he sold them, with interest from the death of the life-tenant.
2. **Husband and Wife—Reversionary Interests.**—The husband of N having died in the lifetime of the life-tenant, his sale of her interest is invalid, and N is entitled to it.
3. The bequest of K to Y vests the interest of J in the slaves in Y.
4. **Pleading—Cross-Bills.**†—It was not necessary that N and Y should file a cross-bill in the cause in order to set up their claims against M.

Jesse Kennedy, of the county of Amherst, died some time previous to 1806. He left a widow, Susanna, and nine children, two of them boys, Joseph and Jesse, and seven girls. One of these girls, Nancy, married William Kelly, who died in the lifetime of his wife and her mother. Jesse Kennedy left a tract of land and a number of slaves;
81 in which his widow *had her dower and distributable part. She seems to have had an illegitimate son, Nicholas, after the death of Jesse Kennedy; and previous to 1806 she married Thomas Alfred. She lived until the 10th of June 1857.

By deed dated the 21st of June 1806, Thomas Alfred sold and conveyed to Joseph Kennedy his wife's interest in the land assigned to her for dower, and four of the slaves she had received; among them was one named Milly. In 1825 Joseph Kennedy died. By his will he gave to his wife Elizabeth, besides other property for her life, ten slaves by name, which he says are the property of the heirs of his father, Jesse Kennedy, at the death of his mother, Mrs. Alfred. One of these was the woman Milly. And at the death of his wife he gives to his brother Jesse Kennedy certain land, his stock and plantation utensils, "and all the interest which I may have in an undivided dower estate."

Jesse Kennedy died in 1826; and by his will he gave to his brother, Nicholas Kennedy, all his interest in the personal estate of his father, "together with the interest conveyed to me by will from my brother, Joseph Kennedy."

Some time previous to June 1828, Elizabeth, the widow of Joseph Kennedy, married Christopher Timberlake. And after his marriage he seems to have received possession of the said dower slaves, and to have purchased the interest of six of the children of Jesse Kennedy the elder; and it seems Jesse, Jr., was one of these six. He also purchased from William Kelly, the husband of Nancy, her interest. And afterwards he sold these slaves to different persons, and removed with his family to Ohio, and has not been heard of for many years. Of these sales, he made one in October 1834, by which, for the
82 sum of $500, *he conveyed to Charles H. Moorman a negro girl named Elizabeth, aged about nine years, and a boy named Robert, aged about seven years: these were children of Milly. These slaves Moorman held until 1847, when he sold the girl and her two children to Samuel McDearman for $960.

Susanna, one of the daughters of Jesse Kennedy the elder, married in 1816, Wiatt P. Smoot, and they removed first to Tennessee and then to Alabama; where they live at present. In 1859 Smoot and wife filed their bill in the circuit court of Amherst county, which was afterwards removed to the circuit court of Lynchburg, in which they claimed an interest of one-ninth of the dower property aforesaid. They set out the sale of the two slaves by Timberlake to Moorman; and claim that they are entitled to the said slaves, with hires from the death of the life-tenant, or the purchase money if he has sold them. Moorman, Nancy Kelly, Nicholas Kennedy and others were made defendants.

Nancy Kelly answered, insisting that her husband, William Kelly, having died in the lifetime of the life-tenant, she was entitled to have her ninth of the dower property, notwithstanding Kelly's sale of it to Timberlake. Moorman answered, insisting he was a *bona fide* purchaser without any grounds to suspect that he was not buying a good title.

When the cause came on to be heard the court held, that Moorman should account for the woman Elizabeth and her children at the price for which he sold them, with interest from the death of the life-tenant, Mrs. Alfred, and for the hires of Robert from that time until he was emancipated by the results of

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Trustees—Breach of Trust—Liability.—In Loving v. Ashlin, 76 Va. 911, the court quotes 2 Story Eq. sec. 261 as follows: "There is no rule of equity applicable to trusts which is more uniformly acted upon by the courts than that one who assumes to act in relation to trust property without just authority, however *bona fide* may be his conduct, shall be held responsible both for the capital and the income to the same extent as if he were a *de jure* trustee," citing the principal case and Cross v. Cross, 4 Gratt. 257; Tabb v. Cabell, 17 Gratt. 160. See also Brown v. Lambert, 33 Gratt. 256 and *note*, citing the principal case; Bartlett v. Patton, 33 W. Va. 80.

***Liability of Life Tenant—Emancipation of Slaves.**—Pettyjohn v. Woodroof, 77 Va. 516 and Brown v. Lambert, 33 Gratt. 256, cite the principal case for the proposition that the remaindermen are entitled to recover the value of slaves notwithstanding their subsequent emancipation where the life tenant had converted them to his own use.

†**Pleading—Cross-Bills.**—The holding of the principal case in regard to filing cross-bills is cited with approval in Atwood v. R. R. Co., 85 Va. 973, citing also French v. Townes, 10 Gratt. 513; Faulkner v. Davis, 18 Gratt. 652. For general rule, see Ragland v. Broadnax, 29 Gratt. 401.

the war in 1865, except for the time he was in the possession of the plaintiffs' 83 counsel in 1859. And an account *having been taken, commencing the interest and hires from the 1st of January 1858, the court on the 13th of June 1872 made a decree against Moorman in favor of the plaintiffs and Nancy Kelly and Nicholas Kennedy each for a ninth of the amount so ascertained to be due from the defendant Moorman. And thereupon Moorman applied to a judge of this court for an appeal; which was allowed.

Mosby & Brown and *Ould & Carrington*, for the appellant.

J. H. Lewis, for the appellees.

STAPLES, J., delivered the opinion of the court.

The court is of opinion that the appellant and the appellees were tenants in common of the slaves in controversy, the appellant being the owner of six interests in remainder, and the appellees of three interests in remainder, and the appellant being also entitled to an estate for the life of Mrs. Susanna Alfred in the same slaves. The sale of the woman Elizabeth, and her two children by the appellant, although intended to pass the fee, could only operate to confer such title as he himself had. It may be that the appellant made said sale in good faith, supposing his title to all the interests in remainder unexceptionable; but the mistake into which he was led by his vendor could not impair the rights of his co-defendants, or in any manner affect his obligations to them. By the sale the property was placed beyond the reach of the appellees. They could not obtain possession of it at the death of the life-tenant, nor pursue their remedies against the person in possession; nor could 84 the *appellant produce the slaves for partition, or for sale and division of the proceeds among those entitled. Under the circumstances his sale must be considered as a conversion of the property, with all the liabilities consequent upon such an act. The appellant was therefore liable to the appellees for the value of the three interests to which they were entitled in remainder.

The court is further of opinion that the circuit court did not err in holding that the appellant, under all the circumstances, shall account for three-ninths of the purchase money received by him under the sale of said slaves. At the date of said sale the woman, Elizabeth, was about twenty-two years of age, and the mother of two infant children; the three were sold for nine hundred and sixty dollars. At the death of the life-tenant in 1857, ten years afterwards, the presumption is, that while the mother did not diminish, the children must have increased in value. There is nothing in the record to rebut this presumption. If, as claimed by the appellant, he is only accountable for the value of the slaves at the death of the life-tenant, it was incumbent upon him to show such value by satisfactory evidence, or to produce the slaves for the benefit of those in remainder. The evidence tends to show that they were still alive in 1857, at the death of Mrs. Alfred, but it does not show in whose possession they were at that time, or at the time of the institution or during the pendency of this suit in the court below; nor does it appear that the appellant made any special effort to obtain information upon these points. Without undertaking therefore now to decide whether in a case such as this the party settling is liable only for the value at the death of the life-tenant, where that value appears, it is suffi- 85 cient to say that in the absence *of proof upon that point the court is bound to adopt the price for which the slaves were sold as the sum with which the appellant is to be charged in his account with his co-tenants. *Kean* v. *Welch*, 1 Gratt. 403; *Cross' curatrix* v. *Cross' legatees*, 4 Gratt. 257.

The court is further of opinion the circuit court did not err in entering a decree against the appellant in favor of Nancy Kelly for one-ninth of the interest in remainder in said slaves, and the proceeds of their hires. It appears that William Kelly, the husband of Nancy Kelly, sold to C. J. Timberlake the wife's interest in remainder, and died leaving the wife and the life-tenant surviving him.

The rule is well settled, that where a wife has a vested remainder in personal estate, expectant on the death of a life-tenant, and both the wife and the tenant for life outlive the husband, the wife is entitled by right of ownership to the interest in remainder, not only against the representatives and general assignees of the husband, but even against his particular assignees for valuable consideration. *Henry* v. *Graves*, 16 Gratt. 244.

The court is further of opinion, that the second clause in the will of Joseph Kennedy is not justly liable to the objection suggested by appellant's counsel, of being too indefinite to confer upon his brother, Jesse Kennedy, the testator's remainder in the property, which is the subject of controversy. That clause is as follows: "At the death of my wife I give and bequeath unto my brother, Jesse Kennedy, all my stock and plantation utensils, and all the interests which I may have in an undivided dower estate, both real and personal."

This language must be read in connection with the clause just preceding, in which 86 the testator fully explains *what he means by "an undivided dower estate;" and manifestly shows that he refers to the land and slaves allotted to his mother for her dower in the estate of Jesse Kennedy, the father. The interest thus bequeathed to Jesse Kennedy, the brother of the testator, was by him bequeathed to Nicholas Kennedy, and was not included in the sale made by Jesse Kennedy to C. J. Timberlake. At all events there is nothing in the record to show that it was so included. Under the will of Joseph Kennedy, as has been seen, Jesse Kennedy was entitled to the legacy at the death of Elizabeth Kennedy, the widow of the testator. The evidence does

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not very clearly show her death. It appears, however, that she was a married woman as far back as 1824, and probably had been for a considerable period; that she afterwards married C. J. Timberlake, and that many years ago she, with her husband, removed to the state of Ohio, and whether she has been since heard from does not appear.

This precise objection does not seem to have been raised in the lower court, probably from an understanding among all parties that Mrs. Timberlake was no longer living, and the fact could be easily established if the proof was called for. If the appellant desired or intended to raise this issue, the nature and character of the controversy required he should do so in the court below. It is too late to raise the question for the first time in this court.

The court is further of opinion, that a cross-bill was not necessary to a proper determination of the questions arising in connection with the claims asserted by Mrs. Nancy Kelly and Nicholas Kennedy, already adverted to. They are parties defendant to the suit; their interests are particularly set forth in the bill; they were tenants in
87 common with the appellant and *the plaintiffs, and they were simply asking their distributive shares derived by descent and bequest from a common ancestor. Their interests were involved in the issue between the plaintiffs and the appellant, with the exception of a single question of law arising upon the construction of a will in one case, and the operation and effect of a sale in the other. Under such circumstances a cross-bill would have accomplished no good, and the failure to file it has not been productive of injury or inconvenience to either party. The appellant might have raised, and with the same effect, before the commissioner any and every question which could have been presented in an answer to a cross-bill.

The court is further of opinion, that if it could be properly held that appellee's primary remedy is against C. J. Timberlake, it appears that he left this state many years ago, and if alive is still a resident of a distant state. It is not shown, it is not even suggested, that he has or had any estate subject to the jurisdiction of the courts of the commonwealth. It was therefore unnecessary to make him a party to the suit, or to ask any decree against him before proceeding against the appellant.

The court is therefore of opinion, for the reasons stated, there is no error in the decree of the circuit court, and that the same must be affirmed.

DECREE AFFIRMED.

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88 *Geo. Home Ins. Co. v. Kinnier's Adm'x.

January Term, 1877, Richmond.

1. **Fire Insurance—Legal Representatives Construed.**—A policy of insurance on a building insures K and his legal representatives. The building having been burned after the death of K, his administratrix may maintain an action on the policy.

2. **Same—Conditions in Policy—Alienation Clause.**—One of the conditions of the policy is, that it shall be void "if the title of the property is transferred or changed." This does not apply to the descent of the property on the death of the assured to his heirs.

3. **Same—Same—Same—Judicial Sale.**—A condition in a policy that the entry of a foreclosure of a mortgage shall be deemed an alienation of the property, and avoid the policy, does not involve a sale under the decree of the court in a creditor's bill against the heirs, &c., which sale is set aside by the court.

4. **Same—Same—Change Increasing Risk.**—One condition of a policy is: Any change within the control of the assured material to the risk shall avoid the policy. The change here referred to is a change in the condition of the property, wrought by the agency of the assured, and not the mere vacation of the house by the assured or its occupants.

5. **Same—Same—Waiver.**—A condition of the policy is, that the policy shall be vitiated if the premises insured become vacated by the removal of the owner or occupant for a period of more than twenty days without immediate notice to the company and written consent—HELD: It was competent for the insurer or his lawful agent to waive this condition; and if at the time the agent of the company received the premium of insurance and delivered the policy he had knowledge of the vacation of the property, and did not then avoid the policy, but treated it as valid and subsisting, such conduct of the agent was a waiver of the condition, and a breach of it cannot be relied on by the company to defeat a recovery upon the policy.

6. **Same—Waiver—General Principles.***—As to waivers by the insurers of conditions in a policy, how and by whom they may be made, see the opinion of BURKS, J.

7. **Same—Proof of Loss—Waiver.**†—A condition of the policy required immediate notice
89 of loss, and that *within thirty days the insured render a particular account thereof with an affidavit, &c.—HELD: If the insurers, from any reliable source, knew that the building insured had been destroyed by fire, and by any act or declaration of theirs, or of their lawful agent, prevented the assured from preparing the schedule with the affidavit thereto required by the policy within the thirty days, whether verbally or in writing, it was

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***Fire Insurance—Waiver—General Principles.**—The principal case is cited, for the proposition that conditions in a policy, which are for the benefit of the insurer, and a breach of which may be visited by forfeiture, may be waived by the insurer or his lawful agent in McLean v. Ins. Co., 29 Gratt. 372. The rule laid down by the principal case in regard to the doctrine of waiver and estopped in insurance cases, are cited and approved in Insurance Co. v. West, 76 Va. 578; Easley v. Ins. Co., 91 Va. 169; Ins. Co. v. Pankey, 91 Va. 269; Ins. Co. v. Goode, 95 Va. 756; Ins. Co. v. Ward, 95 Va. 236; Ins. Co. v. McLean, 31 Gratt. 517 and *note*; Ins. Co. v. Weill, 28 Ga. 389. See Ins. Co. v. Yates, 28 Gratt. 585, for distinctions. See generally, Hurst's Dig. 440.

†**Same—Same—Proof of Loss.**—On the question of waiver of a condition in the policy requiring proof of loss, see Ins. Co. v. Reynolds, 32 Gratt. 613 and *note*. See also Peninsular Co. v. Ins. Co., 35 W. Va. 666 and 13 Am. & Eng. Enc. Law (2nd ed.) 346.

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a waiver of the performance within the thirty days of that condition; and the omission to do so is no bar to the action on the policy, provided it was done within a reasonable time thereafter.

8. **Same—Authority of General Agent—Private Instructions Limiting Same.**—If at the time of issuing a policy I had been authorized by the insurance company to receive and accept proposals for risks, subject to their approval and ratification, to issue and deliver policies and renew the same, and receive premiums therefor, and had been supplied with blanks signed by the president, to be filled and countersigned by him; this constituted I the general agent of the company, and the company is bound by all his acts as such within the scope of his authority, so long as it existed, notwithstanding any private instructions which he may have received limiting that authority, of which the assured had no notice.

This case is fully stated by JUDGE BURKS in his opinion.

Kirkparick & Blackford, for the appellant.

Kean and *John W. Daniel,* for the appellee.

BURKS, J. This is a *supersedeas* allowed by one of the judges of this court to a judgment rendered by the corporation court for the city of Lynchburg in behalf of Bettie J. Kinnier, administratrix of Alexander Kinnier, (defendant in error), against the plaintiff in error, the Georgia Home Insurance Company, a corporation created by the state of Georgia.

The action was *assumpsit* on a policy issued by the plaintiff in error, insuring the said Alexandria Kinnier and his "legal representatives to the amount of $2,000, against loss by fire on a dwelling house situate on
90 Daniel's *hill in the city of Lynchburg, and to the amount of $1,000 against like loss on household furniture and other personal property contained in said building. The plaintiff in her declaration alleged the destruction of the building by fire, and claimed the amount of the insurance upon it. The defendant demurred to the declaration, and also pleaded the general issue. The demurrer was overruled, and on the trial of the issue by the jury the plaintiff and defendant both moved for instructions.

The first instruction asked for by the defendant was refused by the court, and a bill of exceptions was taken to the refusal. This is bill "No. 1" in the record.

The defendant then asked for eight other instructions. The court refused to give the fifth, sixth and seventh; and also refused to give the first, second, third, fourth and eighth in the form in which they were asked, but gave them with modifications of each; and also gave three asked for by the counsel for the plaintiff. To this ruling of the court the defendant's counsel excepted, and the instructions refused, and, as given with modifications, are found in the bill of exceptions "No. 2." By this bill all the evidence of both parties is made a part of the record.

The jury found a verdict for the plaintiff for $2.000, with interest from the first day of April 1871. The defendant thereupon moved for a new trial, upon the ground that the verdict was contrary to law and the evidence. The motion was overruled, and a bill of exceptions, "No 3," was taken, in which the facts were certified.

The first assignment of error is to the judgment of the court overruling the demurrer, and this may be most conveniently disposed of in this connection.

91 *The first, and I suppose the chief objection made to the declaration is, that the action was improperly brought by the administratrix, and could only be maintained by and in the name of the *heirs* of the plaintiff's intestate.

The declaration alleges that "the defendants entered into and duly executed a certain writing, commonly called a policy of insurance, and delivered the same to the plaintiff, wherein and whereby in consideration of the receipt of $37.50 paid by the plaintiff to the defendants, the said Georgia Home Insurance Company did insure the said Alexander Kinnier and his *legal representatives* $3,000, &c."

It is contended that by the terms "legal representatives," used in the declaration pursuing the tenor of the policy, *the heirs* at law of Alexander Kinnier were intended, so far as the insured building is concerned. I do not think this is the proper construction of the policy. The policy declared upon, and as set out, is a contract to indemnify Alexander Kinnier personally. The words "legal representatives," as used, are of the same import as the words *executors, administrators, personal representatives.* The policy as set out is a simple contract; and upon the death of Alexander Kinnier, passed like his bonds, notes, and other choses in action to his administratrix; and she only had a right of action upon it.

We have been referred by the counsel for the plaintiff in error in support of his objection, to the case of *Haxall's ex'ors* v. *Shippen & wife,* 10 Leigh 536. That case involved incidentally the construction of a *covenant* for insurance entered into by the Mutual Assurance Society, a corporation created by the laws of this state. The covenant in terms stipulated for payment in case of loss to the assured, "his *heirs* and
92 assigns;" *and it was construed in a *chancery* suit, in which the *form* of proceeding was not a question, as a covenant *real,* which enured to the benefit of the *heir.* Whatever may have been the proper construction of the covenant in that case, I do not think the policy in this case can be properly construed as intended to enure to the benefit of the *heirs.* However that may be, the statute (Code of 1873, ch. 126, § 19) it seems would give the administratrix the right to maintain this action.

The second objection seems to be based upon a misconception. The declaration substantially alleges a contract made and entered into by the defendant with the plaintiff's intestate, the consideration of which (the premium) is stated to have been paid by the plaintiff, and by fair intendment to

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have been paid by her in her representative capacity.

The remaining objections, the one specially set out in the demurrer, and the other assigned as error in the petition, seem to be merely formal, and do not require any special notice. I am of opinion there was no error in overruling the demurrer.

The policy in this case, as is usual in such writings, contains a multitude of conditions, exceptions, limitations and restrictions, amongst which are the following, which I number for convenient reference:

* * * * * "The company is not liable,

1. * * * * for loss, if there is other prior or subsequent insurance, without written consent of this company.

2. And if the title of the property is transferred or changed, or the policy is assigned without written permission hereon, the policy shall be void.

3. And the entry of a foreclosure of a mortgage, or the levy of an execution, 93 shall be deemed and alienation *of the property, and this company shall not be holden for loss or damage thereafter.

4. * * * * This policy shall be vitiated * * * * if the premises hereby insured become vacated by the removal of the owner or occupant for a period of more than twenty days, without immediate notice to the company and written consent.

5. Any change within the control of the assured, material to the risk, shall avoid this policy.

6. All persons having a claim under this policy shall give immediate notice of the same, and within thirty days render a particular account thereof, with an affidavit stating time, circumstances, and cause of fire, the whole value and ownership of the property assured, the amount of the loss or damage, other insurance, if any, and copies of the written portion of all policies; if required, shall produce books of account and other proper vouchers, and be examined under oath touching all questions relating to the claims, and subscribe such an examination when reduced to writing; and a refusal to answer any such question shall cause a forfeiture of all claims by the parties; and, until sixty days after such proofs are rendered, the loss shall not be payable. * * *

7. This policy shall not be valid until the premium has been paid to and the policy countersigned by the duly authorized agent at Lynchburg, Va."

The policy was signed by the president and secretary of the company, and under their signatures was the following: "Countersigned at Lynchburg, Va., this the 12th March, A. D. 1870. T. H. Ivey, agent."

The defence of the company before the jury consisted in an effort to defeat the recovery sought by the plaintiff by attempting to prove a violation or breach 94 *by the plaintiff of the several conditions and stipulation above set forth and enumerated.

It appears from the evidence that the policy was issued on the 12th day of March 1870, through T. H. Ivey, the agent at Lynchburg, and the risk, as provided by the policy, was to commence on the 13th day of March 1870, at 12 o'clock, noon, and end on the 13th day of March 1871, at 12 o'clock, noon. It was not, however, delivered on the day of its date, nor indeed was it ever delivered to Alexander Kinnier, the insured, but was retained by Ivey, the agent, in his possession for more than two months after it was executed. Nor did Kinnier pay the premium for the insurance. Ivey says, that at the time when the policy was executed Kinnier told him that he did not have the money with which to pay the premium, and that he (Ivey) told Kinnier it made no difference; that at the end of the month he would settle with the company. Kinnier died on the 1st day of April following. Mrs. Kinnier, the wife of the decedent, (the defendant in error), became his administratrix, and made sale of the personal effects of her intestate, including the personal property insured, on the 19th day of May. On the 30th day of the same month (May), J. N. Gordon, the agent of the administratrix, paid the premium on the policy to Ivey, took Ivey's receipt for it, and Ivey at the same time delivered the policy to Gordon, having previously threatened Gordon with the cancellation of the policy if the premium was not paid. On the day of the sale of the personal property, Mrs. Kinnier (the administratrix) who, with her family, had occupied the insured tenement from the time of her husband's death until that day, vacated it, leaving no occupant; nor was it ever occupied at any time thereafter. 95 *Tom Watson (a colored man) as a tenant, occupied the kitchen, an outbuilding on the same lot on which the insured tenement stood, and within fifteen or twenty feet from it, and the evidence tended to show that Watson was charged with the care of the insured building, and continued in charge of it until the 2nd of November following (1870), when it was wholly destroyed by fire in the night time and, as supposed, by an incendiary.

Soon after the sale before mentioned, to wit: in the month of June, the creditors of the decedent (Kinnier) filed a bill in the corporation court of Lynchburg against the widow and heirs of said decedent for a sale of his real estate and payment of their debts out of the proceeds. A decree was accordingly made for the sale on credit of said real estate, including the lot on which the insured building was situate. The decree in express terms provided, that the commissioner ordered to make the sale should, at the time of sale, publicly announce "that no sale under the decree should be valid until ratified by the court." The sale, as ordered, was made on the 8th day of July following, and A. R. Woodroof became the purchaser of the lot on which the insured building stood. The sale was reported to the court, and the commissioner in his report stated that the public announcement required by the decree was made at the time of the sale. Exceptions were filed to the report and sale by some of the parties in interest (not the purchaser)

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on account of alleged inadequacy of price, which exceptions were afterwards sustained by the court, and the sale was vacated. Woodroof (the purchaser) was never let into possession of the premises. After the purchase, however, he took out a policy of insurance in the "Liverpoole, London and Globe Insur-
96 ance *Company" on the dwelling-house, the same on which the policy, which is the foundation of this suit, had been issued. The policy issued to Woodroof was upon condition, that it should be cancelled if the court did not confirm the sale which had been made to him.

The evidence proved that T. H. Ivey was the agent of the company, and tended to show that he was a general agent, with power to receive and accept proposals for risks, subject to the approval and ratification of his principal, to issue and deliver policies, and renew and cancel the same, and that he was supplied with blanks for proof of loss. It further tended to show that he was present when the personal property insured was sold by the administratrix—knew that the insured building had been vacated, and that it was expected to be sold—that he had this knowledge when on the 30th day of May he collected the premium from the agent of the administratrix and delivered the policy to him; and the agent of the administratrix testified that at the time the premium was paid, and the policy delivered, he inquired of Mr. Ivey "if the policy was all right, and if the house was burned would the money be paid," to which Ivey replied "it was all right, and the money would be paid," and that at the same time when told by the agent aforesaid that Mrs. Kinnier had gone away, that the family had broken up, the personalty had been sold, and the real estate would be sold, and that a servant was on the premises in charge, and was asked by said agent whether it would be all right, Ivey replied that "it would."

It further appears by the evidence, that immediately after the house was burned, the company's agent (Ivey) of his own
97 accord sent a notice of the loss to *the company, and the agent of the administratrix testified that soon after the fire he applied to Ivey to furnish him with blank forms for proofs of loss, and inquired of him whether lapse of time would make any difference, and Ivey replied that "it would not;" and that after he procured the blanks, to wit, about the first day of February 1871, they were filled up and delivered to Ivey, and Ivey testified that he sent them to the company. It does not appear that the company ever made any objection as to the proofs of loss, or as to the time in which they were furnished.

It further appears by the testimony of the agent of the administratrix, that he repeatedly wrote to the agents of the company, asserting claim for loss under the policy, and could get no satisfactory response, until finally, on the 13th of May 1871, he received a letter from one of the agents, stating that the claim had been maturely considered by the company, and that they did not regard themselves as liable, either legally or equitably.

Ivey was examined as a witness in behalf of the company, and there was considerable conflict between his testimony and that of Gordon (the agent of the administratrix), who was also examined as a witness, especially in regard to the vacating of the building, Ivey's knowledge of that fact at the time he received the premium and delivered the policy, and also on regard to the proofs of loss and the furnishing of the blank forms for such proofs. There was other evidence in the case, but so much only is stated, and its tendency towards the proof of material facts as is deemed necessary for the proper consideration and determination of the questions of law arising upon the instructions.

The instructions and the rulings of
98 the court *thereon are shown by the bills of exceptions, No. 1 and No. 2, before referred to, and are as follows:

No. 1.

Memorandum: That on the trial of this cause, after all the evidence on either side had been adduced and examined, the defendants by counsel moved the court to exclude from the jury, and instruct them not to consider any evidence going to show a loss by fire, consuming the two-story framed and shingled building, with brick basement fully detached, occupied in his lifetime "by Alexander Kinnier as a family residence, situate on Daniel's Hill near the city of Lynchburg, Virginia," the same having descended to the heirs at law of Alexander Kinnier, at his death and before the happening of said fire; which motion the court overruled, and refused to exclude said evidence, or instruct the jury not to consider it.

No. 2.

The defendant moved to instruct the jury as follows:

1st. That if the jury believe from the evidence, that after said policy was issued, any change within the control of the parties interested, or those representing them, material to the risk, occurred to the property to be insured against in the policy, then the policy became void, and no recovery can now be had thereon.

Which instruction the court gave with this modification:

That the change must have been such a one as affected the condition of the property itself, and that made by the act, au-
99 thority, consent, procurement or *connivance of the assured, and not the mere vacation of the house by the assured or its occupants.

2d, That if the jury believed from the evidence, that after the risk of the policy sued on was assumed by the defendants, the premises thereby insured became vacant by the removal of the owner or occupant for a period of more than twenty days, without notice to the company and their consent thereto in writing, the said policy was thereby avoided, and no recovery can be had thereon in this suit.

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Which instruction the court gave, but with this modification:

That if the insurers or their lawful agent knew of said vacation, and did not then avoid it, but treated it as a still existing policy, by delivering the same, and receiving the premium for the whole unexpired term, it was a waiver of the right to avoid it for that cause, and is no bar to a recovery in this action.

3d. That if the jury believe from the evidence, that after the risk was assumed by the defendants, the title to the property insured was transferred or changed without the permission of the defendants written on said policy, then said policy was thereby avoided, and no recovery thereon can be had in this suit.

Which instruction the court gave, but with this modification:

That if the change be a mere succession of the widow and heirs of the assured, who resided in the house insured at the time of his death, this was not such a change or transfer of title as avoided the policy.

4th. That if the jury believe from the evidence that the plaintiff failed, for more than thirty days after the loss occurred, to render the defendants a particular account thereof, with an affidavit stating time, circumstances, and cause of fire, the
100 whole value and ownership *of the property assured, amount, the amount of loss or damage, &c., then she failed to comply with the requirements of said policy, and cannot recover in this action.

Which instruction the court gave, but with this modification:

That if the jury believe from the evidence that the insurers, from any reliable source, knew that the building insured had been destroyed by fire, and by any act or declaration of theirs, or their lawful agent, prevented the assured from preparing the schedule with the affidavit thereto, required by the policy, within thirty days next succeeding the burning of the house, whether verbally or in writing, it was a waiver of the performance within the thirty days of that condition, and the omission to do so is no bar to this action, provided it was done within reasonable time thereafter.

5th. That the plaintiff cannot recover in this suit unless she proves that at the time of the loss by fire the property consumed was vested in or belonged, legally or equitably, to her as administratrix of Alexander Kinnier, deceased.

Which instructions the court refused to give.

6th. That if the jury believe from the evidence, that there was, on the part of the insured, or those claiming under him, such a violation of the conditions and requirements of the policy in controversy, as to work a forfeiture thereof, they must find for the defendant, notwithstanding that they believe that T. H. Ivey, the agent of the defendant at Lynchburg, did undertake and agree on behalf of the defendant, by an oral contract, to waive in favor of the insured, or those claiming under him, the obligation of such condition and requirements, or any forfeiture which at the time of
101 *such undertaking or agreement may have occurred thereunder.

Which instruction the court refused to give.

7th. That if the jury believe from the evidence that after the death of the intestate, Alexandria Kinnier—a suit having been regularly instituted by his creditors for the purpose of subjecting the premises insured to the payment of his debts, and the court in which said cause was instituted having, on the 15th day of June 1870, ordered said premises to be sold by its commissioner, and said commissioner having, on the 8th of July 1870, made such sale—those facts effected such a change in the title to the property insured under the provisions of the policy sued on as rendered the same void, and the defendants cannot be held responsible for any loss which thereafter occurred.

Which instruction the court refused to give.

The plaintiff by her counsel then moved the court to instruct the jury as follows:

1st. That if they believed from the evidence, that at the time of issuing the policy in the declaration mentioned, the witness, T. H. Ivey, had been authorized by the defendant to receive and accept proposals for risks subject to their approval and ratification, to issue and deliver policies and renew the same, and receive the premiums therefor, and had been supplied with blanks signed by the president, to be filled up and countersigned by him, this constituted him the general agent of the company; and the company is bound by all his acts as such within the scope of his authority, so long as it existed, notwithstanding any private instructions which he may have received limiting that authority, of which the plaintiff had no notice.

Which the court gave.

2d. That the company is bound by
102 all the acts and *declarations of its agent, which were within the general scope of his authority, and made while in the execution of his agency, notwithstanding that in such acts and declarations he may have departed from his instructions received from the company, provided that the assured had no knowledge of such instructions.

Which the court gave.

3d. That the conditions of the policy, that the policy should be avoided by the removal of the owner or occupant for a period of more than twenty days, without immediate notice and written consent, was inserted by the company itself for its own protection and benefit; and that it was competent for the company or its agent to waive the said condition, either orally or in writing, notwithstanding the expression used as to its written consent.

Which instruction the court gave.

After the foregoing instructions, as asked for by both defendant and plaintiff, and rejected, modified, or given as above stated, the defendant by counsel moved the court to give the jury, as a modification of the de-

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fendants' second instruction, as modified by the court. the following instruction:

But if the jury believe from the evidence, that the defendants' agent delivered said policy on the statement of the plaintiff's agent, that the insured premises were in the occupation of a colored man, but that in fact the house insured was not then or afterwards thus occupied, but was then and remained vacant, then such delivery of the policy and collection of the premium was no waiver of the said condition in said policy, and the words "premises hereby insured," used in said policy, refer to the building thereby insured, and the occupancy of a
103 colored man of an outhouse *fully detached was no such occupation of the "premises insured" as said policy required.

The court refused to give said instruction, on the ground that at the time of the delivery of said policy and the receipt of the premium by the agent of the company, there is not a particle of proof before the jury that any statement of such kind was made by the plaintiff's agent; and in lieu of said instruction the court gave the following:

That if the jury believe from the evidence, that after the risk of the policy sued on was assumed by the defendants, the premises thereby insured became vacant by the removal of the owner or occupant for a period of more than twenty days without notice to the company, and their consent thereto in writing, then said policy was thereby avoided, and no recovery can be had thereon in this suit, unless they believe from the evidence that the defendants or their lawful agent knew of said vacation and did not avoid it, but treated it as a still existing policy, by receiving the premium for the whole term, and delivering the policy, which would be a waiver of the right to avoid the policy, and is no bar to a recovery in this action.

The court further instructed the jury that the words in the policy, "the premises hereby insured." are to be interpreted as having reference exclusively to the dwelling house insured; and although the jury should believe from the evidence that an outhouse was occupied by a colored man at the time mentioned, it was not such an occupation of the house insured as contemplated in the policy.

To all which opinions and judgments of the court, refusing to give said first, second, third and fourth instructions asked by the defendant, except with the modifications thereof by the court, the said modifica-
104 tions *as made, and the refusal to give the fifth, sixth, seventh and eighth instructions moved by the defendant's counsel, and giving the instructions in lieu of the eighth, and also giving the first, second. and third instructions moved by plaintiff's counsel, the defendant by counsel except and pray their exceptions to be signed. sealed and unrolled according to law; which is accordingly done.

The instructions set out in bill "No. 1," and the fifth in the series of "No. 2" may be considered together. They propounded as law to the jury. that the title to the property insured being vested in the *heirs* of the plaintiff's intestate, the plaintiff as administratrix could not recover on the policy. This is substantially the same proposition presented by the demurrer to the declaration, and as we have seen that the demurrer was properly overruled, for the same reason these two instructions were properly refused.

The other instructions asked for by the defendant relate to the conditions in the policy hereinbefore recited. Upon examination it will be seen that these conditions and stipulations are wholly for the benefit of the insurer, stringent in their character, some of them more or less ambiguous and equivocal in their terms, and the breach of each is visited with a forfeiture. They are annexed, however, to the policy, constitute a part of the contract, and, however rigorous, are binding on the parties, unless in some way dispensed with. They should be fairly construed according to the rules applicable to such instruments.

The maxim, that "the words of an instrument shall be taken most strongly against the party employing them," is peculiarly appropriate in the construction of a policy of insurance, and especially of such conditions as we are now considering. The
105 instrument is *wholly the work of the underwriter, and is usually filled with a multitude and variety of stipulations seldom read by the assured when he accepts the policy, and if read, rarely if ever fully understood. Abounding in forfeitures and in provisions, generally harsh and difficult of performance, it should be strictly construed against the insurer, and liberally in favor of the insured. A modern writer on insurance thus states the rule: "No rule, in the interpretation of a policy, is more fully established, or more imperative and controlling than, that which declares that, in all cases, it must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to indemnity, which, in making the insurance, it was his object to secure." May on Insurance 182.

Bearing in mind these salutary rules, let us proceed with the examination of the instructions embodied in the second bill of exceptions.

The first in the series evidently points to the condition or stipulation before noted as five. "Any *change*, within control of the assured, material to the risk, shall avoid this policy." The court refused to give this instruction as asked, and gave it with a construction of the word "change," limiting the meaning to a change which affected the condition of the property wrought by the agency of the assured, and excluding the idea that it embraced the mere vacation of the building by the assured or the occupants. I think this explanation was proper to prevent the jury from being misled. The word "change," is certainly a very comprehensive term. In the sentence in which it occurs, considered without reference to other clauses, it might include any change in the title, possession, or condition of the property. But

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we must look to the whole instrument, 106 and so construe it as to *give effect if possible to each and every part of it, and ascertain what limitation, if any, should be placed upon the meaning of this very comprehensive term "change."

Was it used in reference to the title? Plainly not, for a change of title is clearly and distinctly provided against by conditions two and three. Did it refer to a change of possession from the assured to some other person? I think not, for condition four implies authorized occupancy other than by the owner. Did it refer to the vacating of the premises? It could not be, for that change is expressly provided against by condition four. It must therefore, as it seems to me, be taken to refer solely to some such change in the *condition* of the building as is declared in the modification made by the court. At all events, it could not have been intended to include the vacating of the building; and it is apparent that the sole object of the modification was to guard the jury against a construction which would include the vacating of the building; and although the construction given by the court may possibly be somewhat too narrow, yet, under the evidence, it could not have misled the jury, and was not to the prejudice of the defendant.

I do not think there was any error in refusing the instruction as asked, and giving it as modified.

The second instruction is based on condition four, which vitiates the policy, if the insured building should be vacated by the removal of the owner or occupant for more than twenty days without immediate notice and written consent. The instruction was given with modifications. As given, in substance it declares as law that it was competent for the insurer or his lawful agent to waive condition four; and if at the time the agent of the company received the pre- 107 mium *of insurance and delivered the policy, he had knowledge of the vacation of the property, and did not then avoid the policy, but treated it as valid and subsisting, such conduct of the agent was a waiver of the condition, and a breach of it could not be relied on by the defendant to defeat the plaintiff's recovery.

As before stated, there was abundant evidence before the jury tending to show that Ivey (the company's agent) at the time he collected the premium and delivered the policy, had the knowledge on which the modified instruction was founded, and then represented to the plaintiff's agent (Gordon) that the policy was all right, and that the money assured would be paid if the house should be burned; and furthermore threatened to cancel the policy if the premium was not paid. Gordon must have relied upon these acts and declarations of Ivey, and was induced thereby to pay, and did pay the premium and accept the policy.

There was evidence to show that both agents knew that the house had been left vacant, and would not be again occupied by Kinner's widow or by any of his family, for the family had dispersed, and all the circumstances go to show that it was not intended that the condition against removal should be enforced. If such had not been the intention and understanding of the parties, it is safe to conclude that the premium would not have been paid, nor the policy delivered.

Now this conduct of the company's agent, which the evidence strongly tended to prove —his acts and declaration—amounted if proved, (and whether proved was a question left to the jury), to a dispensing with the performance of the condition by the assured, or a waiver of the forfeiture incurred by the breach of it, or they operated as an estoppel, precluding the company from 108 afterwards *relying upon the breach as a bar to the claim of the assured for indemnity under the policy. Such waiver or estoppel, (for the terms "waiver" and "estoppel" may be indifferently used in application to the subject we are now considering), may take place either pending the negotiation for the policy, or after such negotiation has been completed, and during the currency of the policy, and either before or after forfeiture incurred. Such waiver may be made by a general agent, acting within the scope of his powers, needs no consideration to support it, and may be by parol, although the written consent of the insurer is required by the terms of the policy. Nor will the party insured be bound, nor ought he to be bound, by any instructions given by the insurer to his agent limiting the general powers possessed by the latter in relation to the subject of the agency, unless such instructions are made known to the assured. May on Insurance 611, 618, 622; *Coursin* v. *The Penn Ins. Co.*, 46 Penn. St. R. 323; *Peoria Marine and Fire Insurance Co.* v. *Hall*, 12 Mich. R. 203; *Heaton* v. *Manhattan Fire Insurance Co.*, 7 Rhode Isl. R. 502; *Viele* v. *Germania Insurance Co.*, 26 Iowa R. 9.

The case last cited (26 Iowa 9) seems to meet every objection as to matters of waiver and estoppel made by the plaintiff in error. It seems to have been elaborately argued by the counsel on both sides; and to have been thoroughly investigated and well considered by the supreme court of Iowa, in which the Hon. John F. Dillon, an eminent jurist, presided as chief justice The reporter, in a note appended, calls attention to the importance and somewhat leading character of the case, and the interesting nature of the questions discussed.

The following propositions, amongst 109 others, supported *by numerous authorities, some of them English, but mostly American, seem to be established by that case.

1. WAIVER OF CONDITIONS — ESTOPPEL. — A condition in a policy of fire insurance, that if the risk be increased by a change of occupation or other means within the control of the assured, without the written consent of the insurers, "the policy shall be void," being inserted for the benefit of the insurers, they may dispense with a compliance therewith, or waive a forfeiture of the policy incurred by a breach thereof, and thereby

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become estopped from setting up such condition as a breach in an action for a loss subsequently occurring.

2. WAIVER NEED NOT BE IN WRITING.—And such waiver of the forfeiture arising from the breach of the condition need not be in writing, but may be by parol, at least in a case where the policy is not attested by the corporate seal of the company, and is hence not a specialty.

3. WHAT WILL AMOUNT TO A WAIVER.—Any acts, declarations, or course of dealing by the insurers, with knowledge of the facts constituting a breach of a condition in the policy, recognizing and treating the policy as still in force, and leading the assured to regard himself as still protected thereby, will amount to a waiver of the forfeiture by reason of such breach, and estop the company from setting up the same as a defence when sued for a subsequent loss.

4. NEED NOT BE FOUNDED ON NEW CONSIDERATION.—A waiver of conditions, or for-
110 feiture arising from a *breach thereof, need not be founded on any new consideration.

5. POWER OF AGENT TO WAIVE FORFEITURE.—A local agent of a foreign insurance company, clothed with authority to effect contracts of insurance, to fix rates of premium, to give consent to the increase of risks and change of occupation of buildings insured, to cancel policies on account of increase of risk, and exercise supervision over the property covered by policies issued at his agency, has power to dispense with conditions and waive forfeitures arising from a breach thereof in the absence of any limitation upon his authority known to the assured.

6. IMPLIED AND INCIDENTAL POWERS.—The foregoing powers are necessary incidents of the general authority of the agent to effect contracts of insurance, conduct the business at his agency, and do all things necessary and proper in the prosecution thereof.

7. EXTENT OF WAIVER.—A waiver of a forfeiture, resulting from a breach occasioned by a change in the occupancy of the building, increasing the risk, extends not only to breaches occasioned by the occupancy before such waiver, but to those resulting from a continuation of such occupancy.

I see no error in the refusal to give the instruction as asked, and giving it in the modified form.

The third instruction relates to condition two. The court gave it with a construction that the change interdicted by the condition was not intended to include devolution of title upon the heirs by the death of the assured.

In this surely there was no error. By
111 the *change of title provided against in the condition must have been intended a voluntary disposition or alienation of the property. It could not have been intended to embrace all kinds of transfer of title, for, in condition three, change of title by "forclosure of mortgage, or levy of execution," is specially provided against. It is there declared that such a change shall be "*deemed* an alienation;" that is by fair construction, an alienation within the operation of condition two. Condition three must therefore be taken to be intended as supplemental to condition two. Moreover, it is to the last degree unreasonable to suppose, that any sane man would ever accept a policy of insurance against loss by fire, if he understood it, which contained a provision for *immediate forfeiture* by reason of his death and consequent descent of title to his heirs. *Burbank adm'r* v. *Rockingham Mut. Fire Ins. Co.*, 4 Fost. (N. H.) 550.

The fourth instruction refers to condition six, in regard to the preliminary proofs of loss to be furnished to the company. The evidence showed that such proofs were furnished, although not within the thirty days from the time of loss. Gordon, the agent of the administratrix, after repeated applications, finally succeeded in getting the requisite blank forms for the proofs, which he filled up an delivered to Ivey, and the latter says he sent them to the company. No complaint was ever made by the company as to the regularity or sufficiency of the proofs, or as to the time within which they were furnished. Moreover, there was evidence tending to show that Gordon was prevented from sending the proofs within the thirty days, or at least that the furnishing them within the time was dispensed with by the company through their agent. The doctrine of
112 waiver and estoppel, already *discussed, applies to this instruction also. *Home Insurance Co.* v. *Cohen*, 20 Gratt. 312; *West Rockingham Mut. Fire Ins. Co.* v. *Sheets & Co.*, 26 Gratt. 854.

The court committed no error in refusing the instruction asked for, and in giving it as modified.

The fifth instruction has been disposed of.

The sixth and seventh were refused, and, as I think, properly.

The object of the sixth seems to have been to declare at law, that a forfeiture incurred by a breach of any of the conditions of the policy could not be waived, except in writing, if at all, and that a parol waiver by the agent would be nugatory. This proposition has been already determined adversely to the plaintiff in error in disposing of the questions arising upon the other instructions, and need not be further noticed, except to add that the instruction would seem to be faulty for another reason, that it proposed to submit a question of law to the jury for their determination; to-wit: whether there had been *such* a violation of the conditions of the policy *as* to work a forfeiture. Whether the facts and circumstances which constitute a forfeiture are proved, is a question for the jury; whether when proved they constitute a forfeiture, is matter of law for the court.

The seventh instruction asked for was based, as is supposed, on the third condition of the policy, imposing a forfeiture by reason of "a foreclosure of a mortgage." It is sufficient to say that there was no foreclosure of a mortgage in this case, and if a judicial sale under a creditor's bill could by liberal construction be brought within the operation of the condition, still such

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sale must have been so far perfected as to make it equivalent to the foreclosure of a mortgage. There was no such com-
113 pleted sale in this case. The *land with the insured building upon it was, as shown by the record, ordered to be sold before the building was burned, but the sale was never completed. It was made and reported to the court, excepted to, and never confirmed. On the contrary, it was afterwards set aside and wholly vacated. The purchaser was never let into possession, and was never at any time entitled to such possession. By the express terms of the decree ordering the sale, the commissioner, who was appointed to make it, was directed to announce publicly, at the time of sale, "that no sale under the decree should be valid until ratified by the court." This direction would seem to have been unnecessary, but the commissioner followed it, as shown by his report. 2 Dan. Ch. Prac. 1274, 1281.

The instruct. called the eighth, in the bill of exceptions, was asked for as an addition to modified instruction No. 2. It may be doubtful whether this instruction might not have been properly given, but at all events the refusal to give it did not and could not prejudice the defendant, because it was substantially covered by the instruction which was substituted for it.

The propriety of the instructions given on the motion of the plaintiff's counsel has been settled in considering and determining the questions arising upon the defendant's instructions, and need not be further noticed. See Story on Agency, §§ 77, 106, 126, 134.

It only remains to consider the third bill of exceptions taken by the plaintiff in error to the judgment of the court overruling the motion for a new trial, made upon the ground that the verdict of the jury was contrary to the law and the evidence. The bill sets out the *facts* certified as proved on the trial, and those facts seem sufficient to warrant the verdict. As before stated, there
114 was considerable conflict in the *testimony of the two main witnesses touching material facts. It was the peculiar province of the jury to deduce the facts involved in this conflict. They did so, and the judge who presided at the trial concurred with them in their finding. The law was applied by the jury to the facts under the direction of the court, in which direction, as has already been shown, there was no error.

The rules which govern applications for new trials, based upon the ground that the verdict of the jury is against law and the evidence, are well settled by numerous decisions of this court. They are well stated by JUDGE CHRISTIAN in a late case. *Blosser* v. *Harshberger*, 21 Gratt. 214.

Upon the whole, I am of opinion that there is no error in the judgment of the corporation court for the city of Lynchburg, and that the same should be affirmed with damages.

CHRISTAIN, ANDERSON and STAPLES, Js., concurred in the opinion of BURKS, J.

MONCURE, P., dissented.

JUDGMENT AFFIRMED.

115 *Andrews, Ordway & Green v. The Auditor, &c.

The Auditor v. Andrews, Ordway & Green.

January Term, 1877, Richmond.

By agreement between the United States government and the owner of land, the government erects buildings on the land, intended to be and actually used by operatives employed by the government in dressing stone to be employed in the erection of public buildings at Washington; and under the agreement the government has the right to remove the buildings—HELD:

1. The buildings are personal property.
2. **Constitutional Law—Taxing Government Property.**—The buildings being the property of the United States, the state cannot tax them either as personal property or as parcel of the land on which they are built.
3. **Taxation—Exemptions.**—When buildings put up on the land of another are exempted by law from taxation, they should not be valued with the land, and the owner of it is not to be charged with their value as part of his land subject to taxation. But where such buildings are not exempt from taxation, they should be valued and the tax charged to the owner of the land.

One of these cases was an appeal by the auditor of public accounts of the commonwealth of Virginia from a judgment of the circuit court of Chesterfield county, reversing a judgment of the county court, upon the application of Andrews, Ordway & Green, to have repaid to them taxes which had been assessed upon the buildings located upon lands owned by them, which buildings were the property of the United States government, and to have the same exempted from taxation. The other case was an application to the court of appeals for a writ of *man-*
116 *damus* to the *auditor to require him to repay the said taxes. The case is stated by JUDGE CHRISTIAN in his opinion.

F. W. Christian, for the petitioners.

The Attorney General, for the auditor.

CHRISTIAN, J. This case is before us upon a writ of error to a judgment of the circuit court of Chesterfield county. The controversy arose out of a motion made by Andrews, Ordway & Green before the county court of Chesterfield for redress against an alleged erroneous assessment of taxes. The county court held the assessment against them lawful; but on appeal to the circuit court the judgment of the county court was reversed, and the appellants were relieved from the erroneous assessment complained of; and it was to this judgment, reversing the judg-

Erecting Buildings on Another's Land—Effect of Agreement.—See Shelton v. Ficklin, 32 Gratt. 727-743 and *note*, affirming the decision of the principal case that where a building is erected by one man upon the land of another, by his permission, with the right to remove it retained, it does not become a part of the realty but continues to be a personal chattel and the property of the person who erected it.

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ment of the county court, that a writ of error was awarded by one of the judges of this court.

The question we have to determine arises upon the certificate of facts made by the court below, which certificate is as follows:

In the matters of the motion of Andrews, Ordway & Green for redress against an erroneous assessment, the court doth certify that the following facts were proven:

That R. S. Andrews, Albert Ordway and S. S. Green owned a tract of land lying opposite Rocketts, Richmond, in Manchester Township, Chesterfield county, Virginia, containing twenty-one and three hundred and seventy-nine thousandths acres; that the said land and buildings thereon are assessed on the land book for 1873 at $29,650, 117 and the whole thereof *charged to Andrews, Ordway & Green; that the sum included in said assessment on account of buildings is $27,500; that of the said buildings only one-sixth in value belongs to Andrews, Ordway & Green; that the rest of the buildings, amounting in value to five-sixths of the whole, were erected by the United States with the consent of Andrews, Ordway & Green, with the understanding that the said buildings were removable by the United States. The said buildings were paid for entirely by the United States, and are the property of the United States; they are used by the operatives and employees of the United States in dressing the granite to be used in the erection of certain public buildings in Washington, District of Columbia, for the use and accommodation of the state, war and navy departments of the United States government. That the said Andrews, Ordway & Green have not received and do not receive any compensation in any form for the use of their land in the erection of the said buildings by the United States; that for the superintendence of the work done in said buildings the said Andrews, Ordway & Green receive a certain percentage under contract; that the taxes assessed on the said land and all the buildings, which land and buildings are valued at $29,650, are as follows:

State tax	$148 25
School tax	44 48
County levy	44 48
Township levy	59 30
Expenses of collection	11 86
Making a total	$308 37

While the amount involved in this case is insignificant, the question we have to 118 determine is of the *gravest importance, because it involves the respective rights and powers of the state and the Federal government, with respect to the highest prerogative of sovereignty—the power of taxation.

First, I have to remark that it must be taken upon the certificate of facts in the record as a *concessum* in the case that five-sixths of the buildings erected on the lands of Andrews, Ordway & Green were *the property of the United States*, erected by that government for a legitimate purpose, and under a contract to be removed at the pleasure of the government.

Under that contract they (the buildings) were not the property of the owner of the soil, and were no part of the real estate.

It is a principle firmly settled by numerous decisions, that where a building is erected by one man, upon the land of another, by his permission, upon an agreement or understanding that it may be removed at the pleasure of the builder, it does not become a part of the real estate, but continues to be a personal chattel and the property of the person who erected it. 1 Wash. on Real Prop. p. 3, § 4; *Osgood* v. *Howard*, 6 Greenl. 452; *Smith &c.* v. *Benson &c.*, 1 Hill's R. 176; *Wills* v. *Bannister*, 4 Mass. R. 514; *Doty* v. *Gorham*, 5 Pick. R. 487; *Marcy* v. *Darling*, 8 Pick. R. 282; *Rogers* v. *Woodbury*, 15 Pick. R. 156; *Wall* v. *Hinds*, 4 Gray R. 256; *Barnes* v. *Barnes*, 6 Vermont R. 388; *Dulois* v. *Kelly*, 10 Barb. R. 496, and *Dame* v. *Dame*, 38 New H. R. 429, and cases there cited, where the whole subject is elaborately discussed and numerous decisions of many states in the Union are collated.

From these decisions it is clear that the mere fact that these buildings were erected upon the lands of the defendants in error by their permission did not constitute them a part of the realty, but they were the 119 *personal property of the United States government, to be removed at its pleasure under its contract with the defendants in error.

Being, then, the property of the United States, is it liable to be taxed by the state? This is the question we have to determine. It has been argued here on both sides with signal ability and learning. In my view of the case, however, much of the learned and eloquent argument of the attorney general was directed to a question that does not arise in this case. He treated the property taxed as *real* estate, and protested against the right of the United States to acquire or control in any manner any real property within the jurisdiction of the state, except in the mode pointed out in the constitution. Undoubtedly, the jurisdiction of the state is supreme over every inch of her territory, except that which is voluntarily relinquished to another sovereignty. Beyond all question, the right of eminent domain is in the state, and not in the United States. The United States can acquire ownership of the soil within the territory of the state *only* with the consent of the state.

But in this case the property taxed is not *land* but *personal* property; and questions as to eminent domain and exclusive jurisdiction need not be considered.

The single question is whether this personal property acquired by the United States for the purposes set forth in the certificate of facts, is a proper subject of taxation by the state. It is certified as part of the facts proved in the court below, that "the said buildings were paid for entirely by the United States and are the property of the United States, and are used by the operatives and employees of the United States in

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dressing granite to be used in the erection of certain public buildings in Washington 120 for the use and accommodation *of the state, war and navy departments of the United States government." Can *such* property used for *such* purposes be a legitimate subject of state taxation.

Taxation is an incident of sovereignty, and is co-extensive with that to which it is incident. All subjects over which the sovereign power of the state extends are objects of taxation; but those over which it does not extend are upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

In our complex system of government the power of taxation is concurrent in the state and federal governments. These two governments operate on the same people and over the same territory. The powers of sovereignty are divided between the government of the Union and those of the states; and although both exist within the same territorial limits they are separate and distinct sovereignties, acting separately and independent of each other within their respective spheres. Each within its appropriate sphere is supreme. They are each sovereign with respect to the objects committed to it, but neither sovereign with respect to the objects committed to the other. It is true the government of the United States is one of limited and carefully guarded powers. It must be now taken as an established rule of construction of the constitution of the United States, that the sovereign powers vested in the state governments by their respective constitutions remained unaltered and unimpaired except so far as they were granted to the government of the United States. That the intention of the framers of the constitution in this respect might not be misunderstood, this rule of interpretation was expressly declared in the tenth 121 article of the *amendments: "The powers not delegated to the United States are reserved to the states respectively or to the people."

The government of the United States therefore can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication. But while a government of limited powers, yet within the sphere of its granted powers, and in the exercise of all these means, and the employment of all those agencies and instrumentalities "necessary and proper for carrying into execution" its granted powers, the government of the United States is as supreme and independent as the states which created it. *McCullock* v. *State of Maryland*, 4 Wheat. R. 316; *Osborn* v. *U. S. Bank*, 9 Wheat. R. 738; *Western* v. *City of Charleston*, 2 Pet. R. 449; *Bank of Commerce* v. *New York City*, 2 Black U. S. R. 620; *Bank Tax Case*, 2 Wall. U. S. R. 200; Kent's Com. 445-431, (marg.).

Let us now apply these principles to the case before us. The property proposed to be taxed is owned by the United States government, and used by that government in preparing granite for the erection of a grand public building in the city of Washington for the accommodation of the navy, war and state departments. The property thus owned and used is *not the property of a contractor* of that government, but of the government itself, and is used *by its* employees and agents.

Now the power to "erect needful public buildings" is one of the powers *expressly* granted in the constitution, and even if it had not been expressly granted, it would have been conferred by necessary implication; for the very establishment of the government carried with it the necessity 122 of the power to erect *public buildings in which to carry on its great and varied affairs in its different departments.

The power to "erect needful buildings" necessarily carries with it the power to use the proper means to erect such buildings. This cannot be done without materials, without tools, without machinery, without engineering often. Expensive and elaborate buildings cannot be spoken into existence or raised by magic. *Property* in varied forms must be employed in providing material, in dressing it into shape and form, in transporting it and placing it in its appropriate place. And all this must be done often, and generally within the territorial limits of the states.

Suppose the necessary materials cannot be obtained within the ten square miles comprising the district of Columbia, or from any other real estate over which the United States holds exclusive jurisdiction and ownership. What then? May not the government acquire by purchase the necessary materials in one of the states; and if so acquired, may it not, must it not, have the right without hindrance or restriction to prepare those materials by the use of all the machinery and all the appliances necessary to that end? If temporary buildings are necessary, may it not put up such buildings under contract with the owner of the soil? If engines and machinery and teams and wagons and other appliances and property are necessary, can this property be taxed when used for this legitimate purpose? I think not. The power to tax carries with it the power to destroy. If the right to impose the tax exists at all, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the mere will of such state or corporation may 123 prescribe. The consequence *would be, that the states might deprive the general government of the exercise of powers essential to its very existence.

Can any thing be more dangerous or more injurious than the admission of a principle which authorizes every state and every corporation in the Union which possesses the right of taxation, to burthen at their discretion the exercise of the granted powers of the general government, or those which are necessary and proper to carry such granted powers into execution. Within this domain the supremacy of that government

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cannot be questioned; and in the exercise of its legitimate powers, it must be left free and unembarrassed by any conflicting authority. The power of a state cannot rightfully be so exercised as to impede or obstruct the free course of those measures which the government of the United States may rightfully adopt.

In *McCulloch* v. *The State of Maryland* (*supra*), this question was discussed in all its relations by the most distinguished counsel of that day of great men; Daniel Webster, William Pinckney, Wm. Wirt, Luther Martin and Walter Jones being among the counsel who argued the case. CHIEF JUSTICE MARSHALL delivered the opinion of the court. That opinion stands to-day, as it will stand for all time, as a monument to his wisdom and learning, and among the great emanations of that luminous intellect which made clear and certain every question which it took in its grasp. The principles established by that opinion have been recognized and followed ever since. I give his own interpretation of that opinion, given ten years afterwards, to show its application to the case before us. In *Weston* v. *The City Council of Charleston*, 2 Pet. R. 449, 467, he says, referring to the case of *McCulloch* v. *State of Maryland*, "It was discussed at the bar 124 in *all its relations, and examined by the court with its utmost attention. We will not repeat the reasoning that conducted us to the conclusion thus formed; but that conclusion was, that all subjects over which the sovereign power of the state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission; but NOT *to those means which are employed to carry into execution powers conferred by the people of the United States. The attempt to use the power of taxation on the means employed by the government of the Union in pursuance of the constitution is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give.* The states have no power, by taxation or otherwise, to retard, impede, burthen, or in any manner control the operation of constitutional laws to carry into execution the powers vested in the general government."

The case before us seems to me to come within the letter and spirit of the principles here announced.

Property is certainly one of the means, or agencies, or instrumentalities, or whatever you may call it, "necessary to carry into execution" the powers expressly granted in the constitution, to erect "all needful buildings." The government of the United States must of necessity hold property within the states as a means of exercising its high and important functions. And if this property can be taxed by the state, it may be taxed out of existence; and thus the general government may be "retarded, impeded and burthened" in its operations to such an extent that its most important functions may be impaired and its very existence threatened.

125 *I have already said that the principles settled in *McCullough* v. *State of Maryland* have never been departed from, but acted upon by the supreme court of the United States for more than half a century, from 1819 down to the present day. In several recent decisions the same doctrines have been re-affirmed. See *Bank of Commerce* v. *New York City*, 2 Black's R. 620; *Bank Tax Case*, 2 Wall. U. S. R. 200.

In these cases it was held that that portion of its capital which a bank has invested in the stocks, bonds or other securities of the United States, is not liable to taxation by a state. This is upon the principle that these stocks and bonds and other securities are *the property* of the United States, used as a "means of carrying into execution its granted powers"—necessary and proper to carry into effect the great fiscal operations of the general government. My mind can comprehend no distinction between an exemption of such property as this, and an exemption of the property proposed to be taxed in this case. If the power to establish National Banks is within the granted powers enumerated in the constitution, certainly the power "to erect all needful buildings" is beyond all question among the granted powers in express terms; and if the property used in the one case is exempt from taxation, that used in the other must be also.

The establishment and enforcement of the principles declared by CHIEF JUSTICE MARSHALL in the cases above referred to, are absolutely necessary to the harmonious and efficient operations of both the national and state governments. They apply to both and must govern both with equal force. If the state government may tax the property, the means, the appliances, the agencies and instrumentalities used in carrying on its manifold and varied operations within that 126 sphere in which *it is supreme*, why may not the national government tax the property, the agencies and instrumentalities used by the state government in carrying on its operations within that sphere within which *it is supreme*.

If such usurpation of authority can be exercised by one, why may it not be exercised by the other? In both it would be a usurpation and abuse of authority.

In *The Collector* v. *Day*, 11 Wall. U. S. R. 113, 127, MR. JUSTICE NELSON delivering the opinion of the court, uses the following forcible and apt words, which very fitly apply to the point we are now considering. It was a case where a United States collector sought to impose a tax upon the salary of a judicial officer of a state. In discussing the question as to the power of the Federal government to impose such a tax, he says: "And if the means and instrumentalities employed by that government (the U. S. gov't) to carry into operation the powers granted to it, are necessarily exempt from taxation by the states, why are not those of the states depending upon their reserved pow-

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ers for like reasons equally exempt from Federal taxation. Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the constitution that prohibits the general government from taxing the means and instrumentalities of the states; nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means, 127 if another power may *tax them at discretion?" See also *Dobbins* v. *Commissioners of Erie,* 16 Pet. R. 435.

I think the true principle sustained by the highest authority, by the constitution itself and by its most eminent expounders, is that hereinbefore declared, to wit, that each government is, within its appropriate sphere, supreme. Each is sovereign with respect to the objects committed to it. Neither is sovereign with respect to the objects committed to the other.

If this cardinal principle of the constitution be kept constantly in view and steadily upheld, the two governments, state and federal, will move, each in its own orbit of governmental operations, without collision and without conflict of authority. Each being separate and independent, neither interfering with the other within the domain of its exclusive sovereignty, the operations of each left free and unembarrassed from restrictions imposed by the other, the whole complex system will move in harmony and peaceful conjunction, dispensing to all the blessings of free government and constitutional liberty.

There is but one other point I deem necessary to notice. It was insisted by the learned attorney general, that under our system for the assessments and collection of taxes prescribed by the statute, the assessor is directed to value "the land with the improvements thereon;" and that the state will look to the value of the land only for taxes upon the value of both land and improvements. That in providing for the public revenues, the state cannot take notice of the private contracts of parties which fixes the title of the land in one person and the buildings erected thereon in another, but that the owner of the land must, for the purposes of taxation, be regarded as the owner of the buildings also. This view, in its gen- 128 eral application *is certainly correct. Undoubtedly where the buildings erected on the land *are themselves the subject of taxation,* the state will take no notice of private contracts which sever the ownership of the land from that of the buildings; and will hold the owner of the land responsible for the taxes on both. But suppose the buildings *are exempt from taxation,*—how then? Suppose a church or parsonage, or other building used for charitable purposes, is erected on land with the permission of the owner, he retaining the title to the soil on which it stands; can the owner of the land be taxed for the value of such buildings? Certainly not. If authority is wanting for so self-evident a proposition, I refer to the cases cited by the learned counsel for the defendants in error. *Parker* v. *Redfield,* 10 Conn. R. 490; *Lefevre* v. *Mayor &c. of Detroit,* 2 Mich. R. 586; which are express authorities on this point. But it is said that churches and like buildings are exempt from taxation by *express statute.* So they are. And the buildings erected by the United States, owned by that government, and used for the lawful purpose of carrying into execution its granted powers, are also exempt from taxation—not by express statute it is true, but by laws as potent and obligatory as if they were written on the statute books of every state in the Union.

But it is said it is inconvenient to the state government to make separate assessments of the lands from the improvements, and that the assessor cannot be expected to determine complicated questions arising between such separate ownership.

If the argument *ab inconvenienti* can be used in a case affecting such great rights it has no force here. Separate assessments are often made, and required to be made, by the statute. When one party owns the 129 *surface, and another party the minerals beneath the surface, the assessment is made separately. So in some cases where machinery is used for certain kinds of manufactures, the machinery and buildings are assessed to one owner, and the land on which it is erected to another. Code, ch. 33, § 30, 43. Complicated questions of title, or rights arising under contracts of the parties, are not left to the determination of the assessor. Any party may apply in any case to the county court to correct an erroneous assessment. That is the tribunal, and not the assessor, which is to determine all such questions.

Upon the whole, I am of opinion that the buildings upon which the tax is imposed in this case, being the property of the United States employed and used to carry into execution granted powers under the constitution of the United States, is not subject to taxation by the state. I am therefore for confirming the judgment of the circuit court of Chesterfield, and for awarding a peremptory *mandamus,* requiring the auditor of public accounts to refund to the plaintiffs the amount of taxes erroneously assessed and paid by them.

STAPLES and BURKS, JS., concurred in the opinion of CHRISTIAN, J.

MONCURE, P., and ANDERSON, J., dissented.

JUDGMENT OF THE CIRCUIT COURT AFFIRMED AND PEREMPTORY MANDAMUS ISSUED.

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130 *Royall v. Thomas.

[26 Am. Rep. 335.]

January Term, 1877, Richmond.

Quo Warranto—Prior Determination of Right.*—Under the constitution and statute of Virginia, a party who has aided and assisted in a duel fought with deadly weapons may be removed from office by a proceeding by *quo warranto*, or, if that writ be not in use, by information in the nature of a *quo warranto*, though he has not been convicted of the offence in any criminal prosecution against him.

This was a writ of *quo warranto* sued out by George W. Thomas, the attorney for the commonwealth of Henrico county, against William L. Royall, to shew why he should not be removed from the office of notary public in said county by reason of his having been aiding and assisting in fighting a duel. Royall in his answer, without denying that he had been so engaged in a duel, placed his defence to the suit on the ground, that he had not been convicted by any criminal proceeding against him of having been aiding and assisting in fighting a duel. To this defence the attorney for the commonwealth demurred; and the court sustained the demurrer and rendered a judgment of amotion from office against him. Royall thereupon applied to this court for a writ of error; which was awarded.

Royall, for the appellant.
The Attorney General, for the appellee.

STAPLES, J., delivered the opinion of the court.

131 *The commonwealth's attorney for the county of Henrico sued out a writ of *quo warranto* against William L. Royall, alleging that the latter was disqualified to hold office under the government of Virginia by reason of his having been engaged as a second in a duel fought in that county in the year 1873. The defendant did not in express terms deny the charge; but he averred that he had never been *convicted* of being engaged in a duel. To this answer the commonwealth demurred; and the demurrer was sustained by the circuit court. The defendant not desiring to put in any further answer, judgment was rendered against him of amotion from his office. To that judgment he obtained a writ of error from one of the judges of this court. The ground taken by the defendant is, that the provision in the Virginia constitution upon the subject of dueling is not self-executing, and that a conviction founded upon indictment and trial, according to the forms of the criminal law, is necessary before the disqualification for office attaches under the government of the state.

The principal authority relied on in support of this position is the case of the *Commonwealth* v. *Jones*, decided by the supreme court of Kentucky, and reported in 14 Am. Law Reg., N. S., 374, and also in 10 Bush 725.

It was there held that the clause in the Kentucky constitution imposing the disqualification for office for the offence of dueling is not self-executing, except so far as it prevents those who cannot or will not take the requisite oath from entering upon office. A citizen willing, however, to take such oath cannot be proceeded against for usurpation of such office until he has been first indicted, tried and convicted of the disqualifying offence. This case seems to

132 be a strong *authority for the defendant; but it will be found on examination, that much of the reasoning of the court turns upon the peculiar phraseology of the Kentucky constitution, in which it is declared that the offender "shall be *deprived of the right* to hold any office, post or trust under the authority of the state." The court agreed, that if instead of the words "shall be deprived." the phrase "shall not be eligible" had been used, some of the difficulties attending the argument to show the provision is self-executing would have been obviated.

In the case of *Cochran* v. *Jones*, involving the same question, "the board, for the determination of contested elections" arrived at a very different conclusion upon the same clause of the Kentucky constitution, holding that the political disability resulted from the commission of the offence, and is in nowise dependent upon a previous criminal conviction. This board consists of the governor of the state, the secretary of the state, the attorney general, the state treasurer, and the auditor general. See 14 Am. L. Reg., N. S., page 222. In the previous case of *Morgan* v. *Vance*, 4 Bush 330, the supreme court of that state held, that "so far as the constitution prescribes disqualification upon acts and not upon judgment of conviction, the constitution, as the supreme law of the land, executes itself without any extraneous aid by way of legislation; nor can its requirements be defeated." It will thus be seen that even in Kentucky there is such conflict of opinion in respect to the true interpretation of the constitutional provision in question as deprives the decision relied on by the defendant of the weight of being considered even persuasive authority.

The provision in the Virginia con-

133 stitution is as follows: *"No person who, while a citizen of this state, has since the adoption of this constitution fought a duel with a deadly weapon, sent or accepted a challenge to fight a duel with a deadly weapon, either within or beyond the boundaries of this state, or knowingly conveyed a challenge, or aided or assisted in any

*Quo Warranto—Prior Determination of Right.—Upon the proposition, that when the court has jurisdiction in *quo warranto* proceedings it may oust an incumbent from office although the question of the right or of the forfeiture has never before been presented to any court for judicial determination, see generally, 17 Enc. Pl. & Pr. 400. That the writ of *quo warranto* is still in use in this state, see the Bland and Giles County Judge Case, 33 Gratt. 443; and that judgment on writ of *quo warranto* is conclusive, see Shumate v. Supervisors, 84 Va. 574, citing the principal case and Hewison v. Weeden, 77 Va. 704.

manner in fighting a duel, shall be allowed to vote or hold any office of honor, profit, or trust, under this constitution." It has been made a question whether this provision is prospective in its operation. There is, however, no solid ground for controversy on this point. The words might perhaps have been more aptly chosen, but they clearly mean to declare, that any person who after the adoption of the constitution engaged in a duel as principal or second, should be subject to the disability in that section mentioned. However this may be, the legislature at its session of 1869 '70 passed an act carrying out the provision of the constitution, substantially re-enacting that provision, giving it a prospective operation, and emphatically declaring that no person offending against the act "shall be capable of being elected, or appointed to, or of holding any office of honor or profit under the commonwealth." It will be perceived that the language, both of our constitution and of our statutes is very different from that of the Kentucky constitution. In our case, if the constitutional provision required any aid from extraneous legislation, it has been given by the statute already cited. It is also perfectly apparent that the framers of the constitution, and of the statute, designed that the disability to hold office should attach upon the commission of the offence, and not upon judgment of conviction. In the clause next preceding the one already quoted, the constitution in enumerating the persons disqualified by reason of cer-
134 tain offences, specifies *"persons convicted of bribery in any election, embezzlement of public funds, treason or felony." It is also provided elsewhere that persons convicted of perjury or subordination of perjury shall be incapable of holding office.

In the class of infamous and degrading offences, it would seem a conviction is required as a prerequisite to the political disability. But with the respect to the violation of the anti-dueling law, and other laws which are not supposed to involve so great a degree of moral turpitude, a different rule is established. If in this latter class of offences it had been the purpose to prescribe a conviction as the test of disqualification, it would have been easy to do so by a single change in the form of the expression. If we recur to the statute of 1810, and to the subsequent laws on the subject of dueling, and if we compare these enactments with other statutes prescribing a conviction as a test of disqualification, the conclusion is inevitable that the purpose was not to require a conviction as a test of disqualification in cases of dueling; but to leave it as a question of eligibility to the tribunals clothed with authority to decide contested elections or to try titles to offices.

This design of the framers of our law is founded upon the most satisfactory reasons, and upon considerations of the soundest public policy. As was said by JUDGE BALDWIN in *Mosely* v. *Moss*, 6 Gratt. 534, 539, "Dueling received no indulgence whatever from the common law, which treated its conventionals and its chivalry as solemn mockeries, and its violence and bloodshed as the results of deliberate malice. But these denunciations were resisted by long cherished prejudices of society, which appealed with dreadful success to some of the
135 strongest principles of human *conduct —the pride of character, the fear of humiliation, and the love of distinction."

It is said by a learned author, that in the reign of George the Third about one hundred and seventy duels were fought, of which not less than seventy resulted fatally, but in no instance was a conviction ever obtained when the duel was fairly fought according to the terms of the code of honor. The British parliament passed the most stringent laws on the subject in aid of the common law; but they were wholly ineffectual to arrest the practice, or even to moderate its excesses. The defect was not in the laws, but in the tribunals to administer them. A writer of great distinction (Mr. Starkie), in a report made to parliament on the subject, said: "Experience leads to the conclusion that the practice of dueling is not controllable by merely penal laws." Universal observation confirms the truth of this statement.

Notwithstanding the severity of the criminal law, the juries were determined to acquit, and their verdicts were winked at by the judges, and received with acclamations by a sympathizing public. It is recorded of a trial which occurred in 1792 in England, the learned judge went so far as to tell the jury, that although an acquittal might trench upon the rigid rules of law, yet the verdict would be lovely in the sight of God. Such was the state of public sentiment and administration of criminal law in England. Deriving our customs, laws, literature and fashions from that country, it was natural we should imitate them in a practice which, according to prevalent opinion, encouraged forbearance, generosity of sentiment, and manliness of conduct in society.

The long series of our judicial annals in Virginia show but few cases, if any, of
136 convictions of either principal *or seconds, especially where death ensued. Universal experience has demonstrated the truth of the observation that the practice of dueling could not be restrained by penal laws. Fully comprehending the difficulties of the situation, the legislature of 1810 addressed itself to the subject. The preamble to the act then passed (the very first ever enacted in the state) commences: "Whereas experience has evinced that the existing remedy for the suppression of the barbarous custom of dueling is inadequate to the purpose, and the progress and consequences of the evil have become so destructive as to require an effort on the part of the legislature to arrest a vice, the result of ignorance and barbarism, justified neither by the precepts of morality nor by the dictates of reason; for remedy whereof, be it enacted:" The first section then announces the penalty of death by hanging upon all who engage in a duel resulting in death, principals, seconds, aiders and abettors.

The second section imposes the disability to hold office upon any person sending or

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accepting a challenge, whatever be the result of the duel.

And the third section prescribes the expurgatory or test oath to be taken by any person elected or appointed to any office or post under the government of Virginia.

A slight examination of these provisions, and of the causes which led to their adoption, will satisfy every one that the design of the legislature was to provide a two-fold remedy, the one criminal, and the other purely civil in its nature. By the one, the offender was punished as a felon—by the other, he was excluded from every position of honor or profit under the government of Virginia. These two remedies had no necessary connection one with the other.
137 *They were wholly independent of each other. The first section prescribed the punishment of death for homicide in a duel; but the common law did the same thing; and we know how powerless were its mandates or its terms to check the evil. The statute standing alone would have proved equally ineffectual. The very severity of its punishment would have, and indeed has, insured its defeat. The main reliance of the legislature was upon the second and third sections. It was on the direct appeal to the most powerful motives that control the human heart. The men most likely to resort to the duel as a mode of arbitrament were the men generally most ambitious of public honors, power and distinction. These men would feel most keenly their entire exclusion from every hope of preferment. Many of these, confronting death without a tremor, would hesitate long before involving themselves and friends in the consequences of a perpetual disability, political, executive and judicial. Universal observation teaches that the love of place and power, the ambition to serve the state, to connect one's name with distinguished public services, and to attain those great honors, which attract the applause of the world, are among the most powerful motives influencing mankind. It was to these the legislature of 1810 appealed.

In *Brooks* v. *Calloway*, 12 Leigh 466, JUDGE ALLEN said: "The effect of these statutes has been most beneficial; the practice has been repressed." But who can fail to see how utterly valueless is all this legislation if the disabilities depend upon a previous criminal conviction. If no man can be excluded from office for violating the constitution until a jury can be found to convict, and a court to sentence him to an infamous punishment, the statute of 1810, and all
138 the *succeeding laws on the subject, are the merest mockeries. The juries have heretofore set at defiance the penal laws relating to dueling, is it supposed they will be more inclined to hang offenders by the neck, or to put them in the penitentiary, when it comes to be understood this is the only way to exclude them from office. The legislature has repealed the test oath. Let the courts now decide that the disqualification for office cannot attach until there is a conviction, and we shall have contributed something at least to the revival of the ancient practice of dueling.

But let us see where the argument leads us. If a man kills his adversary in a duel it is murder in all concerned. If the juries and the judges obey the law it is hanging by the neck, or at the least confinement in the penitentiary. Of what avail is our boasted disability applied to men thus situated. This is the necessary result, unless we suppose a jury can be found to convict just enough to disqualify, but not quite sufficient seriously to discommode the offender.

But this is not all. All of us understand the great difference in the position of one when on trial for his life upon a charge of murder and when he is proceeded against for usurping an office. Upon the trial of a criminal cause, if a reasonable doubt can be raised by the evidence, or by the ingenuity of counsel, that doubt is decisive for an acquittal. As has been well said, "A verdict of not guilty means no more than that the guilt of the accused has not been demonstrated in the precise, specific and narrow forms prescribed by law." Most professional men are familiar with the trial of the Earl of Cardigan, before the House of Lords, for shooting at Capt. Tuckett in a duel. The combat took place near a mill, and was witnessed by the miller, his
139 wife and daughter, who *were on the ground a few minutes after the occurrence, and conversed with the parties. With these witnesses the attorney general of England was unable to obtain a conviction because he could not prove the identity of the Captain Tuckett who was wounded according to his description in the indictment. If Lord Cardigan had been proceeded against for usurping an office under the Virginia statutes, he might have pleaded as the defendant has, that he was never convicted. If he had said he was never engaged in a duel, the contrary was susceptible of the clearest proof. And this because upon the trial of a civil cause very different rules prevail. In the latter the courts decide according to the preponderance of evidence. It is obvious, therefore, in many instances, an incumbent might be ousted from an office, and very properly too, upon evidence which a jury would deem insufficient for a criminal conviction.

It is to be further remembered that with respect to a very large number of offices in this state, their terms would necessarily expire before a conviction can be obtained. If the offender succeeds in getting possession of the office, the commonwealth is bound to submit to the intrusion until she can institute proceedings of a criminal nature, and await until the tardy steps of criminal justice have demonstrated his guilt.

But there is still another view suggested to the court by a distinguished member of this bar. Under the provision of our constitution already cited, if a citizen of Virginia goes to a distant state and there engages in a duel, he is thereby disqualified to hold office here, although he left the state without an intention of fighting a duel.

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How is his disqualification to appear? Certainly not by a conviction, because the offence can only be punished here crim-
140 inally when the *citizen leaves the state for the purpose of the duel. The state has made no provision to punish one of her citizens who without previous design engages in a duel beyond her borders; nor could she justly or legally punish offences thus committed on foreign territory. It follows inevitably that if the view of the defendant be correct, this part of the provision of the constitution is a nullity.

These considerations, I think, are quite sufficient to show that the framers of our laws could never have designed to make a criminal conviction in this class of offences necessary to the ascertainment of the civil and political disability. Their failure to do so, as we perceive, was not accidental, but the result of deliberate purpose—a determination to eradicate an evil which was annually destroying some of the best men of the state. The offices are made for the benefit of the people. It is competent for them to prescribe such qualifications as they see fit. No man has an indefeasible right to an office. If the sovereign power of the state requires a conviction in one case as the ground of disability, and dispenses with it in another case, whatever be the motive, it furnishes no just cause of complaint.

Under the former constitution no minister of any religious denomination was capable of being elected a member of the legislature, and no foreign born citizen was eligible to the office of governor of the commonwealth. Might it not be said, with great propriety, that this was in effect a punishment of a large and respectable class of men who might justly complain of an arbitrary exclusion? But no one can ever imagine that these disqualifications, or whatever else they may be termed, could only be established by some judicial proceeding in-
141 volving a trial by jury *and the regular sentence of a court of law. What rule of law or of the constitution is there beyond what is expressly provided requiring the application of different forms and rules of evidence to establish the disqualification in different cases? True, dueling is punished also as a criminal offence. But in the case supposed the commonwealth is not prosecuting for the felony. She seeks no criminal forfeiture or conviction. The civil proceeding is simply to try the title to an office, and has no sort of connection with the punishment denounced by the penal law.

The constitution provides that the governor, lieutenant governor, judges, and all others offending against the state by maladministration, corruption, or other high crimes and misdemeanors, may be impeached before the senate and removed from office. Dueling being a high crime, especially where death ensues, is, of course, just cause of removal. If the accused is convicted, he is not only removed from office, but he is forever disqualified to hold any other office under the state. Will it be contended that in such case a previous conviction is essential to the success of the impeachment. So far from it, the very clause in question provides that the party removed from office by the Senate shall, nevertheless, be subject to indictment, trial, judgment and punishment, according to law, thus showing a judgment of ouster may precede the trial under an indictment. If there is any value in the doctrine as laid down by the Kentucky court, it would be in cases of impeachment. The accused is punished by perpetual disqualification, without trial by jury, and by a body of men, many of whom are elected without any reference whatever to judicial capacity and attainment. And the present constitution goes a step further, authorizing the removal
142 *of any of the officers named, simply upon a joint vote of the two houses. If the senate may remove the highest executive officer in the state without previous trial and conviction, surely the courts may be safely trusted with the power of removing the clerks, sheriffs, notaries, and other subordinate officers for like causes upon the same character of evidence. In both tribunals the defendant is duly notified of the accusation, and he is afforded every opportunity of defence he can reasonably desire. The proceeding by information, in the nature of a *quo warranto,* is as direct as an indictment; an issue is made up; and there is as little danger of injustice in the one form of proceeding as in the other. In cases of contested election the law has provided tribunals to adjudicate the rights of the respective claimants. These tribunals thus clothed with jurisdiction to try the title to an office, would seem, upon general principles, to have the power to ascertain and consider all such facts as relate to the question of eligibility. McCrary on Elections, 198.

My opinion therefore is, whether the proceedings be to try the title of an incumbent, or to adjudicate the claims of an applicant for an office, it is legal and proper to establish the disability imposed by the constitution in cases of dueling by any competent and satisfactory evidence. The judgment of the circuit court, for the reasons stated, must be affirmed.

So far as the defendant is concerned, the question decided is perhaps of but little importance to him, as it is understood he is embraced within the amnesty act passed by the present legislature. Whether that act includes all persons in the state under disability by reason of a violation of the anti-dueling statutes is not known. At all events the question is a grave one, likely
143 *to arise at any time hereafter. We have, therefore, deemed it best to give the subject a careful consideration, and to place the whole matter beyond the pale of discussion, so far as the unanimous opinion of this court can effect that object.

In regard to the point raised by the attorney general, that the writ of *quo warranto* is no longer in use in this state, if ever in use here, but has been superseded by the information in the nature of a *quo warranto*; we have not deemed it necessary to express any opinion. The writ in this case was

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sued out by an officer of the commonwealth, was not objected to by the defendant, and is not now objected to by him. It was agreed by the parties in the court below to waive all formal pleadings, and to submit the whole matter to the court. Under such circumstances the court is not inclined to dismiss the whole proceeding from its inception, because the complaint is called a writ of *quo warranto* rather than an information.

JUDGMENT AFFIRMED.

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144 ***Smith v. Butcher.**

January Term, 1877, Richmond.

1. **Appointment of Receiver—Power to Rent Real Estate.***—In a suit by a judgment creditor to subject the real estate of his debtor to pay his debt, where there are deeds of trust on the property and numerous judgments against the debtor, which are to be ascertained and their priorities fixed, and the real estate is not sufficient to pay all the debts, the court may appoint a receiver to take possession of the property and rent it out.
2. A receiver may be appointed by the judge in vacation.
3. **Same—Power to Collect Rents.**—A receiver may be directed to collect from tenants of the real estate rents due as well as such as may become due.

The only questions involved in this case, on this appeal, were whether it was a proper case for the appointment of a receiver, and whether a receiver could be appointed by the judge in vacation.

In May 1869 John Butcher filed his bill in the circuit court of Fauquier county, in which he alleged that he is the creditor of George W. F. Smith by three judgments. That Smith is the owner of large and valuable tracts of land in Fauquier county, which are subject to his numerous judgment and deed of trust creditors. That these lands are not sufficient to pay the recorded liens upon them, nor would the rents and profits pay the interest. He refers to two deeds of trust executed by Smith: one executed in May 1850, by which he conveyed to John L. Marye a tract of nine hundred and eighty-seven acres, to secure a debt of $10,000 due to Thomas W. Anderson; and another executed in March 1866, by which he con-
145 veys *to James V. Brooke and J. M. Forbes, all his lands and personal property to secure a great number of creditors. That previous to the execution of this last deed many judgments had been recovered against Smith, and the plaintiff's among them. And making George W. F. Smith, the trustees, and other parties, defendants, he prays that all the creditors by judgment and deed of trust of Smith may be convened, and their debts and priorities ascertained; that the title and value of the said lands may be enquired into; that the real estate may be sold for payment of the debts; that in the meantime a receiver may be appointed, and for general relief.

Smith answered, admitting his large indebtedness, but insisting that his lands, which had been greatly injured during the war, had been greatly improved since by his labor and management; and protesting strongly against the appointment of a receiver, which he insisted would be injurious to his creditors as well as himself.

In September 1869 the court made a decree directing a commissioner to take an account of and report to the court, the debts binding upon the real estate of G. W. F. Smith, the persons to whom due, their amounts, character, and their just and legal priorities, and also to report the character and value, fee simple and annual, of the real estate in the bill mentioned, with the liens on each tract respectively.

In July 1870 the commissioner made his report. The whole amount of debts reported was $145,856.86, and the value of the real estate was reported at $71,720.02. To this report Smith filed exceptions. And the cause coming on to be heard in September 1871, the court recommitted the report with the exceptions to a commissioner, with direc-
146 tions to inquire *further into the matters and things therein contained, and whether any portion of the real estate had been ordered to be sold in any other suit.

In January 1872 John and Berkely Ward, administrators *de bonis non* with the will annexed of B. Ward, one of the creditors of George W. F. Smith, gave him notice that they would apply to the judge of the circuit court of Fauquier county to appoint a receiver of all the real estate reported to be held by him in the case of Butcher *v.* Smith and others. And the commissioner to whom the report had been committed with exceptions reported that, if all Smith's exceptions were sustained, he would still owe about the sum of $135,000. And he further stated, that though he had given notice to Smith of the time of taking the account, he did not appear before him. That on the 11th of December 1871 he had issued a written notice to Smith, giving him a detailed statement of the exceptions not sustained by any evidence in the cause or which was in reach of the commissioner, and notifying said Smith that unless such evidence was produced on or before the 2d of January 1872 the commissioner would proceed to make up his report, and that Smith's exceptions not sustained by the evidence would be overruled. That Smith not having made his appearance, the commissioner proceeded to make up his report, when, on the 10th of January, Smith appeared and declared his inability to produce at that time the evidence required in the cause; and the commissioner agreed to wait with Smith until the last of the first week in February. Owing to this delay the commissioner has not completed his report, but believes that the figures given in the

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***Receivers—Appointment—Rents.**— Grantham v. Lucus, 15 W. Va. 425, citing the principal case, holds that pending a chancery suit to subject the debtor's real estate to the discharge of liens upon it, the court has a discretion to sequester the rents and profits of such real estate and appoint a receiver for the same. See, for general principle relating to the appointment and duties of a receiver, Beverely v. Brooke, 4 Gratt. 208 and Adkins v. Edwards, 83 Va. 300.

foregoing statement are approximately correct. And on the 3d of April 1872 the
147 commissioner filed a *statement of the debts of Smith on his own account of $110,328.29, and security, $23,294.22; to which Smith filed numerous exceptions. This statement was made after the order appointing a receiver was made.

It further appears that there were four other causes pending in the same court, in three of which lands had been sold under decrees, which, or some of which, had been purchased by Smith, and in which there had been decrees for the sale of said lands for payment of part of the purchase money, and in one of these causes a receiver had been appointed to take possession, &c., of the land involved in said suit.

In opposition to the appointment of a receiver Smith filed the written request of several of the creditors that the lands might be permitted to remain in his hands; and he proved by a number of witnesses, that his lands having been desolated during the war, he had since that time repaired the wastes, by opening the ditches, rebuilding the fences, and bringing the land into a good state of cultivation, so that its value had been greatly enhanced.

On the 16th of March 1872 the judge of the court made an order in vacation by which he appointed the sheriff of Fauquier county (Joseph H. Nelson) a receiver of the real estate of George W. F. Smith, naming the different tracts (except that portion of which he was appointed receiver in the suit of G. W. F. Smith *v.* Pat. H. Smith); and the said Nelson was directed to collect all rents due for the year 1871 upon any of the above tracts of land, and to rent out for the year 1872, for cultivation or grazing, such portions of any of said tracts as were not then rented, to the best advantage, reference being had to the preservation of the property as well as to the interests of the creditors.
148 *And the tenants in possession were directed to attorn and pay their rents to Nelson, &c.

From this decree Smith applied to a judge of this court for an appeal; which was allowed.

Brooke & Scott and *Hunton,* for the appellant.

General W. A. Payne, for the appellees.

ANDERSON, J. The appellee, John Butcher, exhibited his bill in chancery against G. W. F. Smith, to enforce his judgment liens upon his real estate, and to ascertain the amount and priorities of the judgment and deed of trust liens upon the same, and to that end sought to have convened all his lien creditors, and prayed an account, and the appointment of a receiver to take charge of his estate. The defendant, G. W. F. Smith, answered the bill, and a commissioner was directed to take an account of said Smith's real estate, and of his debts binding the same, and report. The commissioner reported the debts, amounting to $145,856.86, including interest to the 1st of July, 1870; and the real estate valued at $70,720.02. To this report the defendant filed various exceptions, and it was recommitted, the court considering it erroneous. The commissioner, to whom it was recommitted, reported to the court that the defendant had failed to produce any evidence in support of his exceptions, although he had notified him to do so; but that if all he claimed by his exceptions were allowed, it would not reduce his indebtedness below one hundred and thirty-five thousand dollars. He afterwards made a more formal report, a synopsis of which is given in the record, showing the total of G. W. F. Smith's own indebtedness to be $110,328.29, and his security
149 debts *to be $23,294.22. To this report also exceptions were filed by the said defendant, and the court without passing upon them recommitted the report to the commissioner for further inquiry.

Prior to the foregoing order, to-wit: on the 16th of March 1872, an order of the court was entered by the clerk in vacation, appointing Joseph H. Nelson, sheriff of Fauquier county, a receiver of the real estate of G. W. F. Smith (except that portion of which he was appointed receiver in the suit of *G. W. F. Smith* v. *Pat. H. Smith*); that is, of the Dan. O'Connell Smith place, the Walter Smith place, the Chapman purchase, and of the several tracts described in the report of commissioner Hugh R. Garden, and known as Meadowville and Moore's patent. All of these lands were the subject of litigation, in one or the other of four suits then pending in the circuit court of Fauquier; *i. e., Chapman* v. *Chapman, McVeigh* v. *Smith, Jett* v. *Smith,* and the case above named, in which the said Jospeh H. Nelson had been previously appointed receiver; and in the case of *McVeigh* v. *Smith,* it appears by entry of record that at a circuit court held on the 11th September 1871, Berkeley Ward's executrix, one of the defendants, by her counsel, filed a notice in writing to the defendant, G. W. F. Smith, of a motion for the appointment of a receiver of said defendant, G. W. F. Smith, in that cause, and in the suit of *Butcher* v. *Smith,* and in the suit of *Jett* v. *Smith,* which notice was proved, docketed and continued. And in the order entered on the 16th day of March 1872, appointing a receiver, it appears that all the above causes were before the court at the time, and considered together in connection with the cause of *Butcher* v. *G. W. F. Smith and others,* in which the order was made, the parties to which suits,
150 and all *other parties having liens upon the lands of the said Smith, having been convened and made defendants in the former suit, and that all the lands which by said order were to go into the hands of the receiver were involved in this and the foregoing suits, all of them in this, and some of them in one and some in another. And it appears from the decretal order itself appointing the receiver, that the motion was heard pursuant to notice to G. W. F. Smith in this cause, of John Ward and Berkeley Ward, *a. d. n. c. t. a.* of Berkeley Ward, deceased. From this decretal order an appeal was allowed by one of the judges of this court, which raises the question as

to the legality of the appointment of a receiver, and is the only question now to be decided.

"The appointment of a receiver is a matter resting in the discretion of the court." 2 Dan. Ch. Plead. and Prac. 1715. The same eminent writer says (next page): "The most ordinary cases, in which receivers are granted by the court, are those in which the suit arises out of claims by parties having equitable interests in the property, the subject of litigation. In such cases the court will appoint a receiver, for the purpose of protecting the property, till the question between the parties shall have been determined." That is precisely this case. Again, "a court will grant a receiver, at the instance of a second incumbrancer, in all cases in which the first incumbrancer is not in possession of the property," as is the case here. *Ibid*, p. 1718.

The court is of opinion, under all the circumstances disclosed by the record, the complication of the matters litigated, the probably protracted litigation, the insufficiency of the property of defendant to pay his debts, and the just claims of the 151 creditors to have the *rents and profits applied first to keep down the interest, and then to the reduction of the principal, the case is one eminently proper for a receiver. But it is objected, that the appointment of the sheriff of the county a receiver in vacation was not within the jurisdiction of the court, and could only be done in open court.

The court is of opinion that the power to appoint a receiver is incidental to the power to award an injunction. And as the latter may be awarded by a judge in vacation, so may the power to appoint a receiver as incidental thereto, in a proper case, be exercised by a judge in vacation. In this case the sheriff of the county was appointed a receiver, which was virtually assigning to him in his capacity of sheriff the duties of a receiver, to be discharged under his responsibilities as sheriff. No new bond was required to be given and no special qualification was necessary to be required of him in his character of receiver, but he was responsible for the discharge of the duties assigned him as receiver under his official bond and qualification as sheriff. JUDGE BALDWIN, in *Beverley* v. *Brooke and others*, 4 Gratt. 187, 212, held that the appointment of a receiver is in the nature of an injunction. Kerr on Receivers says (page 12): "It operates as an injunction. An order for an injunction is always more or less included in an order for a receiver. It is not necessary if a receiver be appointed, to go on and grant an injunction in terms."

The power to appoint a receiver is an important and inherent power of a court of equity, and though it should be exercised with caution, it will be readily conceived that occasions may and do occur, when its exercise in vacation may be important to the ends of justice; and under the cir- 152 cumstances we do not think *it was improvidently or erroneously exercised in this case, or that the appellant has any just cause of complaint on that ground.

The court is further of opinion, that there was no error in directing the receiver to collect the rents, which were in arrear and uncollected. It appears from the recitals of the decretal order, appointing a receiver, that the cause came on to be heard in part, upon executions against the said G. W. F. Smith, and the returns thereon, which were a charge upon the rents in arrear. And it was proper that the same should be applied to prevent the swelling of the debt by the accumulation of interest, which already greatly exceeded, *prima facie* at least, the entire estate of the appellant, real and personal. In Kerr on Receivers, page 13, it is said, "if tenants are in possession of real or leasehold estates over which a receiver is appointed, the order should direct them to attorn, and pay their rents in *arrear* and the growing rents to the receiver. See also 2 Daniell's Plead. & Prac. 1737. And accordingly we find in the order for receivers of real estate, the tenants of the estates are directed to attorn, and pay the rents in *arrear* and growing rents to such receiver. (Seaton's Forms of Decrees, p. 222.) Upon the whole, the court is of opinion to affirm the decree of the circuit court, with costs.

The other judges concurred in the opinion of ANDERSON, J.

DECREE AFFIRMED.

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153 *Vaiden & als. v. Stubblefield's Ex'or.

January Term, 1877, Richmond.

Absent, CHRISTIAN, J.*

1. **Pleading—Misjoinder—Method of Objecting.**†—In this country the rule is well settled, that in cases of misjoinder of parties as plaintiffs in equity, the objection must be made by demurrer if the defect is apparent on the face of the bill, or by plea or answer, if the defect does not so apear; and unless so made, the objection will not avail at the hearing, if a decree can be rendered without prejudice to the rights of parties.
2. **Same—Same—Time of Objecting.**—In a bill by devisees and legatees against the executor, some of the legatees who were infants had been paid their legacies. The executor, of course, knew of these payments, the other plaintiffs probably did not know. It was therefore the more incumbent on him to make the objection in some form, and in an early stage of the proceedings. If he had done this, the plaintiffs might have dismissed their suit and commenced a new one in the name of the proper parties, or might have amended their bill by striking out the names of those improperly joined and making them defendants, if so advised.
3. **Appeal—Misjoinder—Decree.**—In such a case, the objection having been first taken in the appellate court, a decree may be made in the case in favor of such of the plaintiffs as are entitled to

*JUDGE CHRISTIAN had made a decree in the cause, though not the one appealed from.

†**Pleading—Misjoinder—Method of Objecting.**—That the method of raising the objection of misjoinder is by demurrer, see Dunn v. Dunn, 26 Gratt. 291; Wells v. Guano Co., 89 Va. 708; Ward v. Funsten, 86 Va. 365; Snyder v. Cabell, 29 W. Va. 58; 14 Enc. Pl. & Pr. 210.

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recover, and the bill be dismissed as to the others without costs.

4. **Executors—Trust Funds—How to Deposit.***—An executor qualifies in July 1858, and he proceeds in his administration of the estate; so that in July 1861 he has collected all the assets, paid debts and legacies, leaving in his hands at that time but $2,305.24. He is then informed that there are still some debts of his testator unpaid, though not informed as to the amount or the creditors. He deposits the amount in his hands in bank in his own name, along with his own money; and he, from time to time, checks upon the money standing
154 to his credit for his own purposes, and *from time to time, down to March 1864, makes deposits of his own money, so that he probably has at any time standing to his credit in bank a sum more than the amount of the assets deposited in bank by him; but it is Confederate money. Whether he continued his deposit after March 1864 does not appear. HELD: That by depositing the assets in his own name, mingling it with his own money, he became a debtor to the estate for the amount so deposited by him, and must account for it.

This was a suit in equity in the circuit court of Charles City county, brought in April 1868, by Henry D. Vaiden and Sarah M. his wife and others, devisees and legatees of John S. Stubblefield, dec'd. against Thomas H. Wilcox, executor of said Stubblefield, and on his death revived against his executor, for a settlement of the administration account of Wilcox upon the estate of said Stubblefield.

John S. Stubblefield died in July 1858, leaving a will, which was admitted to probate in the same month, and Thomas H. Wilcox qualified as his executor. By his will he directed his executor to sell his land; and he, among other things, gave to his widow the interest and profits of his land for her life, and at her death the principal was to be equally divided among his children and grandchildren; the grandchildren taking the parent's share. And after giving several small pecuniary legacies to some of his grandchildren, he gave the residue of his personal estate to his children and grandchildren in the same way. The parents of some of the grandchildren to whom the small legacies were given, were still living.

The executor seems to have proceeded very promptly to collect the debts due to the estate, and to sell both the land and personalty. The land sold for $9,000, the interest on which he paid to the widow until her death in January 1861; and he very soon
155 thereafter distributed *that fund among the parties entitled. The sales of the personalty and debts collected, after payment of debts, &c., amounted to $5,665.04; and he seems to have paid to legatees $3,359.80, leaving a balance in his hands in July 1861, of $2,305.24. This sum, the executor states in his answer, he then had in his hands, and he was prevented paying it over at once to the legatees, by information he received that there were several bonds outstanding in the county of Surry in which Stubblefield was bound. After speaking of two debts in that county, of which he was for some time in ignorance, in which Stubblefield was bound as surety of E. P. Crenshaw, who had married his daughter, and which had been satisfactorily adjusted after much trouble and anxiety, he says, that being at the house of Wm. R. Wilson, in that county, and having expressed his satisfaction at the settlement of the last of these debts, and the belief it was the last debt in the county of Surry for which his testator was bound, Mr. Wilson replied, "No, sir, you are not through; I know of three or four bonds for which your testator is bound. I will do you the favor to procure a statement of them and send them to you." Your respondent earnestly and particularly requested Mr. Wilson to do so at the earliest possible period of time, expressing at the time his great anxiety to rid himself of the estate of his testator, especially in view of the troubles then rapidly being developed.

The executor states at great length his actings in the administration of his testator's estate, and the grounds on which he claims exemption from liability for the amount in his hands. These grounds refer to the condition of the country, and especially of the part of the country in which he lived, and had to conduct his administration. He
156 said that he deposited *the money in the Farmers and Exchange Bank in Richmond in which he deposited his own; and that he always had in these banks much more than the whole amount of assets in his hands: which was as safe as any personal security he could have taken for it in Charles City. It appears, however, that he had no

*Executors—Trust Funds—How to Deposit.—In Parsley v. Martin, 77 Va. 383 and Gregory v. Parker, 87 Va. 451, it was held that where in good faith a guardian deposits his ward's money in a bank he has reason to regard as solvent and wherein he has no funds of his own, he is not liable for loss from failure of the bank or from the total destruction of currency of the state by the war. In Parsley v. Martin, the court says: "Cases in which a fiduciary has been held to responsibility for the loss of the money of his ward or of an estate which had been deposited in his own name, have all been those in which the fiduciary fund was mingled with his own private or personal funds or used by him for his own purposes *or where the deposit was made in depreciated money as compared with the money received.* This was the case—this the vice which infected the case of Vaiden v. Stubblefield, 28 Gratt. 153." See also Pidgeon v. Williams, 21 Gratt. 251.

Same—Same—War Interest.—In Bennett v. Clevinger, 78 Va. 12, the court, holding that an administrator residing during the late war at Winchester, was not liable for interest on funds of the estate in his hands during that period, said: "In the case of Barley v. Garnett, decided by this court but not reported, the court below disallowed war interest and this court affirmed the case on that point, though it was reversed on others. In the case of Stamper v. Garnett, 31 Gratt. 550, the same rule was followed, and that case was reversed upon a different ground. In the case of Vaiden v. Stubblefield, 28 Gratt. 153, which was an appeal from another border county, war interest was disallowed by this court." See also Lacy v. Stamper, 27 Gratt. 65.

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separate account in these banks as executor; but all moneys were deposited to his individual credit; and further, that though he had at all times to his credit in these banks more than the amount of the assets of Stubblefield's estate in his hands, he from time to time drew out and deposited, so that in 1864, though he had a large sum of money in the banks, it was in fact Confederate money.

In November 1868 the accounts were referred to a commissioner; and in September 1871 he returned his report. In the account settled by the commissioner the executor is charged with the sum of $2,305.24, as of the 15th of July 1861; and this is the only charge against him; and this is distributed among the four surviving daughters and the children of a deceased daughter. To this report the executor of Wilcox excepted: 1st. On the ground that the executor should not have been charged with the sum of $2,305.24, which perished on his hands. 2d. That he should not be charged with interest, certainly not until the end of the war; and 3d. That the executor was a lawyer, and the evidence showed that he rendered various and valuable professional services to his testator's estate, for which no compensation was allowed him.

The cause came on to be finally heard on the 24th of September 1872, when the court sustained the first exception of the executor to the report, and dismissed the bill, though without costs. And the plain-
157 tiffs *thereupon applied to this court for an appeal; which was allowed. In this court the question was raised by the appellee, whether the bill should not have been dismissed for the improper joinder of parties; the children of some of the living daughters, whose legacies had been paid, having been joined as plaintiffs.

Lyons & Stern and *B. W. Lacy*, for the appellants.

Wm. Green, for the appellee.

STAPLES, J. The first question is as to the misjoinder of parties. It is contended by the counsel for the appellee, that two or more of the plaintiffs, having been paid their respective legacies, have no interest in the suit, and are therefore improperly joined as plaintiffs; and this objection may be taken by demurrer or plea, or even at the hearing. Admitting that the point would be fatal if taken in due time, the question arises whether it can be made for the first time in this court.

In this country, it is believed, the rule is well settled, that in cases of misjoinder of parties as plaintiffs in equity, the objection must be made by demurrer if the defect is apparent on the face of the bill, or by plea or answer, if the defect does not so appear; and unless so made, the objection will not avail at the hearing, if a decree can be rendered without prejudice to the rights of parties. If the misjoinder cannot materially affect the propriety of the decree, the court will not regard it at the hearing, if the objection has not been made in the pleadings. *Livingston* v. *Woodworth*, 15 How. U. S. R. 546, 557; *Trustees of Watertown* v. *Cowen*, 4 Paige R. 510; *Harder* v. *Harder*, 2
158 *Sanf. Ch. R. 17; *Newhouse* v. *Miles*, 2 Alab. R., N. S., 460; *Ellicott* v. *Ellicott*, 2 Mary. Ch. R. 468; *Bunce* v. *Gallagher*, 5 Blatch. R. 490; Story Ch. Plead., sec. 188, 544.

There are several well considered English cases which hold that notwithstanding a misjoinder of parties plaintiff, the court permits a decree at the hearing when it appears that justice can be done to all the parties. In *Rafferty* v. *King*, 15 Eng. Ch. R. 604, 620, LORD LANGDALE, in adverting to the objection that one of the plaintiffs had no interest in the suit, said: "I think it is now too late. If the objection had been stated in the answer, the plaintiffs might have obtained leave to amend their bill and make John Rafferty a defendant instead of a co-plaintiff. In such a case as this, when the objection is reserved to the last moment, and even till after argument on the merits, I ought not to allow it to prevail." See also the cases cited in a note to that case, and *Lambert* v. *Hutchinson*, 13 Beavan R. 277; *Dickenson* v. *Davis*, 2 Leigh 401.

In the case before us the plaintiffs alleged to be improperly joined were infants at the time their legacies were paid, and nearly all of them so continued when this suit was brought. It is highly probable the other parties knew nothing of these payments. The defendant of course knew all about them. It was therefore the more incumbent upon him to make the objection in some form in the court below, and at an early stage of the proceedings. Had he done so, the plaintiffs might have dismissed their suit, and commenced a new one in the name of proper parties, or they might have amended their bill by striking out the names of those improperly joined, and making them defendants, if so advised.

This, however, is unnecessary in the
159 present state *of the case, as a decree may be entered in favor of such of the plaintiffs as are entitled to recover, and the bill be dismissed as to the others with or without costs.

The main ground of controversy is in respect to the sum of $2,305.24, received by the executor and never accounted for by him. This sum is part of the assets of the estate with which the executor charged himself in his settlement made in 1859. Being thus in possession of the fund, the burden is upon him to establish the ground of his exemption from liability. His defence is that he could not safely distribute all the assets, because there were unsettled claims against the estate for a long period, and when at last these were adjusted, the condition of the country and of the legatees precluded a settlement, until finally the fund perished by the results of the war. It appeared that the last claim ever asserted against the estate was settled in 1861.

The executor in his answer states that a Mr. Wilson informed him that he knew of three or four bonds for which the estate was bound, and that he (Wilson) would

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procure a statement of them and send it to the defendant. Mr. Wilson did not say who held the bonds, nor did he name the amount. The executor does not appear to have made any enquiry on the subject. This was the first and the last ever heard of the bonds. No statement was ever furnished and no claimant ever appeared.

This is the only excuse given by the executor for his delay in settling up the estate, and for his failing to pay for so many years to the legatees, funds to which they were justly entitled. The executor had a plain course before him, either to require refunding bonds, or to lend out the money upon good security, bearing 160 *interest, or to invest it under the direction of a court of equity. There is no foundation for the assertion that the legatees were so much scattered after the war commenced, the executor could not pay them. It is in proof that nearly all of them were in reach of the executor as late as the year 1862, and some of them were so down to the close of the war.

In order fully to understand the ground upon which the executor bases his defence, it may be better to give his statement in his own words, made in his answer. It is as as follows: "The money now sought to be recovered of him by the plaintiffs was then, to wit, on the 13th March 1861, in the Farmers and Exchange Bank of Va. at Richmond, in the very same place where your respondent kept his own money, and where he had at that time to his credit, more money than was due his testator's estate, besides at least three thousand dollars in his house, and continued from time to time to make deposits until he had to his credit an amount exceeding forty thousand dollars."

It will be seen that the defendant does not state the year in which the deposit was made; nor does he say how much of the trust money was deposited in each bank. All that is said is, that the funds were in those banks on the 13th March 1861. The only evidence offered in support of this statement is the defendant's account with the Farmers and Exchange Banks respectively. These accounts, however, show only his individual transactions with those banks: they do not show any deposit of trust funds. There is not in either of them an item or figure from which it can by possibility be inferred that the money to the defendant's credit in those banks was in any manner connected with the funds of the estate. The account with the Farmers Bank commences in 1848, and closes in 161 *March 1864. The various balances to the credit of the defendant, from time to time, were exhausted by checks, and these were succeeded by other deposits; so that although the defendant was perhaps at no time without funds on deposit down to March 1864, yet the character of that fund had wholly changed by the last mentioned period. The money to his credit in March 1864, or at the close of the war, was not the money, nor the same kind of money to his credit in March 1861. The money which perished by the results of the war was Confederate currency, belonging to the defendant, collected during the war, and was not the money collected by him in 1859 for the estate, nor even a substitute for that money. But this is not all. The account shows a balance of $19,753.89 to the credit of the defendant in March 1864. What has become of that balance? There is nothing to show, and we are given no information beyond what is furnished by the account. The war did not close till a year afterwards. In the meantime the defendant was a refugee, and his section overrun by the enemy. He must necessarily have used the greater portion of the fund to supply his individual wants and necessities. At all events we are entirely in the dark as to the state of the account at the termination of the war in April 1865.

The account with the Exchange Bank is liable to the same criticism in every respect. This account shows a balance of $1,821.98 to the credit of the defendant on the 1st March 1862; but whether it is March 1862, or 1863, or 1864, does not distinctly appear. The reference is probably to March 1862, when the account closes. What became of this balance we are not told. Whether it was designed or not, we are left to infer that the fund remained in bank three 162 *years without use, and was finally lost by the result of the war.

But it may be conceded that the defendant deposited the money in bank, that he never withdrew it, but it remained there until gradually converted into Confederate currency, and finally perished on his hands. All this may be conceded, and yet it does not materially help his case. As has been seen, the defendant kept no separate account of the trust funds, but mingled them with his own money, checking indiscriminately upon the two. All the cases agree that a fiduciary who makes investments, or deposits trust money in his own name, without designating in some way, or describing it as the property of the trust, will be held liable for any loss that may accrue. One of the reasons for this rule is, that the fiduciary would otherwise be able to throw upon the *cestui que trust* the hazards of his own business, by designating the fund upon which the loss has fallen as his (the *cestui que trust's*), whether it was or was not so in reality. Vol. 2, part 2d, page 1805, Leading Cases in Equity (ed. 1877). The cases of *Harman* v. *Davis* and *Pidgeon* v. *Williams*, 21 Gratt. pages 194, 251, do not affirm a different doctrine. In the first named case the money collected was exclusively Confederate currency, collected with the approbation of all the parties, and the larger part of it duly distributed. The balance on hand the court directed its commissioner to hold until it was called for. The commissioner deposited it in bank in his own name. He had no other funds in bank, and no part of the deposits was ever used or withdrawn by him, except to pay the parties upon orders of the court. The controversy then pending not having been settled during the war, the balance of the fund in bank of course perished with the close of the 163 struggle. This court, *while recognizing the principle of law in respect to fiduciaries already stated, was of opinion it

had no application to that case. The commissioner was directed to hold the fund subject to the orders of court; and no safer place could be selected than the bank. It was lost, not by the failure of the bank, but by the destruction of that which was the subject of the deposit.

And so in *Pidgeon* v. *Williams*, the money deposited was Confederate money—it was not placed to the individual account of the attorney, but to his collection account—thus showing a purpose to keep the client's money separate from his own. These and other facts were deemed sufficient to prevent the application of the general rule already adverted to; but the whole court was of opinion that if the attorney had mingled his client's money with his own, or deposited it in bank upon his private account as his own money, this would be evidence of an appropriation to his own use, and his relation to his client would henceforth be that of debtor and creditor, and not that of bailor and bailee.

These cases, it is thus seen, afford no sort of authority to the executor in the present case. He collected the assets of the estate in a sound currency, deposited it in bank to his own private account, using the fund to advance his credit, and appropriating it to his individual purposes, as his convenience or his necessities required. It is very true that he deposited other funds from time to time, in place of what was withdrawn; but this was only done because it suited him, as it suited others, to use the banks as depositories for his private funds. If the money to the credit of the defendant proved as valuable as gold, these legatees could not have claimed any part of it, or
164 derived any *advantage from it. Stripped of all its fictitious surroundings, the transaction presents the simple case of a fiduciary or his representative seeking to throw upon the legatees the loss of his own Confederate currency. It is not intended to impute to this executor any dishonest purpose. He is represented as a gentleman of high social position, and of undoubted integrity; but we are asked to accord to him, upon his own unsupported answer, a measure of indulgence never allowed any fiduciary. No case decided by this court in reference to Confederate transactions, has gone to the extent of sustaining the defence made here.

My opinion is to reverse the decree of the circuit court, and to enter a decree for the balance reported by the commissioner.

In respect to the claim for compensation on account of professional services rendered the estate by the executor, the evidence does not show any such service of this sort, beyond the ordinary duties of an executor, as entitles the defendant to compensation. It is therefore unnecessary to decide the question raised by the learned counsel for the defendant, as to the right of an executor to charge the estate for services rendered in the capacity of counsel.

MONCURE, P., and BURKS, J., concurred in the opinion of STAPLES, J.

ANDERSON, J., dissented.

DECREE REVERSED.

165 *Blair & Hoge v. Wilson.

January Term, 1877, Richmond.

1. **Checks—Conditional Payment—Question for Jury.**—While the giving of a check by a debtor to a creditor is generally presumed to be only a provisional or conditional payment of the debt for which it is given, yet such check may by agreement of parties, be given and received in full payment and absolute discharge and satisfaction of the debt; and whether it was so given and received is a question of *fact* for the jury.
2. **Evidence — Checks — Presumptions.**—A check may be offered in evidence under the money counts; and if there is no other evidence in the case, it is of itself sufficient to entitle the plaintiffs to recover on those counts: yet it is only *prima facie* evidence of money lent, paid and advanced, or had and received; and when it is *proved* that no money had come to the hands of the defendant, the presumption raised by the check is rebutted, and no recovery can be had on those counts.
3. **Pleadings—Assumpsit—Payment.**—Where an action of *assumpsit* is brought for goods sold and delivered, the declaration filed contains only the *common counts*, the bill of particulars is filed, and the only count in the declaration to which the evidence applied, was that for goods sold and delivered. If it is shown that the goods were absolutely paid for by a *check*, the demand upon the account is thereby extinguished, and there is no count in the declaration upon which the plaintiffs can recover.
4. **Appeal—Verdict Contrary to Evidence—Reversal.**—Where the facts proved are not plainly insufficient to warrant the verdict of the jury, the court did not err in refusing to set it aside. *Quaere*: Whether under the evidence in this case the action could have been maintained on the check if it had been specially declared on.

The case is fully stated by JUDGE BURKS in his opinion.

Guy & Gilliam, for the appellants.

166 **Ould & Carrington*, for the appellee.

BURKS, J. This case is before us on a writ of *supersedeas* awarded by one of the judges of this court to a judgment of the circuit court of the city of Richmond, rendered in an action of *assumpsit* instituted in said

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Payment—Debtor Giving Check to Creditors—Intention.—That the giving of a check by a debtor to a creditor is generally presumed to be only a provisional or conditional payment of the debt for which it is given, see Moses v. Trice, 21 Gratt. 568, citing Bank v. Mutual Assurance Society, 4 Leigh 69; Parker v. Cousins, 2 Gratt. 372. See also McGuire v. Gadsby, 3 Call 234; Hornbrooks v. Lucas, 24 W. Va. 496, citing Miller v. Miller, 8 W. Va. 551; Pool's Co. v. Price, 9 W. Va. 73; Feamster v. Withrow, 9 W. Va. 327; Dunlap v. Shanklin, 10 W. Va. 662; Feamster v. Withrow, 12 W. Va. 611; Bautz v. Bassett, 12 W. Va. 773; Sayre v. King, 17 W. Va. 562; Bank v. Good, 21 W. Va. 455; Bank v. Kimberlands, 16 W. Va. 387. See generally, 18 Am. & Eng. Enc. Law 168.

Checks—Discharge of Surety.—In Callaway v. Price, 32 Gratt. 1 and in Stuart v. Lancaster, 84 Va. 775, the principal case is cited for the proposition that "whilst the mere taking a negotiable security, payable at a future day, does not, unless so agreed, operate as a *payment* of an antecedent debt,

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circuit court by the plaintiffs in error (Blair & Hoge) for the benefit of Thomas P. Hoge, against the defendant in error, Nathaniel M. Wilson.

The declaration contains the common counts only, to-wit, for goods sold and delivered, for work and labor done, account stated, and the usual money counts.

The bill of particulars filed with the declaration is an account of Blair & Hoge against Wilson for "3,736 lbs. of tobacco at $8, $29,888."

The defendant pleaded *non assumpsit* and payment; upon which several pleas issues were made up and tried by a jury, and a verdict was rendered for the defendant, and judgment entered thereon accordingly.

On the trial the court gave an instruction to the jury to which the plaintiffs objected. The objection was overruled and the plaintiffs excepted.

After the jury rendered their verdict, the plaintiffs moved the court to set it aside and grant them a new trial, on the ground that the verdict was "not sustained by the evidence and was against the evidence." The motion was overruled, and they again excepted.

The first bill of exceptions sets out the facts proved on the trial, and the second bill refers to and certifies those facts as "all the facts proved on the trial."

It appears from the certificate of facts, that in the latter part of March 1865, Blair & Hoge (the plaintiffs), merchants of the city of Richmond, sold and delivered to the defendant Wilson, also a merchant of
167 *said city, the tobacco in the bill of particulars mentioned at the price therein stated, to wit, $29,888, Confederate currency. On the first day of April ensuing, which was Saturday, Wilson called at the business-house of Blair & Hoge in said city, and gave them his check for the said sum of $29,888 upon the Farmers Bank of Virginia, payable to Blair & Hoge or order, and on the same day Blair & Hoge deposited the check to their credit in the Bank of the Commonwealth, where they kept their bank account. Both of these banks had their places of business in said city. When Wilson gave the check to Blair & Hoge, it is certified in the bill of exceptions, that "Blair & Hoge *received* the check *as cash* and credited ot to the account of Wilson *as cash*, as was the usual habit of Blair & Hoge in receiving checks from their customers."

The check was not presented for payment at the Farmers Bank on the day of its date and delivery aforesaid. On the following day (Sunday) the city was evacuated by the Confederate army then occupying it, and was entered and taken possession of by the Federal army at an early hour on the next day (Monday); and all business by the banks was necessarily prevented and suspended on that day, and for several weeks thereafter, until the officers of the banks, who had left the city, returned and resumed business. In the dreadful conflagration which occurred in the city on that memorable day (the 3rd of April), the banking houses of both banks were burned, and the officers of the Bank of the Commonwealth, on their return to the city, found amongst the *debris* of their banking house and contents the check aforesaid, which was presented to the proper officers of the Farmers Bank at the place where the bank had resumed business for payment; but payment was declined.
168 for the reason *that the officers did not know whether Wilson had funds to his credit in bank equal to the amount of the check. They stated, however, that if Wilson would give his certificate that he had that amount to this credit, they would pay the check. It does not appear that Wilson was ever informed of this statement.

After the refusal of the Farmers Bank to pay the check, but how long after does not appear, Blair & Hoge had a settlement of their accounts with the Bank of the Commonwealth, and the check was surrendered to them. They did not at once present the check to Wilson for payment, or then give him notice of its non-payment by the Farmers Bank; for it seems, that on the 3rd of April when the bank buildings were burned, the business house of Wilson in the city was also burned, and there was, for a time, uncertainty and confusion as to the whereabouts of any one; as soon as they found him (but how long this was after they had received the check from the Bank of the Commonwealth was not proved,) they notified him of the non-payment of the check by the Farmers Bank, and called on him to pay it; which he refused to do.

It sufficiently appears, that at the time the check was given, Wilson had funds in the Farmers Bank to his credit more than sufficient to pay the check; and it does not appear that he ever afterwards had a sum to his credit in the bank less than the amount of the check, and the cashier of the bank testified that if the check had been presented on the day of its date, he would have paid it.

It further appears that Blair & Hoge used about $70,000 Confederate currency, in paying off debts after the first day of April, and would have used in like manner the amount of the check, if it had been paid on the day of its date or at any time thereafter

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it does operate to suspend the right of action on the original demand until the maturity of the bill or note, unless it is made to appear that it was received simply as collateral security. It is a conditional satisfaction with respect to the principal, and with respect to the surety it is absolute unless it plainly appear that the parties intended it otherwise."

Appeal—Evidence—Rules Governing Reversal of Verdict.—In Kimball v. Friend, 95 Va. 144, the statement is made that the court will not set aside the verdict of a jury unless the evidence is plainly insufficient to sustain it. The mere fact that the court doubts the correctness of the verdict, or if on the jury would have rendered a different verdict is not sufficient, citing the principal case and Kates' Case, 17 Gratt. 561; Kemp's Case, 18 Gratt. 977; Read's Case, 22 Gratt. 924; R. R. Co. v. Medley, 75 Va. 499; Imp. Co. v. Smith, 85 Va. 306; Vaiden's Case, 12 Gratt. 717; See also Jones v. Rixey, 79 Va. 656, citing the principal case; Lawrence's Case, 30 Gratt. 845, and *note*; Steptoe v. Flood, 31 Gratt. 323.

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169 *up to the time they notified Wilson of its non-payment by the bank, and demanded payment of him. It was proved that on the 1st day of April 1865, Confederate States treasury notes, as compared with gold, were worth at the rate of $60 of the notes for $1 of gold.

Such being in substance the facts proved, the court gave to the jury the instruction excepted to.

It is in these words: "If the jury shall believe from the evidence, that on the first day of April 1865, the defendant gave to the plaintiffs, in full payment for the tobacco mentioned in the bill of particulars, his check on the Farmers Bank of Virginia, which check was accepted by the plaintiff in full payment of the account; and the jury shall further believe that at the time of drawing the said check the said Wilson had good and sufficient reasons to believe that he had in hand funds to meet the said check, and the jury shall be satisfied from the evidence that in fact the said check would have been paid if it had been presented upon that day; the jury are instructed, that the receipt of said check by the plaintiffs extinguished their demand upon the account sued upon, and that they cannot recover in this action."

Was any error committed in giving this instruction?

It was a fact not controverted on the trial, or, if controverted, it was put beyond dispute by the proof, that in the latter part of March 1865 the plaintiffs sold and delivered to the defendant the tobacco mentioned in the account filed with the declaration, for the sum therein stated, to be paid in Confederate currency. The amount of the account was a debt owing by the defendant to the plaintiffs. It was a fact equally well established, that the check was given for this debt. The suit was upon the account, to recover the amount thereof; and evidence was offered by the defendant 170 to *show that the check had been given and accepted in full payment and absolute discharge and satisfaction of the account. The evidence was sufficient, I think, to authorize the court to submit to the jury the deduction of the facts upon which the proposition of law contained in the instruction was predicated. Supposing this deduction to be properly made, did the court in the instruction mistake or misstate the law arising upon the facts?

A check has been defined to be "a draft or order upon a bank or banking house, purporting to be drawn upon a deposit of funds for the payment at all events of a certain sum of money to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand." 2 Daniel on Neg. Ins., § 1566.

It is sometimes inaccurately described as "a bill of exchange payable on demand," or as, "in legal effect, an inland bill of exchange, drawn on a banker, payable to bearer on demand." While it has many of the properties of bills, it has several peculiar characteristics.

"Bank checks," says MR. JUSTICE SWAYNE, delivering the opinion of the supreme court of the United States in the case of *Merchants' Bank* v. *State Bank*, 10 Wall. U. S. R. 604, 647, "are not bills of exchange, but have many of the properties of such commercial paper; and many of the rules of the law merchants are alike applicable to both. Each is for a specific sum payable in money. In both cases there is a drawer, a drawee and payee. Without acceptance, no action can be maintained by the holder upon either against the drawee. The chief points of difference are, that a check is always drawn on a bank or banker. No days of grace are allowed. The drawer is not discharged 171 *by the laches of the holder in presentment for payment unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the statute of limitations runs only from that time. It is by its face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A check in such case would be a fraud. All the authorities, both English and American, hold that a check *may be* accepted, though acceptance is not usual." For these several propositions the learned justice cites authorites.

The giving of a check for an antecedent debt is not an absolute payment and extinguishment of the debt in the absence of an agreement giving it that effect. Ordinarily, it is only a means of payment, and the debt will not be extinguished unless and until the check be paid, or unless loss be sustained by the drawer in consequence of the *laches* of the holder, in which case the debt will be discharged in proportion to the loss sustained. If the check be not paid, and the payee is without fault, his right of action against the drawer for the debt, which has been merely suspended by the giving of the check, revives, and he may have recourse to the drawer either upon the debt or upon the check at his option. The holder is allowed a reasonable time after the check is drawn and delivered within which to present it for payment, and, as a general rule, it will be in due time if presented within the business hours of the bank on the next succeeding secular day, or if the holder is prevented from making presentment on that day by any impediment which in law will excuse the failure to 172 make such presentment, *it will be sufficient if it be presented within a reasonable time after such impediment is removed. Among the excuses for failure to make presentment deemed valid, and which apply as well to checks as to bills and notes, the following are mentioned by JUDGE STORY: 1. Inevitable accident, or overwhelming calamity. 2. The presence of political circumstances, amounting to a virtual interruption and obstruction of the ordinary negotiations of trade, called the *vis major*. 3. The breaking out of war between the country of the maker and that of the holder. 4. The occupation of the country where the parties

live, or where the note is payable, by a public enemy, which suspends commercial intercourse. 5. The utter impracticability of finding the maker or ascertaining his place of residence. Story on Prom. Notes, §§ 25 , 261, 262, 264. See also, 2 Daniel on Neg. Ins., §§ 1064, 1065.

If the check be not honored on presentment, due notice of the dishonor should be given to the drawer. If the holder use due diligence in making presentment and giving notice of non-payment, the solvency of the bank on which the check is drawn is in the meantime at the risk of the drawer: if, however, the holder fail, without valid excuse, to make demand of payment at the proper time, after such default he assumes the risk of the solvency of the bank, and should the bank afterwards suspend business or become insolvent, the loss occasioned thereby will be the loss of the holder.

The foregoing rules, applicable to checks given as conditional payment, I regard as sustained by the authorities.

While, however, the giving of a check by a debtor to his creditor is generally 173 presumed to be only a provisional *or conditional payment of the debt for which it is given, yet such check, by agreement between the parties, may be given and received in full payment and absolute discharge and satisfaction of the debt.

I do not find this proposition controverted anywhere except in New York, where it seems to be held that such an agreement is invalid because without consideration. The authorities in all the other states seem to uphold such an agreement when made. In some of the cases it is said the agreement must be "express;" in others that it must be "special;" while in many others it is said that it may be either "express or implied." The authorites touching such agreement are collated and classified in 2 Parsons on Bills and Notes 159, 160, 161, 162, note (t), and as there given relate mostly to bills of exchange and promissory notes. I see no good reason, however, why the rule should not apply as well to a check as to a bill or note, nor why the agreement may not as well be implied as express.

To make the agreement however valid, whether it be express or implied, it must, of course, be *bona fide*; and hence, to warrant the conclusion of law propounded in the instruction, it was not only necessary that the check should have been given and received in full payment of the account sued upon, but it must have been drawn against sufficient funds; and if the check was so given and received, and there was such sufficient funds to meet it, which would have been applied to its payment if presented on the day it was given, was not the debt sued upon extinguished by the check, and were the plaintiffs entitled to any recovery in the action?

As before stated, the declaration contained only the common counts. There was no count on the check. It is true, that although 174 there was no special count on *the check, it might have been offered in evidence on the money counts, and if there had been no other evidence in the case, it would of itself have been sufficient to entitle the plaintiffs to recover on those counts. 4 Rob. Prac. 548, and cases there cited. But the check was only *prima facie* evidence of money lent, paid and advanced, or had and received; and when it was *proved* that no *money* had come to the hands of the defendant, the presumption raised by the check was rebutted, and consequently no recovery could be had on those counts. *Bank of the United States* v. *Jackson's adm'x*, 9 Leigh 221.

The only count in the declaration to which the evidence applied was the count for goods sold and delivered, under which the account, as a bill of particulars, was filed; and if the goods (the tobacco) were paid for *absolutely* by the check, then "the demand upon the account sued upon" was thereby extinguished, and there was no count in the declaration upon which the plaintiffs could recover. *Sheehy* v. *Mandeville & Jameson*, 6 Cranch's R. 253; *Slocumb's adm'r* v. *Holmes' adm'r*, 1 Howard (Miss.) R. 139. Whether under the evidence the action could have been maintained on the check, if it had been specially declared upon, it is not necessary in this case to decide.

I find no error in the instruction given to the jury.

Did the court err in overruling the motion of the plaintiffs for a new trial?

I regard the certificate of the judge in this case as a certificate of the facts proved on the trial, and not a certificate of the evidence, and this is the more favorable view for the plaintiffs. The judge certifies as *facts* proved, that the defendant gave his check to the plaintiffs for the amount of his indebtedness for the tobacco sold, and that the 175 check was received by the *plaintiff *as cash*, and credited to the defendant *as cash*, as was the usual habit of the plaintiffs in receiving checks from their customers, and that the plaintiffs deposited the check, on the day it was received, to their credit in the Bank of the Commonwealth. Cash is "money at command; ready money." Worcester. "Cash (commerce) is money on hand, which a merchant, trader or other person has to do business with." Bouv. Law Dic. 240. To receive a check therefore "as cash" is to receive it as money—*ready money*, and imports a payment of the debt for which it was given. If there was any doubt as to the intention of the parties in thus giving and receiving the check, it was for the jury to solve that doubt. Every reasonable presumption should be made in support of the verdict of a jury fairly rendered, and according to the long established well settled rule of this court, such a verdict cannot be set aside as against the evidence, unless there is a *plain* deviation—unless the evidence is *plainly* insufficient to warrant the finding. Many of the cases, the earlier and the more recent, establishing this rule in Virginia, are cited and commented upon by JUDGE MONCURE in delivering the opinion of the court in *Read's case*, 22 Gratt. 924.

I cannot say that the evidence in this case was insufficient to warrant the verdict; certainly, as it appears to me, it was not *plainly* insufficient.

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If there had been no evidence tending to shew a satisfaction of the debt sued upon by the check given and received, it is still not very clear that the plaintiffs were not guilty of *laches* by which loss was sustained by the defendant. But, with my views of the case already expressed, it is not necessary to proceed further in our inquiries.

176 *I am of opinion, that there is no error in the judgment of the circuit court of the city of Richmond, and that said judgment should be affirmed.

MONCURE, P., and ANDERSON, J., concurred in the opinion of BURKS, J.

CHRISTIAN and STAPLES, Js., dissented.

JUDGMENT AFFIRMED.

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177 *Hudgins v. Marchant & Co.

January Term, 1877, Richmond.

1. **Judicial Sales—Rights of Purchaser to Possession.***—Where real estate has been sold under a decree in a cause, and the sale has been confirmed, the purchaser is entitled to the possession of the property, even though the decree confirming the sale does not direct possession to be delivered to him.

2. **Same—Same—Appeal.**—If an appeal in the cause has been obtained and perfected before possession of the property is obtained by the purchaser, he is not entitled to have possession. But if possession is obtained before the appeal is perfected, the purchaser is entitled to retain it until the case is decided in the appellate court.

The case is fully stated by JUDGE MONCURE in his opinion.

J. T. Seawell, for the appellant.

M. B. Seawell and *Donovan*, for the appellees.

MONCURE, P., delivered the opinion of the court.

This is a writ of error and *supersedeas* to a judgment of the circuit court of Mathews county, rendered on the 26th day of October 1872, affirming a judgment of the county court of said county, rendered on the 11th day of March 1872, in an action of unlawful detainer, in which William H. Hudgins was plaintiff, and J. W. Marchant & Co. were defendants. The action was brought to recover possession of a lot of land in said county commonly known as "Cricket Hill;" was tried on an issue joined on the plea of not guilty, and verdict

178 *and judgment were rendered therein for the defendants. Two bills of exceptions were taken by the plaintiff to rulings of the court against him in the progress of the trial.

In the first bill of exceptions are set out the facts of the case, which were agreed by the parties, and, so far as it is material to state them here, are as follows: The said William H. Hudgins was the owner of the said lot of land up to the time the same was sold by virtue of a decree of the circuit court for said county made on the 11th day of October 1870, in a cause therein pending in which Lanier Bros. & Co. were plaintiffs and said Hudgins was defendant, of which decree a copy is inserted in the bill of exceptions. Thereby it was decreed that unless the said Hudgins should within a certain period therein mentioned, pay to the said Lanier Bros. & Co. the amount of their judgment therein mentioned against the said Hudgins, certain commissioners appointed by the decree should proceed to sell, in the manner and on the terms prescribed by said decree, the property real and personal conveyed by the said Hudgins and his wife, for the benefit of his creditors, by deed of trust mentioned in the decree. The lot of land in controversy was a part of the real estate thus decreed to be sold. The said commissioners accordingly sold the said lot of land under the said decree, and the said J. W. Marchant & Co. became the purchasers thereof at said sale, made the cash payment, and executed and delivered their bonds for the deferred payments to the said commissioners. A report of said sale having been made to the court, the same was excepted to by the said Hudgins, on various grounds, which are set out in the bill of exceptions. Afterwards, to wit: at October term of said circuit court 1871, the

179 cause *came on to be again heard, on the papers formerly read, and the report of said commissioners of the sale by them of the real estate in the report mentioned, the exceptions thereto, &c., and was argued by counsel. On consideration whereof, the courts, overruled the exceptions, and confirmed the said report and sale. And it being suggested to the court that Walter G. Hudgins was in possession of the property sold by said commissioners in the report mentioned, it was ordered that he should, within ten days from the service upon him of a copy of said decree, surrender and deliver to said J. W. Marchant & Co., the purchaser of said property, possession thereof. And it was further ordered that unless said Walter G. Hudgins should so surrender possession of said land to said purchasers, and if he should continue to hold possession of the same until the 1st day of December 1871, then the sheriff of said county was ordered to remove him from said property, and put the said purchasers in possession of the same. A copy of the said decree of October term 1871 is also inserted in the bill of exceptions. The purchasers were accordingly put in possession of the property purchased by them as aforesaid.

***Judicial Sales—Rights of Purchaser to Possession.**—The principal case is cited approvingly in Whitlock v. Johnson, 87 Va. 329, upon the proposition laid down in the first headnote.

Same—Conditional Character—Confirmation.—In Childs v. Hurd, 25 W. Va. 533, the principal case is cited approvingly for the proposition that a sale made by a commissioner under a decree in a court of equity is not an absolute sale and does not become such until it has been confirmed by the court. Citing also, Hartly v. Roff, 12 W. Va. 401; Cooke v. Gilfin, 1 Rob. 39; Crews v. Pendleton, 1 Leigh 297; Heywood v. Carrington, 4 Leigh 373; Taylor v. Cooper, 10 Leigh 317.

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Afterwards the said William H. Hudgins applied to this court for an appeal from, and *supersedeas* to the decree last mentioned, which were accordingly allowed and awarded. A *supersedeas* was accordingly issued in the usual form, and the bond with security thereby required was accordingly given. But the said purchasers being then in possession of the said premises, refused to deliver the same to the said William H. Hudgins.

Upon the foregoing, which were all
180 the facts and *evidence in the cause, the plaintiff moved the court to instruct the jury as follows:

"That if they believed from the evidence in the cause, that the complainant, William H. Hudgins, was the owner of the tenement and premises in the complaint in this cause mentioned, before the decree of sale and sale made in the chancery cause of Lanier, Bros. & Co. against Wm. H. Hudgins now pending in the circuit court for the county of Mathews; that at the said sale the defendants became the purchasers thereof; that said sale was confirmed by the said circuit court, and the defendants put in the possession of said premises by virtue of the decree of said court, which said decree has been superseded by a decree of the supreme court of appeals of Virgina; they are bound to find for the complainant."

Which instruction the court refused to give; but gave an instruction prayed for by the defendants as follows:

"The jury are instructed that if they believe from the evidence in the cause that the complainant, Wm. H. Hudgins, was the owner of the tenement and premises in the complaint in this cause mentioned before the decree of sale, and sale made in the chancery cause of Lanier, Bros. & Co. against Wm. H. Hudgins, now pending in the circuit court for the county of Mathews; that at the said sale the defendants became the purchasers thereof; that said sale was confirmed by the said circuit court, and the defendants put in possession of said premises by virtue of the decree of said court *before the supersedeas hereafter mentioned was awarded;* and that the said decree has been superseded by a decree of the supreme court of appeals of Virginia; they are bound to find for the defendants in possession."

181 *To which rulings of the court, refusing to give the instruction prayed for by the plaintiff, and giving that prayed for by the defendants, the first of the said two bills of exceptions was taken.

The other bill of exceptions was taken to the opinion of the court overruling the motion of the plaintiff to set aside the verdict and award a new trial, on the ground of misdirection by the court to the jury, and because the said verdict was against the law and the evidence in the cause.

The county court having rendered judgment for the defendants in the said action, the same was affirmed by the circuit court; whereupon the plaintiff applied to this court for a writ of error and *supersedeas* to the judgment of the circuit court; which were accordingly awarded.

The only assignment of error in this case is contained in the petition for a writ of error and *supersedeas* in the case, and is in these words:

"Your petitioner is advised that the said J. W. Marchant & Co., by bidding off the said land at the sale thereof by the commissioners aforesaid, acquired no right to the possession of said land (the decree under which it was sold not ordering possession thereof to be given), and could only claim that their offer should be reported to the court, subject to its approval or disapproval (and here it will be noticed that said decree did not direct the said commissioners to deliver possession to the highest bidder). They are no parties to the case of *Lanier, Bros. & Co.* v. *your petitioner*, and their right to the benefit of their bid for said land depends on the decision of that case by this honorable court. Your petitioner is also advised that the said Marchant & Co. having no claim to the possession of said land, except by virtue of the decree aforesaid,
182 made in the *case of *Lanier, Bros. & Co.* v. *Hudgins*; when that decree was superseded by the order of this court, their title to the possession failed, and your petitioner became entitled to the possession."

When property is sold under a decree of a court of chancery, and the report of the sale is confirmed by the court, the purchaser is entitled to possession of the property from the time of such confirmation, unless there be something in the decree to the contrary, even though there be in the decree no express direction for the delivery of such possession to the purchaser. But in this case there was an express direction in the decree that the purchaser should be put in possession of the property, which was accordingly done before any appeal from the said decree was allowed by this court. A purchaser under a decree of a court of chancery, though not an original party to the cause in which the decree is rendered, becomes a party thereto by his purchase, so far as his rights as a purchaser are concerned. A *supersedeas* to a decree perfected before the decree is executed, operates as a stay of such execution until the cause is determined in the appellate court. But when the decree is executed before the *supersedeas thereto* is perfected, the *supersedeas* does not operate as a writ of restitution to restore them to the condition they were in before the execution of the decree.

In this case possession of the property in controversy was delivered to the purchasers under the decree before a *supersedeas* to the decree was awarded, and of course that *supersedeas* cannot of itself operate as a writ of restitution to deprive the purchasers of possession and restore it to the plaintiff in the suit.

A decree, though appealed from, is presumed to be right until it is reversed,
183 and purchasers under it, who *have been put in possession accordingly, are entitled to retain such possession until deprived of the right thereto by such reversal.

It can hardly be necessary to cite author-

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ities in support of principles before stated, which seem to be well settled and to admit of no question. References are made in the brief of the counsel of the appellees which are very pertinent, and among them are the following to our own reports: *White* v. *Jones*, 1 Wash. 117; *Wilson* v. *Stevenson's adm'r*, 2 Call 213; *Rucker* v. *Harrison*, 6 Munf. 181; *Newcomb* v. *Drummond*, 4 Leigh 57; *Spencer* v. *Pilcher*, 10 Id. 490; and *Jones* v. *Tatum*, 19 Gratt. 720. Bacon's abridgment, title *supersedeas* is also referred to in regard to the common law doctrine on the subject; and some notice is taken of a modification of the doctrine made by our statute, but it does not affect this case.

It results from what has been said that there is no error in the judgment of the circuit court, and that the same must be affirmed.

But in addition to what has been said it may be proper to state, that pending this case in this court the appeal from the decree under which the said J. W. Marchant & Co. became purchasers of the land in controversy as aforesaid, has been decided by this court, by which decision the said decree was affirmed. *Hudgins* v. *Lanier Bro. & Co.*, 23 Gratt. 494. That decision would have been conclusive of this case in favor of the defendants, if it had not been otherwise in their favor. But it is needless to say any thing further on that subject.

JUDGMENT AFFIRMED.

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184 *Cardwell v. Allen, Trustee.

March Term, 1877, Richmond.

1. **Statutes—Supersedeas Bond—Rents and Profits.***—That portion of § 13, chapter 178, of the Code of 1873, prescribing the penalty of an appeal and *supersedeas* bond, refers only to the *damages* mentioned in § 24 of the same chapter, and was not intended to cover the rents and profits of real estate in the possession of the appellant who had given a deed of trust thereon to secure a debt fully its value, he having obtained an injunction to prevent the sale of such real estate, which injunction was dissolved, and the bill dismissed, and the penalty of the appeal and *supersedeas* bond will not be fixed with reference to such "rents and profits."
2. **Same—Construction of Terms Used.**—The word "awarded," in said section 13, refers to the words "damages and costs;" and the word "incurred" to the word "fees" therein, so as to make the meaning the same as if the sentence had been written; "and also to pay all damages and costs which may be awarded against, and all fees which may be incurred by, the appellants or petitioners."
3. **Supersedeas Bonds—Injunction Bonds—Penalty.**—The penalty of the appeal and *supersedeas* bond should be sufficient to indemnify and save harmless the surety in the *injunction* bond.

***Supersedeas Bond—Liability of Obligors.**—In Perry v. Horn, 21 W. Va. 739, the court said: "These courts (Virginia and West Virginia) have held that when the sale of land has been ordered and is stayed by the *supersedeas* the *supersedeas* bond does not render the obligors in the bond responsible for the rents and profits of the land pending the appeal," citing the principal case. See also Beard v. Arbuckle, 19 W. Va. 149.

Wiltshire Cardwell filed his bill in the circuit court of Prince Edward county, and obtained an injunction to prohibit Edgar Allen, the trustee in a deed of trust executed by Cardwell and wife, from selling certain real estate conveyed in said deed to secure two negotiable notes held by the English and American Bank at Farmville, Va. The penalty of the injunction bond was five hundred dollars. Upon the hearing of the case the injunction was dissolved, and the bill dismissed with costs. Cardwell then obtained from a judge of this court an appeal
185 from, and *supersedeas* to, *the decree of the circuit court dissolving the injunction and dismissing the bill; and the penalty of the *supersedeas* bond required by said judge was only $200. A motion was made to require the appellant to give a new bond in a larger penalty, on the ground that the real estate conveyed would not sell for enough to satisfy the debt due; that the appellant was in possession of the same, enjoying the rents and profits, and that the penalty of the bond ought at least to be sufficient to cover the amount of said rents and profits, in addition to the amount of damages, costs and fees intended to be covered by the said penalty of two hundred dollars on the first bond required.

Guy & Gilliam, for the appellant.

W. W. Henry, for the appellees.

MONCURE, P., delivered the opinion of the court.

This is a motion to require the appellant to give bond with security in a larger penalty than two hundred dollars, the penalty of the appeal bond required to be given by the judge who granted the appeal in this case. The appeal is from a decree dissolving an injunction to a sale of land under a deed of trust, and dismissing the bill. The appellant is in possession of the land, enjoying the issues and profits thereof, pending the appeal. The appellees contend that the land is not of sufficient value to satisfy the debt for which it is bound to them; and that the penalty of the appeal bond ought therefore to be large enough to cover the amount of the said issues and profits in addition to the amount of damages, costs and fees intended to be covered by the said penalty of two hundred dollars.

186 *The question we now have to solve it not what the law ought to be, but what it actually is. The former question is addressed to the legislature, the latter to the courts. If we were a legislature, we might and probably would consider it very reasonable and proper that in such a case as this the penalty of the appeal bond should be large enough for the purpose aforesaid, and that the condition of the bond should plainly provide to that effect; and we might and probably would make or amend the law accordingly. But as we are a court, and not a legislature, the enquiry we have to solve simply is, what is the law as it now stands, not what it ought to be.

The law which we now have to construe

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is the 13th section of chapter 178 of the Code of 1873, page 1139, which is in these words:

"13. Except where an appeal, writ of error, or *supersedeas*, is proper to protect the estate of a decedent, convict, or insane person, the same shall not take effect until bond is given by the appellants or petitioners, or one of them, or some other person, in a penalty to be fixed by the court or judge by or in which the appeal, writ of error, or *supersedeas*, is allowed or entered, with condition, if a *supersedeas* be awarded, to perform and satisfy the judgment, decree or order, or the part thereof proceedings on which are stayed, in case the said judgment, decree or order, or such part, be affirmed, or the appeal, writ of error, or *supersedeas*, be dismissed; and also to pay all damages, costs and fees which may be awarded against or incurred by the appellants or petitioners; and if it be an appeal from an order dissolving an injunction or dismissing a bill of injunction, with a further condition to indemnify and save harmless the surety in the injunction bond against all the loss or damage in consequence of his suretyship;
187 *and with condition, when no *supersedeas* is awarded, to pay such specific damages and such costs and fees as may be awarded or incurred."

This is the only law which requires the execution of an appeal bond and makes provision in regard to the amount of the penalty and terms of the condition of the bond. That portion of it which involves the question we are now considering is in these words: "with condition, if a *supersedeas* be awarded, to perform and satisfy the judgment, decree or order, or the part thereof proceedings on which are stayed, in case the said judgment, decree or order, or such part thereof, be affirmed, or the appeal, writ of error or *supersedeas* be dismissed; and also to pay all damages, costs and fees which may be awarded against or incurred by the appellants or petitioners."

Now if the damages which may arise from a loss of issues and profits of the land in controversy while in possession of the appellant pending the appeal as aforesaid, are provided for by the terms of the condition of the appeal bond prescribed by the said law, it must be because they are included in the word "damages," in that part of the law which is as follows: "And also to pay all *damages*, costs and fees which may be awarded against or incurred by the appellants or petitioners."

Are they so included? What is the meaning of the word "damages" in that connection? Plainly, we think its meaning is defined by a succeeding section of the same chapter, page 1142 of the Code, which is in these words:

"24. When any judgment, decree, or order is affirmed, damages shall be awarded to the appellee; such damages, when the judgment, decree or order is for the payment of money, shall be the interest to which the parties are legally entitled in the cause (to
188 *be computed upon the whole amount of the recovery, including interest and costs), from the time the appeal, writ of error or *supersedeas* took effect, until the affirmance, or if the affirmance be by the court of appeals, until a copy of its decision is entered in the order book of the court below, which damages shall be in satisfaction of all interest during that time. When the judgment, decree or order is not for the payment of any money, except costs, the damages shall be such specific sum as the appellate court may deem reasonable, not being more than one hundred dollars, nor in the court of appeals less than thirty dollars."

In construing the words, "and also to pay all damages, costs, and fees which may be awarded against or incurred by the appellants or petitioners," we must apply the rule, "*redendo singula singulis*," and refer the word "awarded" to the words "damages" and "costs," and the word "incurred" to the word "fees." So as to make the meaning of the sentence the same as if it had been thus written: "And also to pay all damages and costs which may be awarded against, and all fees incurred by the appellants and petitioners."

In that form of expression the meaning of the word "damages" in the 13th section seems to be perfectly plain, especially when we take that section in connection with the 24th of the same chapter; which declares that when any judgment &c. is affirmed, damages shall be awarded to the appellee; such damages to be a certain percentage on the recovery, if of money, or a specific sum, if the recovery be not of money except costs.

That the words "incurred by," in the 13th section, refers, and is confined to, the word "fees" therein, appears from the act passed February 15, 1844, acts of assembly 1843 '44, page 46, chap. 54, § 3, which enacts
189 *"that the securities to all appeal and *supersedeas* bonds in the said court of appeals shall be liable to the clerks for all fees which shall be *incurred* by the appellant or plaintiff in any appeal or *supersedeas*."

This is the first law which made the appeal bond cover fees incurred by the appellant to the clerk. These fees never were, nor ever are, *awarded* against the appellant, though *incurred* by him. Damages and costs recovered by the appellee on the affirmance of a judgment or decree always have been and are *awarded* against the appellant.

That the revisors did not intend to make any material change of the law by the sections aforesaid which they embodied in the Code of 1849 is manifest. Such is the presumption of law in the absence of any decided evidence to the contrary. They made in their report no note of any intention to make such change. The refer in the margin of their report, opposite to sections 13 and 24 of chapter 182, on pages 888 and 891, to the old laws revised by them, which seem to have been substantially the same as the new, except that the latter is much more condensed that the former.

The word "incurred" is used, and properly so, in section 10 of chapter 175 of the Code, page 1128, which directs that where an injunction is to proceedings on a judgment or decree, the condition of the injunction bond

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shall be to pay such judgment or decree, "and all such costs as may be awarded against the party obtaining the injunction, and all such damages as shall be incurred in case the injunction be dissolved." The costs here referred to are "awarded" by the court of chancery in the injunction suit, and against the plaintiff therein; but there is no *award* in that suit of any damages incurred in case the injunction should be dis-
190 solved. The damages referred *to in the section by the words "all such damages as shall be incurred in case the injunction be dissolved," are the damages provided for by section 12, on the same page, which enacts, that "where an injunction to stay proceedings on a judgment or decree for money is dissolved, wholly or in part, there shall be paid to the party having such judgment or decree, damages at the rate of *ten per centum per annum*," &c. These damages may properly be said to be "incurred in case the injunction be dissolved;" for, in that event, they are directed to be included in the execution afterwards to be issued on the judgment or decree, and may be recovered of the surety in the injunction bond by a suit thereon. There is therefore no conflict between the law in regard to injunction bonds and the construction we have placed on the law in regard to appeal bonds.

Of course, as the appeal in this case is from a decree dissolving an injunction and dismissing a bill in injunction, the bond should be with a further condition to indemnify and save harmless the surety in the injunction bond against all loss or damage in consequence of his suretyship. Therefore the penalty of the appeal or *supersedeas* bond ought to be not less than the penalty of the injunction bond, which is appears was $500. The appellant ought to be required to execute a new bond in the penalty of $700, with condition as the law directs, in a case in which a *supersedeas* is awarded, and in which the appeal is from an order or decree dissolving an injunction or dismissing a bill of injunction. See Code, p. 1139, § 13. And the same is ordered accordingly.

We have not in the foregoing opinion, referred to the cases cited by the counsel in the argument, because they seem to
191 depend upon the statutes and rules *of practice of other states and of the United States, which do not apply to this state; the law of which is sufficiently plain without seeking for aid from those sources.

We have prepared an order to be entered in conformity to the foregoing opinion.

STAPLES, J. I am not prepared to concur in the opinion just delivered, nor to express any dissent therefrom. There may be cases in which the language of the statute would require a more extended construction than that given by the opinion of the president. For example, in an action of ejectment by the owner for the recovery of real estate, and a judgment in his favor. If the plaintiff is kept out of possession for three or four years by an appeal to this court, and the judgment is affirmed, I am not prepared to say there is no remedy upon the appeal bond for the recovery of the rents and profits between the date of the judgment and the affirmance. Other cases may be readily suggested. I prefer to wait, and to decide each case as it arises; especially as there may be actions on appeal bonds in which these questions will be distinctly presented.

The order was for a new bond in a sufficient amount to secure the surety in the injunction bond, as well as the costs and damages, but not the rents and profits of the land.

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192 *Lewis v. Henry's Ex'ors & als.

March Term, 1877, Richmond.

Absent, ANDERSON, J.*

I. Testator by his will gives land and stock upon it to his son H. By the 3d clause of his will, he gives to his five daughters, by name, the balance of his land, his daughter M to account to the rest of his daughters, in the sum of $3,500, and his daughter L $5,200, these being the amounts paid for homes for them. By the 4th clause he gives to his son H and his five daughters the balance of his personal property to be equally divided among them—HELD:

1. **Advancements—Real Estate.**—The advancements to M and L are only to be brought into the division of the real estate.
2. **Same—Personal Estate.**—The personal estate embraced in the 4th clause is to be equally divided among the son H and the five daughters.

II. Testator, some months after making his will, makes a codicil to his will in which he says: If my estate should have to pay the debt, or any part thereof in the lawsuit brought by M's adm'r against Dr. B's estate, I hereby will and direct that my daughter M is to forfeit all interest in my estate, and is to inherit nothing under my will. He was the surety of B, who had been the husband of M, and was not sued, but settled the debt and took an assignment of it. After his death in a suit by his executors, his daughter brings the money into court, and tenders it—HELD:

1. **Wills—Condition Subsequent.**—The condition created by the codicil is a condition subsequent, and the estate not having paid the debt, but M tendering the money to pay it, her interest in her father's estate is not forfeited.

III. **Executors—Trustees—Powers.**—As to the portion of the property given to his daughter S, testator directs that his executors shall hold
193 it in trust, and manage and deal *out the proceeds thereof for her and family as their necessities may require—HELD:

The executors, as trustees of S, may use the proceeds arising from sales and collections, as well as from rents and profits, as in their discretion the necessities of said S and family may require. They may give her possession of the property, or they may purchase for her such property as they may deem necessary for the

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*JUDGE ANDERSON was prevented by severe illness from sitting in most of the causes decided during this term of the court.

See generally, Watkins v. Young, 31 Gratt. 84, and *note* on advancements.

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use of herself and family, or to enable her to cultivate or improve the real estate devised to her; and to erect suitable buildings upon the real estate, so as to enable her to reside upon and cultivate it. And they will not be responsible for any personal property which in their discretion they may put in the possession of said S, and which may be wasted or lost while in her possession. And they may sell and use or reinvest as in their judgment the necessities of said S and her family may require.

In October 1872 Edward W. Henry, Sen., of the county of Charlotte, departed this life, having made his will and a codicil thereto, which was duly admitted to probate in the county court of Charlotte, and Edmund W. Henry, Jr. and James T. Buster qualified as executors thereof.

By the second clause of his will the testator gave to his son, Edward W. Henry, a tract of land which is set out by metes and bounds, for his life; and at his death it was to be divided among his children by his then present wife. Testator gave also to his said son all testator's stock of horses, mules, hogs and sheep, all his cattle, except two cows and calves, which he gave to his daughter, C. Catlett, and the furniture in the room occupied by the said Edward, &c.

The third and fourth clauses are as follows:

3d. I give and bequeath to my daughters, M. R. Lewis, S. J. Armistead, Lucy D. Leighton, Celine Catlett and A. B. Smith, and their heirs, the balance of my landed property, to be equally divided between them; but my daughter Lewis is to be
194 accountable to *the rest of my daughters in the sum of $3,500, and my daughter Leighton, $5,120, these being the amounts paid for homes for them.

4th. I will and direct that all my household and kitchen furniture, not before willed, silverware, all money in hand due me, bonds, accounts and everything which may be due me from any source, crops, and any personal property which may herein be omitted, shall be equally divided between my son E. W. Henry and my five above named daughters.

By the fifth clause of his will, as to that portion of his property willed to his daughter, A. B. Smith, the testator directed that his executors shall hold it in trust, and manage and deal out the proceeds thereof, for her and her family, as their necessities may require.

This will was written by the testator himself, and bears date on the 21st of April 1871. The codicil bears date on the 15th of November 1871, and is as follows: If my estate should have to pay the debt, or any part thereof, in the lawsuit brought by Miller's administrator against Dr. Wm. B. Lewis' estate, I hereby will and direct, that my daughter M. R. Lewis is to forfeit all interest in my estate, and is to inherit nothing under this my will.

The bond referred to in the above codicil bears date the 16th of November 1858. It was executed by Lewis, with E. W. Henry as his surety, to George M. Y. Miller, for the sum of one hundred and ninety-five dollars. Dr. Lewis having died, and as it would seem without sufficient assets to pay his debts, an action on his bond was brought by Miller's administrator against Mrs. Lewis as executrix of Dr. Lewis, and a judgment was recovered against her prior to the 15th of April 1872. No action was instituted
195 upon the *bond against Mr. Henry; but after the judgment was rendered against Mrs. Lewis, he settled with the counsel of the plaintiff, by giving him a receipt for the amount upon a claim which he had upon an estate in the hands of the counsel of Miller, as administrator, and the bond was assigned by Miller's administrator to E. W. Henry, Sr., without recourse.

In January 1873 the executors of E. W. Henry, Sr., and E. W. Henry, Jr., in his own right, instituted a suit in equity in the circuit court of Charlotte county, against M. R. Lewis and the other daughters of E. W. Henry, Sr., and the husbands of those who were married; in which they set out the foregoing facts and asked the advice and direction of the court in the administration of their testator's estate. The points on which they asked for instruction were: 1st. Whether upon the facts of the case Mrs. Lewis had, under the codicil, forfeited her share of the testator's estate. 2d. Whether the charges made against Mrs. Lewis and Mrs. Leighton in the third clause of the will were to be considered as affecting the division of the personalty directed in the fourth clause. 3d. Whether, under the powers vested in the executors in the fifth clause of the will, they were authorized to use the principal of the fund, or only the interest and profits thereof, for the support and maintenance of Mrs. A. B. Smith and family. And if she should wish to reside on the land devised to her, to what extent might the money coming to her be used in improving by building, &c., on said land, or any other land selected for her home.

Mrs. Lewis alone answered the bill. She insisted, that the case had not occurred on which the forfeiture of her interest in her father's estate was to occur, he never having been sued for the debt; and if it
196 was *paid, was paid by him in his lifetime, though in fact he had paid no money. But if the codicil created a forfeiture, it was upon a condition subsequent; and the facts must come precisely up to the terms of the condition, which was not the case here, and moreover, it lay in compensation; and she brought into court the amount of the debt, and tendered it in satisfaction thereof.

On the question of the charges made in the third clause of the will, she insisted they were to be confined to the real estate disposed of in that clause.

The cause came on to be heard on the 2d of April 1873, when the court held, that the event had occurred upon which the testator, by the codicil to his will, provided for the forfeiture of Mrs. Lewis' interest in his estate, and she had no interest therein beyond the advancements to her by the testator in his lifetime; and that the portion

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which had been willed to her passed to the other children mentioned in the third and fourth clauses of the will, and there was no intestancy thereof. And the court further held, that Mrs. Leighton could take no further interest in the estate, real or personal, until the other daughters should be made equal to her by receiving the like sum of $5,120.

And the court held, that by the 5th clause of said will the said testator did not intend to change the bequest to his daughter, Ada B. Smith, but only to place it under the control and management of his executors as trustees for her sole use and benefit; and that, in exercising the said trust, they are to deal out the proceeds arising as well from sales and collections as from the rents and profits, according as in their discretion the necessities of said Ada B. Smith and family may require; and that the said trustees are at liberty to give the said Ada B. Smith
197 the possession and use of any *and all of the said property, if in their discretion the necessities of herself and family require it, or they may purchase for her such property as they may deem necessary and proper for the use of herself and family, or to enable her to cultivate or improve the real estate devised to her; and they are at liberty, in the exercise of the same discretion, to erect suitable buildings upon the said real estate, so that she may be enabled to reside thereon and to cultivate the same. And any personal property which, in the exercise of their discretion, they may place in the possession of the said Ada B. Smith, and which may be used, wasted or lost while in her possession, shall not be chargeable to them, the said trustees, by reason thereof, but their responsibility therefor shall cease whenever, in the exercise of their descretion, they have so placed her in the possession thereof. And the said trustees, if in their discretion they deem it best, are at liberty to sell any and all of the trust subject, and use or reinvest the proceeds, or any part thereof, as in their judgment the necessities of the said Ada B. Smith and family may require.

From this decree Mrs. Lewis applied to this court for an appeal; which was allowed.

Ould & Carrington, for the appellant.

W. W. Henry and *Wood Bouldin, Jr.*, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

Two questions arise in this case for our consideration. Both depend upon the true construction to be given to the will of the testator, Edward W. Henry.
198 *They arise under the third and fourth clauses of said will, and under the codicil executed several months after the date of the will.

In the first clause of his will the testator provides for the payment of his debts. In the second clause he gives to his son, Ed. W. Henry, a tract of land set out by metes and bounds and certain personal property.

Then follow the third and fourth clauses in these words:

"3d. I give and bequeath to my daughters, M. R. Lewis, S. J. Armistead, Lucy D. Leighton, Celine Catlett and A. B. Smith, and their heirs, the balance of my landed property, to be equally divided between them; but my daughter Lewis is to be accountable to the rest of my daughters in the sum of $3,500, and my daughter Leighton $5,120, *these being the amounts paid for homes for them.*

"4th. I will and direct that all my household and kitchen furniture, not before willed, silverware, all money in hand and due me, bonds, accounts, and everything which may be due from any source, crops, and any personal property which may be herein omitted, shall be equally divided between my son, E. W. Henry, and my five above named daughters."

The court is of opinion, that reading these two clauses together, and looking to the general scope of the will, the intention of the testator was manifest in making, by the third clause of his will, an equal distribution of the balance of *his real* estate (after the disposition of that contained in the second clause to his son, Edward W. Henry,) among his daughters. He had in his lifetime advanced to his daughter, Mrs. Lewis, real estate to the value, fixed by himself, of $3,500, and to his daughter, Mrs. Leighton, real estate to the value, also fixed by
199 himself, of the sum of *$5,120, these amounts being, as he expresses it in the third clause of his will above quoted, "*the amounts paid for homes for them.*"

We think it is plain, that the testator disposing of his real estate among his five daughters, and having advanced certain real estate to two of his daughters as *homes for them* of the value of $3,500 to one, and $5,120 to the other, intended to make the distribution of this real estate equal by requiring his advanced daughters to account in the distribution for the real estate thus advanced at the price fixed by the testator.

We are of opinion that the third clause, thus disposing of his *real* estate, is entirely independent of, and is not controlled by the fourth clause of the will. The latter clause disposes of the residuum of the *personal* estate, which he directs "shall be divided equally between my son, E. W. Henry, and my five daughters."

These two clauses are separate and independent. One relates to the disposition of his real estate, the other to that of his personal estate.

The advancements which the testator in his lifetime had made to his daughters were in *real* estate, "as homes purchased for them." In disposing of his real estate, he requires an equal distribution; and in order to make it equal, his advance daughters are required to account in *that* distribution. When he comes to dispose of his *personal* estate in the fourth clause of his will, the objects of his bounty are no longer his daughters alone, but he divides this personal property equally among his son and his five daughters.

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We think it is plain, that the testator having separated his bequests in two distinct clauses of his will, one having reference to real estate and the other to personal estate, and the objects of his bounty being different persons (in the one his daughters
200 only, and *in the other his son and daughters), it was not his intention to charge the advancements to his two married daughters upon both the real and personal estate devised and bequeathed to them. If he had intended these advancements to be a charge against both real and personal estate, he would not have created this charge by putting it in the third clause of his will, which related to real estate alone, but in a separate item, general in its terms, and without qualification of any sort.

The court is therefore of opinion, that the advancements made by the testator in his lifetime are made by his will a charge only upon the *real estate* disposed of by the third clause of the will, and are in no manner to be considered in the distribution of the personal estate bequeathed under the fourth clause.

The second and most important question we have to determine arises under the *codicil* to the will of the testator, which is in these words:

"CODICIL.

"If my estate should have to pay the debt, or any part thereof, in the lawsuit brought by Miller's administrator against Dr. Wm. B. Lewis' estate, I hereby will and direct that my daughter M. R. Lewis is to forfeit all interest in my estate, and is to inherit nothing more under this my will."

The record shows that this codicil had reference to a bond for the sum of $195.50, executed by William B. Lewis, the husband of Mrs. M. R. Lewis, payable to George M. Y. Miller, with the testator as the surety of said William B. Lewis, dated November 16th, 1858. In the year 1871 suit was
201 instituted on this bond, and *judgment in favor of Miller's administrator against Mrs. Lewis as executrix of her husband. But it does not appear that any judgment was recovered against the surety (the testator), E. W. Henry, or that any suit or other proceeding was ever commenced against him on account of said suretyship.

But it appears that the administrator of Miller, the obligee in this bond, assigned it to the testator and surety, by the following assignment which appears in the record: "For value received I assign the within bond to E. W. Henry, Sr., without recourse." Signed, C. E. Miller, administrator of G. M. Y. Miller, by W. W. Henry, attorney.

It further appears that this bond thus assigned to the testator, E. W. Henry, Sr., was found enfolded in his will.

In a bill filed by the executors of E. W. Henry, in the circuit court of Charlotte, the court is asked to construe the third and fourth clauses of the will above referred to, and also to construe the codicil; and the court is asked to say "whether on the facts stated (in the bill) the contingency mentioned in the said codicil has not happened; so that Mrs. M. R. Lewis is denied participation in the estate of her father; no part of the said debt having ever been paid by her or the estate of W. B. Lewis."

In answer to this bill, Mrs. Lewis, after denying that her failure to pay the debt for which her father was bound as surety, in his lifetime worked a forfeiture of her interest in his estate under his will and codicil, produced in court and made then and there with the filing of her answer, a tender of the whole amount, principal, interest and costs, of the judgment against her husband, for which her father, the testator, was bound as surety, to Miller's administrator.

202 *The circuit court decreed "that by the codicil annexed to his will the testator provided for a forfeiture of the portion of the estate willed to his daughter Lewis upon the happening of a certain event, which actually occurred in the lifetime of the testator; and upon the happening of which she ceased to have any interest in the estate of the testator beyond the advancements to her by the testator in his lifetime; and the portion which had been willed to her passed to the other children mentioned in the third and fourth clauses; and there is no intestancy thereof." The court is of opinion that the decree of the circuit court is erroneous.

The condition imposed by the codicil is plainly a condition subsequent. The distinction between conditions precedent and conditions subsequent is well marked and clearly defined by the authorities. The former are such as must generally happen or be performed before the legacy can vest. The latter are such as by non-performance, or breach of them, will in most instances defeat the legacy already vested. 1 Roper on Legacies 501. In other words, in the former the performance of the condition is required before the estate can vest; in the latter the failure to perform the condition will divest the estate. 2 Redfield on the Law of Wills 283; 2 Jarman, Ed. 1861-2.

In the case before use, the testator, by his will, devised a certain part of his estate to his daughter. By his codicil, executed six months afterwards, he declares, "If *my estate* have to pay the debt, or any part thereof, in the lawsuit brought by Miller's administrator against Dr. W. B. Lewis' estate, I hereby will and direct that my daughter M. R. Lewis is to forfeit all interest in my estate, and is to inherit nothing more under this my will."

The condition here imposed is by its
203 very terms a **condition subsequent*. By it Mrs. Lewis was to *forfeit all interest* in the testator's estate if the condition was not performed. In other words, she was to forfeit, or be divested of all interest she had acquired under the will if the condition of the codicil was not complied with.

Nothing is better settled than that in conditions subsequent, since they are in defeasance of interests already vested, courts of law and courts of equity are strict in requiring the *very event*, or the act to be done, with all its particulars, which is to defeat the interest previously vested. Roper on

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Legacies, 513, 514, and cases there cited. As was said LORD ALVANLY, 5 Vesey's R. 209, "where there are clear words of gift, creating a vested interest, the court will never permit the absolute gift to be defeated, unless it be perfectly *clear* that the *very* case has happened in which it is declared that the interest shall not arise."

Now the condition imposed by the codicil is, "If *my estate* have to pay the debt," &c. Before there can be a forfeiture, the *very event*, to wit, the payment of the debt, for which the testator was bound, by *his estate* must happen. This never happened. *His estate* never paid one dollar of the debt. It was paid, principal, interest and costs, by Mrs. Lewis.

The fact that the debt was assigned to the testator, and filed by him in his will, has no significance, except to show that he intended that *his estate* should not be called on for payment, except on the condition of the forfeiture by Mrs. Lewis of her interest, provided for her and vested in her under his will. As long as he lived he had the control of the debt. If he had chosen to do so, he could have made its payment a condition precedent to his daughter's taking any part of his estate, or, because of non-pay-
204 ment by her, have *cut her off from all participation in his estate. But he did not choose to do this; but taking an assignment of the debt to himself, he did not change his will, by which he made Mrs. Lewis an equal beneficiary with his other daughters, but filed the bond with the will and codicil, in which he declared, "*If my estate* have to pay the debt," &c., then his daughter, Mrs. Lewis, should forfeit her interest in his property devised to her. His estate has never paid the debt. The event has never happened. The contingency has never arisen. A court of equity, always slow to enforce a forfeiture, will surely be quick to prevent it when there has not only been a substantial, but, as in this case, literal compliance with the condition imposed. That condition it is manifest was a condition subsequent, made *in terrorem* to secure the payment of the debt for which the testator was bound as surety.

The court is therefore of opinion that the decree of the circuit court of Charlotte is erroneous, and that the same be reversed.

The decree was as follow:

The court is of opinion, for reasons stated in writing and filed with the record, that the decree of the circuit court is erroneous: First, in holding that the advancements made by the testator to his daughters, M. R. Lewis and Lucy D. Leighton, was a charge upon both the *personal* and real estate devised and bequeathed to his said daughters in the third and fourth clauses of his will. Second, in declaring that under the codicil to said will the appellant, Mrs. M. R. Lewis, had forfeited her interest under the will, because of the non-payment by her in the lifetime of the testator of the debt of her husband William B. Lewis for
205 *which the testator was bound as surety. It is therefore decreed and ordered, that for these errors the said decree of the said circuit court be reversed and annulled, (but in all other respects be affirmed); and the appellant being the party substantially prevailing in this court, it is further decreed and ordered, that she recover of the appellees, Edward W. Henry, Jr., and James S. Buster, executor of Edward W. Henry, deceased, and of Edward W. Henry, Jr., in his own right, her costs by her expended in the prosecution of her appeal here.

And this court now proceeding to enter such decree as the said circuit court ought to have entered, it is ordered, adjudged and decreed, that under the true construction to be given to the will of the testator, Edward W. Henry, the advancements made in his lifetime to his daughters, M. R. Lewis and Lucy D. Leighton, are only to be considered in the distribution of the *real* estate devised to his five daughters, and that the personal estate bequeathed under the fourth clause of said will to his son and five daughters should be equally divided between them without reference to the advancements made to his two daughters, M. R. Lewis and Lucy D. Leighton, mentioned in the third clause of the will.

And it is further adjudged, ordered and decreed, that by the codicil to his will the appellant, Mrs. M. R. Lewis, did not forfeit her interest in the testator's estate because the debt of William B. Lewis for which the testator was bound as surety was not paid by her in the lifetime of the testator; that the condition imposed by the will was a condition subsequent, which was fully performed by her in the payment into court of the principal, interest and costs of said debt. And this performance on her part en-
206 titles her to a full participation *in the division of the estate of her father, according to the terms of the will.

It is therefore decreed and ordered, that the decree of the said circuit court, to the extent in which it is herein declared to be erroneous, be and the same is hereby reversed and annulled; and that the cause be remanded to the said circuit court, to be further proceeded in in accordance with the principles herein declared.

DECREE REVERSED.

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207 *Roberts' Adm'or v. Cocke, &c.

Murphy v. Gaskins' Am'or.

March Term, 1877, Richmond.

Absent, ANDERSON and STAPLES, J's.

1. International Law — War Interest.*— Where, during the late war, a creditor resided within the territory of one of the belligerent powers, and his debtor within that of the other of said powers, such debtor would, under the rules of pub-

*War Interest.—The rule laid down in the principal case in regard to allowing interest during the war is affirmed in Ins. Co. v. Reynolds, 32 Gratt. 613. See also, Vaiden v. Stubblefield, 28 Gratt. 153, and *note* on the question of war interest and administrators.

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lic law, be entitled to an abatement of interest during the time the war lasted.

2. **Same—Same—Debtor and Creditor Residing in Same Section.**—Where the debtor and creditor resided within the same territory, the mere existence of war does not alone furnish any legal ground for the abatement of interest upon contracts during the time such war lasted.

3. **Interest—Presumption in Absence of Express Contract.***—In contracts for the payment of a certain sum of money, interest on the principal sum is a legal incident of the debt, and the right to it is founded upon the presumed intention of the parties.

4. **Constitutional Law—Obligation of Contract.**—Wherever there is a contract, express or implied, for the payment of legal interest, the obligation of the contract extends as well to the payment of interest as it does to the payment of the principal sum; and neither the courts nor the juries ever had the arbitrary power to dispense with the performance of such contracts either in whole or in part.

5. **Contracts—What Laws Govern.**—The laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of the contract; and that whether such laws affect its validity, construction, discharge or enforcement.

6. **Constitutional Law—Remedial Legislation.**—While it is competent for the state to alter or change the remedy on a contract, this can only be done where the change does not impair substantial rights.

7. **Statute—Unconstitutional and Void.**†—The act of the general assembly approved
208 April 2, 1873, entitled "An *act to amend and re-enact § 14, ch. 187, of the Code of 1860, in relation to interest," so far as said act confers upon courts and juries, in the suits therein mentioned, power to remit interest, as therein provided, on contracts entered into prior to April 10, 1865, which said courts and juries did not have under the laws in force at the time such contracts were entered into, is repugnant to the constitution of the United States, and of this state, and is so far null and void.

8. **Same—Same—Abating Interest.**—And so much of the said act as empowers the courts to review judgments and decrees, upon motion, and to abate interest as in said act provided, is repugnant to the constitution of the United States, and of this state, and therefore void.

The cases are stated by JUDGE BURKS in his opinion.

F. M. Forbes, for the appellants.
Hunton, Brooke & Scott, for the appellees.

BURKS, J., delivered the opinion of the court.

The amounts in controversy in these cases are small. Besides the costs, in the first case, only $182, and in the second $119.41, not sufficient of themselves to give this court jurisdiction to review the judgments of the court below. Our jurisdiction is invoked, however, upon the ground set out by the plaintiffs in error in their petitions, that the act of the general assembly, under which the judgments were rendered, is unconstitutional and void; and we have given to the question, thus presented for our determination, that consideration which its importance demands.

Throughout our deliberations, terminating in the conclusion to which we have come, we have been guided by the wise and salutary rule enunciated by CHIEF JUSTICE MARSHALL as long ago as 1810, in the leading case of
209 *Fletcher* v. *Peck*, 6 Cranch's R. 87, *generally followed by the courts of last resort in the several states in like cases, and by none more uniformly and implicitly than by this court. *Griffin's ex'or* v. *Cunningham*, 20 Gratt. 31; *Homestead Cases*, 22 Gratt. 236.

The question, says the chief justice, whether a law be void for its repugnancy to the constitution, is at all times a question of much delicacy, which ought seldom if ever to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void.

The opposition between the constitution and the law should be such, that the judge feels a clear and strong conviction of their incompatability with each other.

The act, the validity of which is drawn in question in these cases, was approved April 2, 1873, and is entitled "An act to amend and re-enact section 14, of chapter 187, of the Code of 1860, in relation to interest." The section, as thus amended and re-enacted, constitutes the 14th section of chapter 173 of the Code of 1873, p. 1120.

The amendment, in substance, empowers the courts and juries in all suits for the recovery of money founded on contracts, express or implied, or on causes of action, or on liabilities which were entered into or existed, or where the original consideration accrued prior to the 10th day of April 1865, to remit the interest upon the original debts found to be due, or any part thereof, for the
210 period between the 17th day of *April 1861, and the 10th day of April 1865, or for any portion of said period. It further empowers the court, in which any judgment

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***Interest — Bonds — Notes—Implied Contract.**—In McVeigh v. Howard, 87 Va. 605, the court cites the principal case for the proposition that though no interest be reserved, a note or bond bears interest from the date it is due, citing also Chapman v. Shepherd, 24 Gratt. 383; Cecil v. Doyerle, 28 Gratt. 775; Kent v. Kent, 28 Gratt. 840. See also, Cecil & Perry v. Hicks, 29 Gratt. 4.

†**Statutes—Unconstitutionality.**—The principal case as embodied in the 7th and 8th headnote is distinctly reaffirmed in Linkous v. Snafer, 28 Gratt. 775; Kent v. Kent, 28 Gratt. 840; Pretlow v. Bailey, 29 Gratt. 212.

Judicial Functions—Avoiding Legislature Acts.—In Helfrick's Case, 29 Gratt. 847, the principal case is cited for the proposition that "to declare a legislative enactment void is the exercise of a judicial function of a most delicate character, never to be done except upon the clearest conviction of the unconstitutionality of the law," citing also Eyre v. Jacob, 14 Gratt. 422; Homestead Cases, 22 Gratt. 266.

or decree has been rendered prior to the passage of the act, on motion of the defendant, upon ten days' notice to the plaintiff, to review such judgment or decree, and abate the same to the extent of the interest for the period foresaid.

In the first of the cases now under review here, the plaintiff brought an action of debt in the court below upon a bond, which was in these words:

"$762.

Nine months after date, for value rec'd, we, the undersigned, promise to pay to C. M. Roberts, or order, seven hundred and sixty-two dollars, with int. from date.

Witness our hands and seals this 12th day of Decem'r, 1860.

WILLIAM COCKE, [Seal.]
(Security) RICH'D H. CARTER, [Seal.]"

The defendants appeared and filed three pleas: 1st, payment; 2d, a plea averring that the bond sued on was entered into prior to the 10th day of April 1865, and praying judgment that the interest on the bond from the 17th day of April 1861, till the 10th of April 1865, be remitted in accordance with the act aforesaid; and 3d, a plea of the like tenor and with the like prayer as the 2d, with the further averment that "the confusion of the business relations of the country incident upon the secession of the State of Virginia from the United States, and the war consequent thereupon between the Confederate States and the United States was so great and disorganizing that the principal money in said writing obligatory specified was not worth any interest between the periods aforesaid *to the defendants, who were citizens of the county of Fauquier, which was occupied from time to time by the Federal troops."

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The plaintiff took issue on the plea of payment and demurred severally to the other two pleas.

The demurrers were overruled, and, neither party demanding a jury, the whole matter of law and fact was submitted to the court; and the bond sued on being given in evidence, and that being all the evidence, the court gave judgment for the plaintiff for the principal sum specified in the bond, with interest from the time it became payable until the 17th day of April 1861, and from the 10th day of April 1865 until payment, and for costs, expressly remitting the interest between the dates aforesaid.

In the second case the plaintiff, Frances A. Murphy, in the year 1869, brought an action of covenant in the circuit court of Fauquier county, upon an instrument under seal and of the tenor following:

"Received, Nov'r 26th. 1860. of Frances A. Murphy, five hundred dollars, to bear interest from date. I also agree to and put a negro boy, Abraham, in pond (meaning in pawn) to secure the payment of the same. Whenever the five hundred dollars is paid to Mrs. Murphy, with legal interest, the said boy no longer belongs to the said Mrs. Murphy, but the title returns back to me.

Given under my hand and seal this the 26th day of November, 1860.

JOHN GASKINS, [Seal.]"

The defendant pleaded to this action "covenants performed" and "covenants not broken;" upon which pleas issues were made up, and neither party demanding *a jury, the issues were tried by the court on the 4th day of April 1872, and judgment was rendered for the plaintiff for the $500 in the covenant specified, with interest from the date thereof, and for costs.

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On the 12th day of April, 1873, the personal representative of John Gaskins (the defendant in error here) pursuant to notice, made a motion in the circuit court of Fauquier county for a review of the judgment aforesaid, and an abatement of the interest included therein between the 19th day of April, 1861, and the 10th day of April, 1865; and the court rendered judgment accordingly, abating said interest. Upon the hearing of the motion the only evidence adduced was the record of the first judgment, including the covenant on which it was rendered.

We will examine the case of *Roberts' adm'r* v. *Cocke &c.*, first, and when we have disposed of that, we shall have but little to say of the other case.

If during the late war between the United States and the Confederate States, the defendants Cocke and Carter had resided within the territory under the dominion of one of the belligerent powers, and their creditor had resided in the territory of the other of said powers, they would have been entitled, independently of the statute in question, to an abatement of the interest during the time the war lasted. Such is the rule of the public law applicable to a war between independent nations, and at an early period after the termination of the late war between the states, it was applied by the courts to that war. It was so applied in 1866 by the district court of appeals of Virginia for the first judicial district. See the opinion of the court delivered by JUDGE JOYNES in *Tucker* v. *Watson, McGill & Co.*, 6 Amer. Law Register, (N. S.) 220; citing among other authorities *McCall* v. *Turner*, 1 Call 133, *and *Brewer* v. *Hastie & Co.*, 3 Call 22; and this court recognizes the same rule in the case of *McVeigh* v. *The Bank of the Old Dominion*, 26 Gratt. 188.

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The supreme court of the United States, although at first hesitating as to this application of the rule, (*Ward* v. *Smith*, 7 Wall. U. S. R. 447,) finally sanctioned it by their decision in *Brown* v. *Hiatts*, 15 Wall. U. S. R. 177.

If, therefore, Cocke and Carter (the defendants in error) had been alien enemies in respect of their creditor, they would have been entitled to an abatement of the interest on their debt for the period covered by the war, and might have made their defence, certainly under a special plea, and perhaps under the plea of payment, as was allowed to be done in *McCall* v. *Turner, supra.*

But as no such defence was made, it is to be presumed, if indeed it may not be inferred

from the record that the fact did not warrant the defence.

The averment, which seems to be the gist of the third plea, that the principal money "was not worth any interest to the defendants" during the war, was no bar to the plaintiffs' right to recover. The defendants by their bond had expressly stipulated for continuing interest on the debt without any exception of the period during time of war, should one occur, and the law as the general rule, makes no such exception where the contracting parties make none. It may be true, that the defendants derived no benefit from the use of the principal money during the war. This may have been their fault or their misfortune; but whether the one or the other, the contract was not affected by it. They were at liberty under the contract to discharge the obligation at any time by payment, according to its terms, of the principal
214 sum and accrued *interest. They neither paid nor offered to pay any part of either, and while they withheld another's money it does not lie in their mouths to say, that they derived no benefit from it, and therefore should not be required to pay for the use of it that compensation which they had agreed to pay.

It remains to consider whether the third plea stripped of the faulty matter which has been passed upon, and the second plea entitled the defendants to the abatement of the interest which they claimed, and which by the judgment of the court was allowed and ordered. The solution of this question depends upon the answer to be given to the main question in these cases: Is the act of the legislature, by force of which only the judgment was rendered, valid as law? Is the act repugnant to the constitution of the state, or to the constitution of the United States?

Section 1, article 5, of the constitution of this state, is in these words: "The legislative power of this commonwealth shall be vested in a general assembly, which shall consist of a senate and house of delegates." Whatever power therefore is comprehended in the terms, "the legislative power of this commonwealth" is vested in the general assembly by the section aforesaid, subject only to such limitations as are imposed by other parts of the state constitution and by the constitution of the United States. Amongst the limitations contained in the latter, section 10, article 1, declares that "no state shall pass any law impairing the obligation of contracts;" and the same inhibition is put upon the general assembly by the constitution of the state, article 5, section 14.

Speaking of this clause, JUDGE COOLEY says: "No clause which the constitution contains has been more prolific of litigation,
215 or given rise to more animated *and at times angry controversy. It is but twice alluded to in the papers of the *Federalist*, and though its great importance is assumed, it is evident that the writer had no conception of the prominence it was afterwards to hold in constitutional discussions, or of the very numerous cases to which it was to be applied in practice." Cooley's Con. Lim. 273. And CHIEF JUSTICE MARSHALL in 1827, in the case of *Ogden* v. *Saunders*, 12 Wheat. R. 213, 335, responding to the question, what is a law impairing the obligation of contracts said, "that in solving this question all the acumen which controversy can give to the human mind has been employed in scanning the whole sentence and every word in it."

The numerous and diversified cases which have arisen under this clause of the constitution from time to time since its adoption have been the occasion of a great multitude of decisions by the supreme court of the United States and the supreme appellate tribunals of the several states.

In the light of these decisions, let us first see what has been the result of judicial inquiry as to the true meaning of the clause, "any law impairing the obligation of contracts," and we can then determine whether the act of the legislature in question is such a law.

The clearest and most satisfactory construction of this clause is given by CHIEF JUSTICE MARSHALL in 1819 in the opinion pronounced by him in *Sturges* v. *Crowningshield*, 4 Wheat. R. 122, 197.

"It would seem difficult," said he, "to substitute words which are more intelligible or less liable to misconstruction than those which are to be explained. A contract is an agreement in which a party undertakes to do or not to do a particular thing. *The law binds him* to perform his undertaking; and this
216 is, of course, *the *obligation* of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day; and this is its obligation: Any law which releases a part of this obligation must, in the literal sense of the word, impair it—much more must a law impair it which makes it totally invalid and entirely discharges it."

This construction of the clause of the cc stitution and interpretation of its words have been followed by the courts ever since they were declared. As it is the *law binding* to the performance of the contract which constitutes the *obligation*, it has accordingly been held, and is now thoroughly settled, that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms: and this principle embraces alike those which affect its validity, construction, discharge and enforcement: that the ideas of validity and remedy are inseparable, and both are parts of the obligation guaranteed by the constitution against invasion; that while the remedy may be altered or changed by the state, yet it is with the qualification that the change shall not impair substantial rights: and that a law which lessens the duty under the contract on the one side, or abridges the right on the other, whether such law acts directly on the contract or indirectly through the remedy, impairs the obligation and is void. *Bronson* v. *Kinzie*, 1 How. U. S. R. 311; *McCracken* v.

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Hayward, 2 How. U. S. R. 608; *Von Hoffman* v. *City of Quincy*, 4 Wall. U. S. R. 535; *White* v. *Hart*, 13 Wall. U. S. R. 646; *Gunn* v. *Barry*, 15 Wall. U. S. R. 610; *Walker* v. *Whitehead*, 16 *Wall. U. S. R. 314; *The Homestead Cases*, 22 Gratt. 266; *Bank of Old Dominion* v. *McVeigh*, 20 Gratt. 547; *Taylor* v. *Stearns*, 18 Gratt. 244.

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The rule, then, being that the laws in force at the date of a contract enter into and form part of it, it is pertinent to inquire what the laws of Virginia were touching interest prior to the 10th day of April, 1865. For a reference to the early statutes on this subject see note to 1 Revised Code, 373. The subsequent statutes will be found in 1 Revised Code, ch. 102, ch. 128, §§ 79, 80; Code of 1860, ch. 141, §§ 4, 5, *et seq.*, ch. 171, § 44; Code of 1873, ch. 137, ch. 173, § 14, ch. 167, §§ 43, 44.

It has always been lawful in Virginia for parties to contract for the payment of interest for the use or forbearance of money within the limits prescribed by statute; and in the absence of any express agreement for the payment of interest, in obligations for the payment of a certain sum of money on demand or on a given day, interest on the principal sum from the time it becomes payable is "a legal incident of the debt, and the right to it is founded on the presumed intention of the parties." *Chapman's adm'rs* v. *Shepherd's adm'r &c.*, 24 Gratt. 377.

JUDGE STAPLES, in delivering the opinion of the court in the case just cited, speaking of the defences which may be made to the recovery of interest on such obligations as we have mentioned, says: "It is true that the debtor may sometimes, under peculiar circumstances, avoid the payment of interest; but these are matters of defence, the burden of which is upon him in all cases. They are offered to show that the obligation to pay the interest has been discharged, and not that it did not originally exist. If no valid ground of defence is shown, the judgment is as certainly rendered *for the interest as for the principal. In contracts of the character just mentioned, it is apparent, therefore, that interest is not given as damages at the discretion of the court or jury, but as an incident of the debt, which the court has no discretion to refuse."

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Wherever there is a contract, express or implied, for the payment of legal interest, the obligation of the contract extends as well to the payment of the interest as it does to the payment of the principal sum, and neither the courts nor the juries ever had the arbitrary power to dispense with the performance of such contract, either in whole or in part.

Such being the law binding upon parties to contracts, and upon the courts and juries prior to the 10th day of April 1865, was it competent for the legislature to change the law, and by giving it a retrospective action to deprive a party to a contract of the benefit to which he was entitled under it? It will not be pretended that the legislature could by a statute, acting either directly upon the contract or indirectly through the remedy, release the principal sum or any part of it; and this because the law binds the debtor to the performance of his undertaking, which is the payment of such principal sum; and for the same reason it would seem equally clear that the interest, when a part of the contract, and its payment as much a part of the undertaking of the debtor as the payment of the principal, cannot by legislative action, direct or indirect, be remitted, released, or discharged.

If by the laws in force prior to the 10th day of April 1865, when the contracts were entered into, upon which the act of April 1873 is intended to operate, the courts and juries had, as some seem to suppose, absolute control over the subject of interest, and were invested with full power in their discretion to allow or *disallow interest in all cases coming before them, what necessity was there for the act of April 2, 1873? Why pass an amendatory act merely to confer upon them a power which they already had under the law without amendment?

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It would be unjust to the general assembly to impute such a purpose to them.

We must conclude, therefore, that the object of passing the act was, and if the acts were valid, its effect would be to confer upon the courts and juries a power over the subject of interest connected with past transactions not possessed by them under the law at the time such transactions took place—the power to "*remit* the interest upon the original debt *found to be due*, on any part thereof" from the 17th day of April 1861 to the 10th day of April 1865. The power to "remit" is a power to release. It is conferred by the act without any limitation except the discretion of those upon whom it is conferred; a discretion not controlled by the settled principles and established rules of our jurisprudence, but to be exercised according to the pleasure of the courts and juries. In other words, it is an arbitrary power, the exercise of which can hardly be called a judicial inquiry.

The dates, 17th April 1861 and 10th April 1865, indicate the commencement and termination of the late war. The first was the day on which Virginia passed her ordinance of secession, and the last the day after that on which General Lee and the Confederate army surrendered at Appomattox Courthouse. It is to be inferred therefore, that the remission of interest was authorized by reason of the existence of the war. But the mere existence of war does not abrogate debts, nor does it ordinarily stop the running of interest on debts, except, as before stated, between alien enemies. To *make the war, therefore, the occasion, under all circumstances, for the remission of interest on antecedent debts and contracts, would be giving it a controlling character as a fact in determining the rights of parties which it did not have under the law at the time such contracts were entered into, and would thus substantially impair the obligation of such contracts.

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In the case of *McCall* v. *Turner*, 1 Call 133, there are expressions in the opinions of several of the judges, which might indicate, that under the law as it then stood, they thought that the juries were invested with

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discretion to abate interest in all cases during war. But these expressions are mere *dicta*, and have no controlling influence as authority. The case decided was a controversy between parties who were considered as occupying the relation to each other of alien enemies during the revolutionary war, and the interest during the war was therefore properly abated.

Ambler's ex'ors &c. v. *Macon &c.*, 4 Call 605, decided in 1803, contains a *dictum* of JUDGE PENDLETON, that "interest during the war ought not in justice and equity to have been allowed on debts due to domestic creditors no more than to foreign; but since it has not been attended to either in practice or judicial decisions until so much business has been otherwise adjusted, it would be unjust at this late era to introduce it in a particular case, unless in one attended with peculiar circumstances." Afterwards, in 1804, came on the case of *Hawkins' ex'or* v. *Minor &c.*, 5 Call 118, which was an appeal from a decree pronounced by CHANCELLOR WYTHE in the high court of chancery. One of the errors assigned on the appeal was, that the chancellor had disallowed interest for the period of the revolutionary war in a case where both creditor and debtor resided during the war
221 in Virginia; and *this court unanimously held that the disallowance by the chancellor of interest for said period was erroneous.

In the case of *Crenshaw* v. *Seigfried*, 24 Gratt. 272, one of the questions decided by this court was, that it was error in the court below to deduct interest during the war on a bond given before the war for the payment of a sum of money with interest from date. As the decree by which this deduction was made was pronounced prior to the passage of the act of the legislature the validity of which is drawn in question in the cases now before us, this court did not in that case pass upon the validity of said act. But JUDGE MONCURE, in delivering the opinion of the court, said: "Certainly the use of money is a valuable and legal consideration for a promise to pay legal interest thereon; and even *an act of the legislature passed to annul or impair such a promise would be unconstitutional and void.* Of course a decree declaring such a promise to be void, even in the absence of such an act, must therefore be erroneous."

Our conclusion is, that the act of the general assembly, approved April 2, 1873, entitled "an act to amend and re-enact section 14 of chapter 187 of the Code of 1860, in relation to interest," so far as said act confers upon courts and juries, in the suits therein mentioned, a power to remit interest, as therein provided, on contracts entered into prior to the 10th day of April, 1865, which said courts and juries did not have under the laws in force at the time such contracts were entered into, is repugnant to the constitution of the United States, and to the constitution of this state, and is so far null and void. And we are further of opinion, that the mere existence of the late war between the United States and the Confederate States
222 *does not alone furnish any legal ground for the abatement of interest on debts upon contracts during the time such war lasted. We do not mean to say, however, that there may not be special cases, attended with circumstances connected with or growing out of the war, which would furnish legal cause for abatement of interest. When such cases arise, they must be decided according to the law applicable to the peculiar facts and circumstances of each case. We can only lay down the general rule.

It follows from what has been said, that, in our opinion, the judgment of the circuit court of Fauquier county, in *Roberts' adm'r* v. *Cocke, &c.*, the first of the cases considered by us, based as it is solely on the acts of the legislature aforesaid, is erroneous, and should be reversed and annulled.

Our reasoning, in the first case, leaves us but little to say in the second.

Blackstone, in his commentaries, divides contracts of debt into three classes: debts of *record*, debts by *special* and debts by *simple* contract. "A debt of record is a sum of money, which appears to be due by the evidence of a court of record. Thus when any specific sum is adjudged to be due from the defendant to the plaintiff in an action or suit at law, this is a *contract of the highest nature*, being established by the sentence of a court of judicature." 1 Chitty's Black., book 2, side p. 455.

With us decrees for money are of the same nature and dignity as judgments.

Judgments and decrees for money being contracts of the highest character, of course and for the reasons before stated, to abate any portion of the interest included in them, would necessarily impair their obligation.
Moreover, by such judgments and
223 decrees the *rights of the parties, in whose behalf they were rendered, to the money ordered to be paid, whether principal or interest, have become *vested*, and cannot be *divested*, as provided by the act of the general assembly. *Griffin's ex'or* v. *Cunningham*, 20 Gratt. 31.

We therefore conclude, that so much of the act aforesaid as empowers the courts to review judgments and decrees upon motion, and abate interest as in said act provided, is repugnant to the constitution of the United States and to the constitution of this state, and is therefore void; and it follows that the judgment of the circuit court of Fauquier county in the second case, *Murphy* v. *Gaskins' adm'r*, based upon said act, is erroneous, and must be reversed and annulled.

JUDGMENTS REVERSED.

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224 *Barksdale & als. v. White & als.

[26 Am. Rep. 344.]

March Term, 1877, Richmond.

1. Wills—Construction of Separate Clauses.* —Testator, by five separate clauses of his will, gives

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***Wills — Construction of Separate Clauses.**—The rule laid down in the second headnote in regard to the construction of wills is expressly

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to his five daughters by name, five slaves, and certain other personal property, and $1,500 in money "to her and her heirs forever." By the ninth clause he gives all the balance of his estate, both real and personal, to be equally divided among his children before named, which he lends to them during their lives, and at their death to be equally divided among their children; "but should either or any of his daughters die without an heir of their own body, it is his will that all the property loaned or given them be equally divided among his grandchildren"—HELD: The daughters each take the property and money given them in the first five clauses absolutely; and their right thereto is not cut down or restricted by the concluding provisions of the ninth clause; that only applies to the property embraced in that clause.

2. **Same—Same—General Rule.**—Where property is clearly given absolutely by one clause of a will, the right thereto will not be limited or restricted by a separate clause, unless the language of the second clause is as clear and explicit as the terms embraced in the first clause. It is not sufficient to create a doubt from other terms in another part of the instrument—Possibilities and even probabilities will not avail. If the benefit is to be taken away it must be by express words or necessary implication.

This was a suit in equity instituted in the circuit court of Halifax county, by David H. White and others, grandchildren of James McCargo, to have a construction of the will of said McCargo. It appears that Martha McCargo, one of the children of James McCargo, married John J. Watson, and surviving him died without children; and the question intended to be raised is, which **225** of the grandchildren of James *McCargo were entitled to the property bequeathed to the said Martha in the third clause of his will. The will it set out in the opinion of JUDGE CHRISTIAN, except a codicil, which this court held did not affect the previous bequests. There was a decree in the circuit court which held that the specific property bequeathed to Martha McCargo passed under the ninth clause of the will to the grandchildren of James McCargo living at the death of Martha; and there was a second decree which held that the money part of the legacy was hers absolutely. The appellants afterwards filed a bill to review the last decree; but upon the hearing the bill was dismissed. And they thereupon applied to this court for an appeal; which was allowed.

Jones & Bouldin, for the appellant.
W. W. Henry, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

The question in this case depends altogether upon the construction of the will of James McCargo.

The testator, after directing the payment of his debts and after making a liberal provision for his wife, made the following disposition of his property for the benefit of his daughters:

3d. I give to my daughter, Martha McCargo, five choice negroes, such as she may think proper to select from my estate, one yoke oxen, four cows and calves, one best horse, saddle and bridle, ten head sheep, two sows and pigs, four hundred pounds pork, two beds and furniture, one black wal- **226** nut bureau, one small *chest of drawers, six sitting chairs, and fifteen hundred dollars in money to her and her heirs forever.

4th. I give to my daughter, Jane McCargo, five negroes, such as she may select from my estate, one yoke oxen, four cows and calves, one best horse, saddle and bridle, ten head sheep, two sows and pigs, four hundred pounds pork, two beds and furniture, one black walnut bureau, one small chest—drawers, six sitting chairs, and fifteen hundred dollars in money, to her and her heirs forever.

5th. I give to my daughter, Mary Magdalen White, all the property that I have heretofore possessed her of, to her and her heirs forever.

6th. I give to my daughter, Francis Booth, all the property that I have heretofore possessed her of, to her and her heirs forever.

7th. I give to my daughter, Cicily Elliotte, all the property that I have heretofore possessed her of, to her and her heirs forever.

8th. It is my will and desire, immediately after my death, that all money due me, by bond or otherwise, be collected, and the legacies hereinbefore named paid, and the balance laid out in land, to be divided as hereafter directed; and I hereby request and appoint my friends, Hezekiah McCargo, Thomas Roberts, John Coleman, Richard Russell and William Bacon, to make the purchase.

9th. The balance of my estate, both real and personal, that I now possess, or that may be purchased after my death, of what nature or kind soever it may be, not hereinbefore particularly disposed of, I desire may be equally divided among my several children before named, which I lend to them for **227** and during *the term of their natural lives, and after their death to be equally divided among their children; but should either or any of my daughters die without an heir of their own body, it is my will and desire that all the property loaned or given them be equally divided among my grandchildren.

The question we have to determine is, whether the bequests contained in the third, fourth, fifth, sixth and seventh clauses, are to be controlled or restricted by the latter part of the ninth clause. In the first named five clauses, the property bequeathed, by terms plain and unequivocal, is given to the donee respectively, absolutely without any restriction whatever. The words used in each clause are the appropriate and technical words to

affirmed in the following cases: Stark v. Lipscomb, 29 Gratt. 322; Haymond v. Jones, 33 Gratt. 317; Senger v. Senger, 81 Va. 700; Smith v. Fox, 82 Va. 768; Gaskins v. Hunton, 92 Va. 531. Citing also, Rayfield v. Gaines, 17 Gratt. 1; 2 Min. Inst. (4th Ed.) 1057.

create an absolute estate. In each clause the bequest is, "to her and her heirs forever."

It is a settled rule, in the construction of instruments, that if an estate is conveyed, an interest given, a benefit bestowed in one part by clear, unambiguous, explicit words, upon which no doubt could be raised to destroy or annul that estate, interest or benefit, it is not sufficient to raise a mist or create a doubt from other terms in another part of the instrument. Possibilities and even probabilities will not avail.

The terms to rescind or cut down the estate or interest before given, must be as clear and decisive as the terms by which it was created. If the benefit is to be taken away it must be by express words, or by necessary implication. This rule of construction thus stated in the clear and comprehensive terms of the Lord Chancellor in *Thornhill* v. *Hall*, 8 Bligh's R. 88, 107, has been substantially adopted by this court, as it is the established rule of the English chancery. See
228 **Mooberry* v. *Marye*, 2 Munf. 453; *Rayfield & wife* v. *Gaines*, 17 Gratt. 1. In the last named case JUDGE JOYNES, delivering the opinion of the court, said: "Clear and unambiguous provisions expressly made cannot be controlled by mere inference and argument from general ambiguous provisions in other parts of the will." See also 2 Lomax Ex'ors, ch. 11, § 1, p. 11; *Collet v. Lawrence*, 1 Vesey, Jr., R. 269; *Blake* v. *Bunbury*, 1 Vesey, Jr., R. 194, note 4, and cases therein cited; *Jones* v. *Colbesh*, 8 Vesey R. 38.

Now applying these principles and rules of construction to the case before us, it is plain that the testator by the 3rd, 4th, 5th, 6th, and 7th clauses of his will, gave to his daughters an absolute estate in the property bequeathed to them by clear unambiguous and explicit words. Are these bequests controlled or limited by the 8th and 9th clauses of the will which follow, and as before quoted, are in these words:

8th. It is my will and desire, immediately after my death, that all money due me by bond or otherwise be collected, and the legacies hereinbefore named paid, and the balance laid out in land, to be divided as hereafter directed; and I hereby request and appoint my friends, Hezekiah McCargo, Thomas Roberts, John Coleman, Richard Russell and William Bacon, to make the purchase.

9th. The balance of my estate, both real and personal, that I now possess, or that may be purchased after my death, of what nature or kind soever it may be, not hereinbefore particularly disposed of, I desire may be equally divided among my several children before named, which I lend to them for and durin the term of their natural lives, and
229 after their death to *be equally divided among their children; but should either or any of my daughters die without an heir of their own body, it is my will and desire that all the property loaned or given them be equally divided among my grandchildren.

The court is of opinion, that the absolute estate conferred upon his daughters, given "to them and their heirs forever," by the preceding clauses, is not affected or limited by the 9th clause.

That clause is limited in its operation, in express terms, to property "not hereinbefore particularly disposed of."

The latter provision of the ninth clause, in the words, "but should any or either of my daughters die without an heir of their own body, it is my will and desire that all the property loaned or given them be equally divided among my grandchildren," has no reference to the absolute estate already given to his daughters in the previous clauses of the will, but is plainly limited to that devised in the ninth clause. These words, incorporated in the ninth clause, have reference only to such estate as "is not hereinbefore particularly disposed of"—that is, to the property mentioned in that clause, and not to that in which the testator, by clear, explicit and technical words, had already created an absolute fee simple estate.

In *Mooberry and others* v. *Marye* (*supra*) the testator gave to his daughters certain lands, describing them. He then gave them, in separate clauses, certain slaves which had in his lifetime been delivered to them and deeds of gift recorded. The eighth clause of his will, out of which the controversy arose in that case, was as follows: "8th Item. In
230 case of either of my daughters' *death before they marry, that *then their parts* be equally divided among the surviving sisters."

The court held, that though the words "their parts" were broad enough to cover the lands devised to them, yet it was to be confined to the slaves, upon the ground that this limitation, being connected with clauses of the will having reference to the slaves, could not affect the devisees in fee of the land contained in previous clauses. JUDGE ROANE said, p. 463: "After having dismissed one subject and taken up another, he will not be construed to have resumed the former unless his expressions to that effect be clear and unequivocal." This remark may be applied with equal force to the case before us. Here the testator, after having disposed of the property bequeathed to his daughters in the previous clauses of his will, "to them and their heirs forever," may be said to have "dismissed that subject from his mind and taken up another," to-wit, that which he had directed to be invested in land, and which "had not been" therein "before disposed of." It was to that and that alone to which the latter part of the ninth clause evidently has reference.

In *Thornhill* v. *Hall* (*supra*) the testator, after making certain provisions for his daughters, married and unmarried, devised to his son R the profit rent in *Blachouse;* and then provided, "and further, if any of the above legatees should die, or die unmarried, then the property bequeathed to them to be divided equally among the survivors of them." It was held, that the devise to his son R (who died unmarried) was not cut down to a life estate by the clause of survivorship (though

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in terms it applied to *all* of the legatees); but that the words of this clause applied to his unmarried daughters only.

231 *This case was afterwards taken by appeal to the House of Lords; and the lord chancellor, then LORD BROUGHAM, said (and I quote his language as most apposite to the case before us): "My lords, I hold it to be a rule that admits of no exception in the construction of written instruments, that where one interest is given, where one estate is conveyed, where one benefit is bestowed, in one part of an instrument, by terms clear, unambiguous, liable to no doubt, clouded by no obscurity, by terms upon which, if they stood alone, no man breathing, be he lawyer or be he layman, could entertain a doubt, in order to reverse that opinion to which the terms would of themselves and standing alone have led, it is not sufficient that you should raise a mist, it is not sufficient that you should create a doubt, it is not sufficient that you should show a possibility, it is not even sufficient that you should deal in probabilities; but you must show something in another part of that instrument which is as decisive the one way as the other terms were decisive the other way; and that the interest first given cannot be taken away either by *tacitum* or by *dubium* or by *possible*, or even by *probabile*; but that it must be taken away, and can only be taken away, by *expressum et certum*." 2 Clarke & Finn. R. 22, 36.

Applying these principles of the English chancery, and of this court, to the case before us, we are inevitably led to the conclusion, that the absolute estate vested in the daughters of the testator by the five clauses of the will above quoted, cannot be limited or contracted by the subsequent provision in the latter part of the ninth clause, that limitation being confined to the property devised in the ninth clause only.

Nor is there anything in the codicil to alter this construction or to show a different

232 intention of the testator. *It is plain that the testator by his codicil only designed that the land to be purchased should stand in place of the money before absolutely bequeathed, if the occasion should arise for such substitution; but in point of fact no such substitution was ever made.

We are therefore of opinion, that there is no error in the decree of the circuit court upon the construction of the will of the testator; and the same be affirmed.

DECREE AFFIRMED.

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233 *Utterback's Adm'r v. Cooper.

March Term, 1877, Richmond.

1. **Debtor as Executor—Administrators.***—Although at common law the appointment by a creditor of his debtor as executor, operated, as against legatees and distributees, with certain exceptions, as a release of the debt, this rule never applied to a debtor who was appointed administrator of his creditor.

2. **Same—Remedy.**—If the obligor of a bond take out administration to the obligee, and dies, the administrator *de bonis non* of the obligee may maintain an action for such debt against the executor of the obligor. And so if the debtor administrator is removed from his office the action may be maintained against him by the administrator *de bonis non* of the obligee.

3. **Same—Executor's Lien.**—A lien given to secure the debt due from an executor or administrator to his testator or intestate, is of course discharged when the debt is actually paid to the creditors or legatees and distributees of the creditor; but the introducing the debt into an administration account, as a charge to the executor or administrator, is not sufficient to discharge the lien, either as against creditors, legatees or distributees of the creditor, or as against the sureties of the executor or administrator.

4. **Facts in This Case—Decision.**—A sold to his son U a tract of land, taking his bonds for the purchase money, and a deed of trust on the land to secure them. He died, and his son U qualified as his administrator. Shortly afterwards U obtained a loan of money and stock from C, and gave a deed on this same land to secure it. Upon a bill by C against the adm'r *de bonis non* of A, and U and his sureties on his official bond, to enforce his lien; the court being of opinion, from all the evidence, that U had not paid any part of his debt to A, though he represented to C he had done it, and that he was fraudulently trying to get rid of the lien in favor of A, in order to raise money for his own purposes, and that C either knew, or might have known, if he had wished it, the facts, and made the loan with a knowledge of them, or in willful ignorance—Held in favor of A's estate and U's sureties, that the lien to secure A's debt was a valid subsisting lien, and had preference of the lien of C.

234 *This was a suit in equity in the circuit court of Fauquier county, brought in February 1868 by E. T. Cooper, of Baltimore, to enforce the execution of a deed of trust executed in July 1866 by Charles H. Utterback, by which said Utterback conveyed to R. W. L. Rasin a tract of land in the county of Fauquier, in trust to secure to Cooper the payment of a note of $11,000. Charles H. Utterback, Charles T. Green, administrator *de bonis non* of Armistead Utterback, deceased, and others, were defendants. The undisputed facts in the case are as follows:

On the 2d of February 1859 Armistead Utterback conveyed a tract of land in Fauquier county to his son Charles H. Utterback, for the price of $6,254.34; and Charles T. executed to his father six bonds, each for the sum of $1,042.39, payable on the first of January 1863-'64, '65, '66, '67, '68, with interest

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***Appointment of Debtor as Guardian.**—In Bank of Va. v. Richmond, 79 Va. 113, the principal case was cited for the proposition that where fiduciary funds are paid over to a person who subsequently is appointed guardian of the equitable owner of such funds, his appointments and qualification operate to create assets from such funds, *eo instanti*, citing also Harvey v. Steptoe, 17 Gratt. 289; Farmer v. Yates, 23 Gratt. 145; Brown v. Lambert, 33 Gratt. 256. See also Williams v. Sloan, 75 Va. 149; Allen v. Shriver, 81 Va. 185.

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from January 1st, 1863; and at the same time he executed a deed conveying the land to John P. Phillips, as trustee, to secure the payment of the bonds.

Armistead Utterback died intestate in December 1862, and no administration was taken on his estate until the 25th of September 1865, when Charles H. Utterback qualified as administrator; executing his official bond with three sureties. On the 5th of July 1866 Charles H. Utterback conveyed the said land to R. W. L. Rasin, in trust to secure the payment of a loan of $11,000, with interest, made by E. K. Cooper to the said Charles H. Utterback. The facts in relation to the loan of this money, and the knowledge of Cooper and his conduct in relation to it, was the important question in the cause; and on this subject the judges of this court differed; and their views will be seen in the opinions of JUDGES MONCURE and STAPLES. Prior to February 1867, Charles H. Utterback was 235 *removed from the administration of Armistead Utterback's estate, and on that day Charles T. Green qualified as administrator *de bonis non.*

There was a decree in favor of Cooper, and an appeal by Armistead Utterback's administrator to this court.

Wm. Green, for the appellant.

John S. Mosby, for the appellee.

MONCURE, P. This case has been argued very elaborately and ably by the learned counsel on both sides, who have quoted and commented on a great many authorities, but in my view of the case, it will not be necessary to consider many, if any of them, as I think it depends upon facts and principles which admit of little or no controversy. And,

First, in regard to the facts of the case. On the 5th of July 1866, Charles H. Utterback, of the county of Fauquier, Virginia, executed his negotiable note for eleven thousand dollars, payable two years after date, to the order of Edward K. Cooper of the city of Baltimore, at the National bank of Baltimore; and also executed his four other negotiable notes, each for the sum of three hundred and thirty dollars, payable, respectively, six, twelve, eighteen and twenty-four months after date, to the same order, at the said bank; the said last mentioned sum being the amount of the semi-annual interest on the said first mentioned sum. And on the same day and year the said Charles H. Utterback, by deed bearing the same date, conveyed to Robert W. L. Rasin, of Baltimore, a certain tract of land in said county, containing 312 acres, 2 roods and 34 perches 236 of land, which was *conveyed to said Charles by his late father, Armistead Utterback, by deed bearing date on the 2nd day of February 1859, and admitted to record in the clerk's office of the said county on the following day. Also another tract of land in said county, described in first mentioned deed, as containing 131 acres, 3 roods and 4 poles, in trust to secure the payment of the said five negotiable notes.

At the time of the execution of the said deed of trust of the 5th day of July 1866, there remained of record in the clerk's office of the said county of Fauquier, and unreleased, a deed of trust on the said tract of land containing 312 acres, 2 roods and 34 perches, dated the 2d day of February 1859, between said Charles H. Utterback of the first part, John P. Phillips of the second part, and said Armistead Utterback of the third part; executed to secure the payment of six bonds, each for the sum of $1,042.39 with interest from the 1st day of January, 1863, payable on the first days of January 1863, 1864, 1865, 1866, 1867 and 1868, respectively, and given by the said Charles to the said Armistead for the said last mentioned tract of land.

The controversy in this case is about the said 312 acres, 2 roods and 34 perches of land, and is beween the said Edward K. Cooper on the one side, and those claiming the estate of Armistead Utterback on the other; the former claiming a lien upon it under the said deed of trust of the 5th day of July 1866, freed and discharged from the lien under the said deed of trust of the 2d day of February 1859; the debt secured by the last mentioned lien, having, as he insists, been paid and satisfied; and the latter, on the other hand, claiming a lien under the said deed of the 2d 237 *day of February 1859, the debt secured by that lien not having, as they insist, been paid and satisfied.

The said note for $11,000 was given for $5,000, money borrowed, and eighty-five shares of Navassa Phosphate Company's stock, bought at $70 per share, by the said Charles H. Utterback through the agency of Henry M. Willis, a property broker of Baltimore, from the said Edward K. Cooper. The parties to the said loan and sale were total strangers to each other at the time the negotiations of the transaction commenced, to-wit, in May or June 1866. At that time Charles H. Utterback came from his home in Fauquier county, Virginia, to the city of Baltimore, and proposed, through his said agent, to the said Cooper, to borrow the money and purchase the stock on the terms aforesaid, and to secure the payment of the amount which would become due on the transaction by a deed of trust on his said two tracts of land in the said county, which he represented as ample security for the said amount, after paying the only existing encumbrances upon the said land, which he represented as consisting of some judgments of comparatively small amount. Cooper replied that he "would accept the proposition, provided that on examination the property proved to be sufficient to secure the loan and purchase money and the title proved satisfactory to Mr. Ridgely," the counsel of Cooper in Baltimore. Cooper "sent James M. Rasin to Virigina to report to" him "his estimate of the value of the property, and on his return was satisfied of its sufficiency in value. Mr. Ridgely in the meantime discovered that, in addition to judgments against the property, there was a deed of trust or mortgage to secure the payment of certain alleged indebtedness to Armistead Utterback." The said Charles, "on

having his attention called to this, stated
238 *that it was only an apparent, not an actual indebtedness; that the said Armistead Utterback was his father, and was dead; that he, the said Charles H. Utterback, was the administrator of the said Armistead; that he had paid off all the other distributees of the estate and all the debts thereof, and only awaited the meeting of the court to have the account formally closed and the apparent lien released." Cooper took him to said Ridgely, who was acting as the former's counsel. "Utterback returned to Virginia, and brought back with him certain papers, which he exhibited to Mr. Ridgely in confirmation of what he had said to" Cooper; "and the transaction was finally consummated." The foregoing account of it is extracted from the deposition of said Cooper in the case. The following is extracted from the deposition of said Ridgely, who, as the plaintiff's attorney, was requested to examine the title and prepare the papers. "I applied to Mr. Utterback for the title papers, and the information he had to communicate about the title. He produced to me a recorded deed to himself from his father, and a certificate from Mr. Jennings, the clerk of Fauquier county court, showing the existence of several judgments against himself. He showed me also another deed for a small portion of the property adjoining his principal farm. He also stated that copies of the judgments, with the orders of the respective counsel to enter the same satisfied, were in the possession of the Farmers and Merchants National Bank; that it would take about $1,700 or $1,800 to pay off these incumbrances, and that was to be done out of the money to be received from Captain Cooper. I told him that the certificate was but partial, and that there was no certificate about deeds or mortgages given by him.

He said that there was no other incum-
239 brance *on the property, but the judgments of which he had given me a list. I told him that I could not pass the title without an examination of the land records, and that he must bring me a certificate from Mr. Jennings, the clerk, showing that there were no deeds of trust or mortgages. Reluctantly he acquiesced and submitted, and returned to Virginia to procure the necessary certificates." "About the 5th of July he returned, and produced Mr. Jennings' certificate, showing that he had conveyed the property by deed of trust in favor of his father to secure the payment of six notes of a little over $1,00 each, with the interest thereon. He explained the deed of trust as practically satisfied. He said that he had paid the three first notes, and took them up in the lifetime of his father, but that in the ups and downs of the war they had been lost. In regard to the other three notes he explained that they had been paid by himself as administrator of his father's estate, and would be duly entered satisfied at the next term of the court. He also produced to me a certificate from the commissioner in chancery of Fauquier county" "confirming this statement, and that the property would be relieved from the lien of those notes mentioned in the deed of trust in favor of his father, Armistead Utterback, at the next term of the court. He said that he had more than paid to the other distributees of his father's estate their proportion thereof, and was a creditor of the estate. He also produced a note to himself from his counsel, Mr. Brooke, in which he said that he sent him the deeds referred to in my testimony, and the certificate from the commissioner in chancery, and asked what more could Cooper's counsel here in Baltimore require in consummation of the title; and on the

faith of it all I passed the title. A deed
240 of trust, *being that referred to in the interrogatory, was executed to Mr. Rasin, to secure the promissory notes mentioned in the interrogatory. The $5,000 was applied by me to the payment of the judgments against the estate, amounting to $1,686.57; broker's commissions, my fee of fifty dollars, costs of stamps, and other incidental costs of the deed, were paid out of the fund, and the balance of $2,683.43 was paid to Utterback; and on the 26th day of July 1886 I delivered to him eighty-six shares of said Navassa Phosphate company, which, at the stipulated price of seventy dollars a share, produced $6,020, and he returned to me twenty dollars for Captain Cooper. The consideration for the promissory notes and deed of trust referred to, was the loan of the $5,000 by Cooper to Utterback, as heretofore explained, and eighty-six shares of Navassa Phosphate company sold by Cooper to him."

The commissioner's certificate, referred to by the witness Ridgely, is in these words:

"COMMISSIONER'S OFFICE,
Warrenton, Va., July 2d, 1886.

This will certify that Charles H. Utterback, administrator of Armistead Utterback, has filed before me, as commissioner in chancery for the county court of Fauquier county, three bonds for $1,042.39 each, due respectively on the first day of January 1866, first January 1867, and first January 1868, as vouchers in the settlement of his administration account of said Armistead Utterback's estate, and the said Charles H. Utterback has directed me to credit the amounts of the said three bonds in his said administration account, as receipts which have come into his hands as assets of said estate, and the

same will be entered in said account
241 *as having been paid by said Charles H. Utterback to the estate of his said intestate.

Given under my hand, as commissioner aforesaid, the 2d day of July, 1866.

JOHN W. PUGH."

Under the above is a certificate in these words:

"I, William A. Jennings, clerk of the county court of Fauquier county, do certify that John W. Pugh is a duly appointed, authorized and acting commissioner in chancery of Fauquier county court, as such authorized by law to settle account of administrators and other fiduciaries, and that his signature to the the above certificate is genuine.

Given under my hand this 3d July, 1866.

WILLIAM A. JENNINGS, *C. C.*

The note to Charles H. Utterback, from his counsel, Mr. Brooke, referred to by the witness Ridgely, is in these words:

"WARRENTON, July 4, 1866.

DEAR CHARLES:—I enclose you the deeds from Saunders & Schanot, Mr. Pugh's certificate, to which is added the clerk's certificate of your qualification, and his certificate about Saunders' debt. You have already his certificates of all the judgments, and I do not see what you need further to show your title. You must stamp the deed, and cancel them by writing the initials of the name and date of the deed. Saunders' deed will take four dollars, and Schanot's will take fifty cents. The justice's certificates and the clerk's certificates ought also to have five cent stamps
242 *attached. I have no stamps on hand, but you can buy them. Yours,

JAMES V. BROOKE."

The administration account of Charles H. Utterback on the estate of his father, Armistead Utterback, was never in fact settled by commissioner Pugh, because the said Charles H. countermanded the direction he had given to said commissioners in regard to said settlement, and withdrew the papers he had left in his hands for that purpose, especially his last three bonds to his father for the purchase money of the land, which bonds he afterwards handed to the administrator *de bonis non* of his father. And the said Charles H. Utterback having made default in the payment of such of his said notes to E. K. Cooper as had become payable, except the one for the first semi-annual interest, which became payable six months after date, the said Cooper, in February 1868, instituted this suit for redress. In his bill, filed at March rules 1868, he stated the facts of the case on which he relied, made Charles H. Utterback in his own right, and as former administrator of Armistead Utterback, deceased, Charles T. Green, administrator *de bonis non* of said A. Utterback, R. W. L. Rasin, and W. H. Gaines, administrator of John P. Phillips, deceased, defendants to the bill, and prayed for a decree for the sale of the said land, for the payment of the debt due to him as aforesaid, and for general relief. Various proceedings were afterwards had from time to time in the said suit, including the following, which alone are material now to be mentioned, though some of the others may be hereinafter noticed.

In April 1868, the defendant, Charles
243 T. Green, *administrator *d. b. n.* of A. Utterback, filed his answer, in which he not only claimed the said three bonds which had been handed to him by C. H. Utterback as still remaining due and unpaid to the estate of A. Utterback, but insisted that the other three, alleged by the complainant to have been long since paid, were in fact wholly unpaid.

On the same day, to wit: on the 13th day of April 1868, Louis Shumate, Robert E. Utterback, and Addison W. Utterback, sureties of C. H. Utterback, as administrator of A. Utterback, on their petition, which they filed by leave of the court, were admitted as parties defendant in the cause.

On the 17th of April 1868, C. H. Utterback filed his answer, in which, among other things, he stated that the money loaned by complainant to him was not the sum of $11,000; on the contrary he averred "that all the money loaned by the said complainant was $4,980, and that the balance of the consideration of said bond consisted of 86 shares of Navassa Phosphate stock, fraudulently represented to this respondent to be saleable in the market at the rate of 55 *per cent.* (per share), and which this respondent, under this representation, was induced to take at 70 *per cent.* (per share), making for the 86 shares, the sum of $6,020, which, with the above sum of $4,980, constituted the consideration of the said note of $11,000." Respondent charged that "said E. K. Cooper was a party of these false representations, and was himself connected with the said Navassa Phosphate company. This respondent was not a dealer in the stock market, and had no use for Navassa Phosphate or any other stock, except as a means of raising money, which he needed; and finding it impossible to procure the loan of money, even on the most undoubted security, with-
244 out *submitting to some extortion, he voluntarily agreed to shoulder the loss between the 70 per cent. which he allowed for the stock, and the 55 per cent. represented as its market value. This respondent did not dream however that he was duped so egregiously as he was, until, upon trial, he ascertained that the highest price he could obtain in the market for said stock was 26 *per cent.*, and at this price he was compelled to sell" &c. "It will thus appear that this respondent only in fact received (either in money or value,) the sums of $4,980, $2,236, in all $7,216; and that this was all which the plaintiff gave for this respondent's note of $11,000; and this respondent, insisting that the said transaction is not only tainted with fraud, but also with usury, relies as fully upon both said grounds of defence as if fully and specially pleaded." "This respondent admits, as stated in said bill, that at the time of the pendency of negotiations of said loan, his real estate was encumbered by a deed of trust executed by him to John P. Phillips, to secure six several bonds executed by him to Armistead Utterback, only three of which were due, the rest having been discharged." "His real estate was also encumbered by several judgments for a large amount, and these incumbrances this respondent was required to remove. With this view this respondent did consult his counsel named in said bill, and under the advice of said counsel proceeded as follows: With regard to the judgments, he made arrangements with the creditors that the amount of their respective judgments should be deposited to their credit in a Baltimore bank, and that when this was done the judgment should be considered as discharged. This plan was adopted, and the judgments satisfied out of the $4,980 aforesaid. With regard to the deed of trust,

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this respondent supposed that, as a
245 *debtor, he had a right to pay the debt he owed his father's estate, and being the administrator of that estate, he could pay no one but himself, and could pay himself as administrator only by giving the estate credit in his administration account. He accordingly laid his papers before the commissioner, as stated in said bill, and directed the commissioner to charge him as administrator, with the amount of said three outstanding bonds in an account to be settled by said commissioner." "This respondent then believed, and now believes, that when he laid his accounts before the commissioner for settlement, directing himself to be charged as administrator of the estate of A. Utterback, deceased, with the debt he owed as aforesaid, he was doing what he had the right to do, and that the effect thereof was to discharge the lien of the deed of trust given to secure said debt; and if a different result has followed, it has not been through the agency or by the direction of his said counsel, but in consequence of the loss aforesaid, and the consequent defeat of his plans and purposes." Respondent also made a statement in regard to the receipts for $1,000 each, given to him by three of the distributees, but it is unnecessary to set out the same here.

Notice having been given by the plaintiff of a motion for receiver in the case, and sundry depositions taken and filed in reference thereto, a decree was accordingly made for such an appointment on the 24th of April 1868, and the said C. H. Utterback was injoined from committing waste of the said land.

Many depositions were taken in behalf of the plaintiff, and were filed in September 1868; all of them were taken in Baltimore, and of persons residing there, except that of commissioner Pugh, which was taken in Fauquier county, where he resided. Among
246 *the persons examined as witnesses in behalf of the plaintiff were, H. M. Willis, the person who as agent for the defendant, C. H. Utterback, proposed and negotiated the loan and purchase aforesaid; James M. Rasin, who, as said plaintiff's agent, went to Fauquier to examine the land proposed to be conveyed and report upon its value; R. W. L. Rasin, trustee in the deed executed by C. H. Utterback to secure the said debt to E. K. Cooper; the said E. K. Cooper himself; Charles W. Ridgely, the counsel of said Cooper, to whom was referred the question of title to the property proposed to be conveyed for the security of the debt, and who, as counsel and agent of the plaintiff, carried his arrangement aforesaid with C. H. Utterback into effect; and S. Teakle Wallis, who, as a legal expert, testified as to the law of Maryland on the subject of usury. Only one person was examined as a witness in behalf of the defendants, and that was the defendant C. H. Utterback himself. It is unnecessary, at least for the present, to state any part of the testimony of any of the witnesses or of the substance thereof; but so much of the same as may be necessary to be noticed in this opinion will be noticed therein hereafter.

On the 9th of September 1868, Robert E. and A. W. Utterback, two of the sureties of C. H. as administrator of Armistead Utterback, and also two of the children and distributees at law of said Armistead, filed their answers; and on the 17th day of the same month Lewis Shumate, the other surety of the said administrator, filed his answer.

On the 18th of September 1868 the cause came on to be heard; when the court, without deciding any other matters involved in the cause, decreed that an issue be made up and tried on the common law side
247 *of the court, before a jury to be impanelled therefor, to ascertain: First, whether the consideration of the note of $11,000 aforesaid was a loan from the said Cooper to said Utterback, and, if so, whether said loan was upon a consideration usurious in law; and, secondly, whether, if the jury find that the plaintiff sold to the said Charles H. Utterback, on the 5th day of July 1866, eighty-six shares of Navassa Phosphate stock, and that the purchase money of the said stock entered into and formed a part of the consideration of said note of $11,000, there were any false representations or fraudulent devices upon the part of the said plaintiff, by means whereof the said C. H. Utterback was induced to become the purchaser of said stock, and, if so, to what extent the said C. H. Utterback hath suffered damages by reason of said false representations or fraudulent devices; in which issues the said Utterback shall have the right to open and conclude.

On the 1st of October 1870 another decree was made in the cause appointing commissioners to sell the land in controversy.

On the 10th of November 1870 a copy of the verdict rendered by the jury upon the issue ordered in the cause was filed, from which it appeared that the said verdict was as follows: "We, the jury, find, first, that the consideration of the note for $11,000, executed by the defendant Charles H. Utterback to E. K. Cooper, the plaintiff, dated 5th July 1866, and payable two years after date, and secured by deed of trust from said Utterback to R. W. L. Rasin, of date of 5th July 1866, was a loan of money and sale of stock by said Cooper to said Utterback, and that said loan was upon a consideration not usurious in law; we further find, secondly, that there was no false representations or fraudu-
248 lent device on *the part of the said E. K. Cooper, the said plaintiff, by means whereof the said Charles H. Utterback was induced to become the purchaser of said stock called Navassa Phosphate stock; and that said Charles H. Utterback has suffered no damage by reason of any representation or device of said E. K. Cooper. J. W. James."

And it further appeared that the court, being satisfied with said verdict, ordered the same to be certified to the circuit court of Fauquier county sitting in chancery.

And it further appeared that afterwards, during the same term at which said verdict was rendered, a motion was made by the

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defendants to set it aside for misconduct of the jury; which motion was overruled; to which ruling of the court a bill of exceptions was tendered by the defendants and made a part of the record by the court.

On the 23d of September 1871 the cause came on to be heard, on the papers formerly read and the receiver's report returned on the 2d of March 1870 and the verdict of the jury aforesaid. "On consideration whereof, and for reasons contained in a written opinion of the court, then filed and ordered to be made a part of the record in the cause, the court, being of opinion, in accordance with the verdict aforesaid, that there was no fraud or usury in the contract between the plaintiff and the defendant Charles H. Utterback, and that under the circumstances shown by the evidence in the cause the debt due by Charles H. Utterback to Armistead Utterback in the lifetime of the latter, and secured by the deed of trust of the 2d February 1859, became assets in the hands of the said Charles H. Utterback upon his qualification as the administrator of the said Armi-
249 stead Utterback deceased *(the court not expressing any opinion upon the question as to whether the said Charles H. Utterback did or did not pay any portion of said debt to the said Armistead Utterback in his lifetime); and being further of opinion that upon the debt aforesaid so becoming assets in the hands of the said Charles H. Utterback, administrator as aforesaid, the said deed of trust ceased to operate or exist as a security therefor, and that the plaintiff is entitled to subject the real estate conveyed by the said Charles H. Utterback to Robert W. L. Rasin by his deed of trust of the 5th day of July 1866 to the satisfaction and discharge of the debt thereby secured;" decreed that said receiver's report be confirmed, and that one of the commissioners of the court take an account of the amount then due to the plaintiff of the debt secured by the deed of trust aforesaid, and make report to the court.

On the 29th of March 1872 commissioner Pollock made a report under the last mentioned decree; on the 20th of April 1872 the commissioners appointed to sell the land in controversy made their report of said sale, showing that E. K. Cooper had become the purchaser of the land at $25 per acre, making the whole purchase money amount to $7,813.25, and that the purchaser had not been required by the commissioners to comply with the terms of the decree, as by the decision of the court he was entitled to receive the purchase money of the land; and on the day and year last aforesaid the cause came on to be further heard, when the court, without passing upon anything contained in the report of commissioner Pollock, ratified and confirmed the sale of land to E. K. Cooper, as reported, there being no exception to said report of sale.

Afterwards Charles T. Green, admin-
250 istrator *de bonis* **non* of Armistead Utterback, deceased, presented a petition addressed to the judges of this court, complaining of being aggrieved by the decrees and proceedings in the said suit, and praying for an appeal therefrom, which appeal was accordingly allowed by one of the said judges.

The only question in controversy in this case is, as we have seen, whether Edward K. Cooper is entitled to the benefit of the lien of the deed of trust to Robert W. L. Rasin, of the 5th day of July 1866, on the three hundred and twelve acres, two roods and thirty-four perches of land in the proceedings mentioned, freed and discharged from the lien under the deed of trust to John P. Phillips of the 2d day of February 1859, on the same land? In other words, whether the debt provided for by the last mentioned deed has been paid and satisfied, or at least must be considered so to have been, so far as concerns any claim of the said E. K. Cooper under the first mentioned deed?

My opinion is, that this question must be answered in the affirmative.

'I do not consider it necessary in this case to decide the question, whether the qualification of Charles H. Utterback, as administrator of Armistead Utterback, deceased, *ipso facto* and *proprio vigore*, operated a payment and satisfaction of the debt due by the former to the estate of the latter at the time of such qualification.

I think it very probable, from the facts and circumstances of this case, that the very and only purpose of Charles H. Utterback, in qualifying as administrator of his father, was thereby to extinguish the debt he owed to his father, or rather to discharge himself individually from liability for that debt, and to become liable therefor in his char-
251 acter of administrator, so as *to release the land from the lien of the deed of trust of the 2d day of February 1859, and to enable Charles H. Utterback to sell the land and convey a title to the purchaser free from that lien.

If such were the facts and circumstances, and there was no fraud in the transaction, I think a purchaser of the land from Charles H. Utterback would have acquired a good title against the lien of the said deed of trust of the 2d of February 1859, and especially as against the sureties of the said administrator, if they became such, as they probably did in this case, for the very purpose of promoting the object which the administrator had in view in becoming such, to wit: to free his lands from incumbrance, and thus enable him to sell it; and especially also as against such of the distributees of the intestate as may have facilitated a sale of the land by the administrator free from the said incumbrance, as some of them seem in this case to have done by giving him receipts for large sums on account of their distributive portions of the estate, which receipts were to be exhibited to the purchaser.

But it is unnecessary in this case to decide even the question which would arise on the facts and circumstances as last supposed; for the case itself is infinitely stronger in favor of the purchaser than would be the case supposed. In this case, not only is it probable that Charles H. Utterback qualified

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as administrator of his father, and his sureties as such joined him, to enable him to convey the land free from incumbrance; and that some of the distributees gave him receipts for $1,000 each on account of their distributive interests in the estate, for the same purpose; but also the money was loaned by E. K. Cooper to Charles H. Utterback with the express understanding and agreement 252 *between them, that all prior incumbrances on the land, whether by judgment, deed of trust or otherwise, should be paid out of the said money, as a condition of the loan of it, and an amount of the said money more than equal to the whole amount of the said prior incumbrances, was actually paid into the hands of the said administrator, who was in duty bound to apply the same to the payment of the said incumbrances; and therefore the said debt due by him to his intestate's estate, and the incumbrance on the said land therefor, was then at least, if not before, fully paid and satisfied by Charles H. Utterback as an individual to himself as administrator of his father.

Now in this case, it must be remembered, that there was no fraud on the part of E. K. Cooper in this transaction; nor any usury. As we have seen, the jury in this case, to which the present administrator *de bonis non* of Armistead Utterback was a party, so expressly found; and the judge who presided at the trial of the issue, certified that he was satisfied with the verdict; and the court of chancery decreed accordingly.

The cause must, therefore, be considered precisely as if the whole amount of the note for $11,000 had been loaned in money by E. K. Cooper to C. H. Utterback, and there had been no sale of stock by the former to the latter, in part of the consideration of the note.

Suppose such had actually been the case; could there have been any doubt, that the debt due the administrator or individually to his intestate, would have been considered as paid and satisfied; at least so far as E. K. Cooper was concerned? Could the sureties of the administrator or the distributees of the intestate, and especially those who signed the thousand dollar receipts, have doubt- 253 ed it? Could the *honorable counsel of C. H. Utterback who wrote to him the note of the 4th of July 1866, hereinbefore referred to and recited, have doubted it?

The only ground on which a doubt has since been expressed is, that there was fraud on the part of E. K. Cooper in the sale of the stock, and that there was usury in the transaction. But both of these charges have been negatived by the verdict of the jury and the decree of the court; and the only ground of objection on the part of the defendants has thus been swept from beneath them.

Suppose commissioner Pugh had settled the administration account of Charles H. Utterback on the estate of his father, according to the papers and vouchers which were placed in his hands and the instructions which were given him by C. H. Utterback and his counsel, and the report of the commissioner had been confirmed by the court, could it have then been denied that the debt was paid and satisfied? And how would that case have differed in substance from the case as it is? The settled account would not have been itself a payment, but only evidence, however strong, of the fact of payment. That fact, however proved, has the same force and effect.

That E. K. Cooper required the debt due by the administrator, C. H. Utterback, to his intestate's estate to be paid; that the administrator positively agreed with E. K. Cooper to make such payment, as a condition of the loan and sale made to him by Cooper; and that he derived from such loan and sale ample means to make such payment, are facts expressly proved in the case, and proved by the evidence of C. H. Utterback himself.

E. K. Cooper seems to have used an extraordinary degree of caution in the trans- 254 action. He was a total *stranger to C. H. Utterback and his property and affairs; sent an agent to Virginia to examine the land; and employed counsel in Baltimore to advise him as to the title, to prepare the papers, and to carry the whole arrangement into effect. And he acted on the information, and with the assistance, thus received. And he acted in good faith, and without any fraud or usury. How then can it be said, that he is not entitled to the benefit of the lien for which he contracted?

Can it be said that he was bound to see to the application of the money which the administrator derived from him? Certainly not. An administrator is the legal representative of his intestate, and is entitled to receive, and bound to apply in a due course of administration, all debts due to the estate of such intestate, whether due by the administrator himself or any other person. No person who pays him the money is bound to see to its application. A person who participates in a breach of trust or *devastavit* of an administrator, is of course liable as the administrator is; but it is not pretended that E. K. Cooper was guilty of such a participation in this case.

That the debt in this case was due by the administrator as an individual to himself as administrator can make no difference. Surely the administrator whose land was bound under a deed of trust to secure the payment of his debt to his intestate, had a right to pay off his own debt and to redeem his land from the incumbrance, so that he might make sale of it. To whom was he to make such payment? To whom but himself, who was the only legal representative of the creditor? How is a vendee from him to acquire title to the land but by stipulating with him that so much of the purchase money as was nec- 255 essary should be *applied to the payment of the debt, and by paying it to the administrator for that purpose. And if the administrator receives it with that understanding and for that purpose, is not the debt paid, however the administrator may actually apply the money; unless, indeed, the person who pays it fraudulently participates in the

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misapplication, or at least has notice of an intention to misapply it when he makes the payment?

An administrator is a complete legal representative of his intestate, and has power, and is in duty bound, to settle the affairs of his intestate's estate. Such a settlement, fairly made, is as conclusive as if made by the intestate himself in his lifetime. Though the administrator make such a settlement with intent to misapply the funds of the estate, and actually misapply them, those who deal with him are not liable for such misapplication, unless they participate therein, or have notice thereof. It is contended by the counsel of the appellant, that all six of the bonds of Charles H. Utterback to his father, secured by the deed of trust to Phillips, remained unpaid when the money was borrowed by Charles H. Utterback from Cooper. The said Charles proves that only the last three of said bonds remained unpaid, and those only were handed by him to the appellant as administrator *de bonis non* of Armistead Utterback. This proof is conclusive of that fact; but if it were not, Charles H. Utterback, while he was administrator of his father, declared that such was the fact, and made his settlement upon that basis with Cooper, who acted fairly in the transaction, and advanced his money upon the faith of the truth of such declaration, which cannot therefore be now denied as to him. Charles H. Utterback had a deed for the land from Armistead Utterback, subject only to the lien of the deed of trust to
256 Phillips to secure the *bonds for the purchase money. Of course Charles H. Utterback had a perfect right to sell the land and make a good title to the purchaser, subject only to the payment of the prior lien to Phillips, and his only means of discharging that lien was by selling or incumbering the land. He could discharge the lien only by paying the amount of it to the legal representative of his father, and *he* was himself such legal representative. He could therefore lawfully make such payment to himself as such representative, and could in fact only make it in that way. If he had borrowed the whole amount of the eleven thousand dollars mentioned in his bond in money, stipulating as he did with Cooper that the prior lien should be discharged out of the money borrowed, nobody can doubt that the lender would have acquired a lien on the land free from the incumbrance of the deed of trust to Phillips. But he realized from the transaction a sufficient amount of money to discharge the said incumbrance with all the other incumbrances on the land; and it was an express condition of the loan to him by Cooper that he should do so. Is not that precisely the same thing in effect as if the whole amount of the loan had been made in money, at least so far as concerns this case? There was enough loaned in money to pay the prior lien and a stipulation for such payment by the borrower. The whole amount of the loan, beyond what was necessary to pay the prior lien, belonged to Charles H. Utterback, who might receive it in such commodity and on such terms as he pleased. That is a matter between him and the lender, with which the estate of Armistead Utterback has nothing to do.

It seems to me that the foregoing
257 views are conclusive *of this case, and steer clear of most of the difficulties raised in the case by the argument of counsel.

I am therefore of opinion that there is no error in the decree and proceedings complained of, and that they ought to be affirmed.

The foregoing opinion was written some time ago, and was read in conference during the last term of the court, but a majority of the judges not concurring in it, JUDGE STAPLES, one of the majority, was charged with the duty of writing an opinion for them. His opinion was read in conference on Tuesday last, the day before yesterday, before which time I had neither seen it nor heard it read, nor heard any thing of its contents. I have no doubt he prepared it as soon as he could, and read it in conference as soon thereafter as he could. I do not complain, and have no cause to complain of him; and mention what I have just done only to show why I do not make more fully an explanation which his opinion seems to make necessary or proper in regard to mine. I did not ask to delay the decision of the case for the purpose, as it has already been very long delayed, but will now give the explanation as well as I can consistently with the pressure of my present engagements. But it must necessarily be brief and imperfect, though I may hereafter, if I have time before the case is reported, enlarge and try to improve it.

It will be observed that my opinion is based on the existence, among other things, of three facts which I think are fully sustained by the record; though I do not mean to admit, by any means, that the existence of all of them is necessary to the success of the appellee Cooper in this cause. Those three
258 facts, with such *brief commentaries as I deem necessary, are as follows:

1st. There was no usury nor fraud in the transaction in the proceedings mentioned between Cooper and Charles H. Utterback. On the 18th of September 1868 a decree was made in the cause that an issue be made up and tried on the common law side of the court, before a jury to be empanelled therefor, to ascertain: first, whether the consideration of the note of $11,000, executed by the defendant Charles H. Utterback to E. K. Cooper, the plaintiff, dated on the 5th day of July 1866, and payable two years after date, and secured by deed of trust from said Utterback to R. W. L. Rasin, of date the 5th July 1866, was a loan from the said Cooper to said Utterback, and if so, whether said loan was upon a consideration usurious in law; and, secondly, whether, if the jury find that the plaintiff sold to the said Utterback on the 5th day of July 1866, eighty-six shares of Navassa Phosphate stock, and that the purchase money of said stock entered into and performed a part of the consideration of said note of $11,000, there were any false representations

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or fraudulent devices upon the part of the said plaintiff, by means whereof the said Utterback was induced to become the purchaser of said stock; and if so, to what extent the said Utterback hath suffered damages by reason of the said false representations or fraudulent devices—in which issues the said Utterback shall have the right to open and conclude. In September 1870 the said issue was tried, and a verdict was found in these words: "We the jury find, first, that the consideration of the note for $11,000," &c., describing it, "was a loan of money and sale of stock by said Cooper to said Utterback, and that said loan was upon a consideration not usurious in law; we further
259 find, *secondly, that there was no false representation or fraudulent device on the part of said Cooper by means whereof said Utterback was induced to become the purchaser of said stock, and that said Utterback has suffered no damage by reason of any representation or device of said Cooper." And the court, JUDGE KEITH, being satisfied with said verdict, ordered the same to be certified to the circuit court of Fauquier county, sitting in chancery. On the 23rd of September 1871, the cause came on to be heard on the papers formerly read, &c., and the verdict of the jury aforesaid. On consideration whereof, and for the reasons contained in a written opinion of the court, filed and ordered to be made a part of the record in the cause, the court being of opinion, in accordance with the verdict aforesaid, that there was no fraud or usury in the contract between the plaintiff and the defendant Utterback, and that under the circumstances shown by the evidence in this cause the debt due by Charles H. Utterback to Armistead Utterback in the lifetime of the latter, and secured by deed of trust of the 2nd of February 1859, became assets in the hands of the said Charles, &c., and being further of opinion that thereupon the said deed of trust ceased to operate as a security for said debt, and that the plaintiff is entiled to subject the real estate conveyed by said Charles H. Utterback to said Rasin by said deed of the 5th of July 1866 to the satisfaction of the debt thereby secured, proceeded to decree accordingly. Now it thus clearly appears that the fact that there was no fraud or usury in the transaction aforesaid between said Cooper and Utterback is *res adjudicata*, and cannot be denied by any of the parties to this cause, as to all of whom, therefore, it must be regarded as conclusive. I have therefore so treated it in the foregoing opinion.
260 *2dly. There was no intention on the part of Cooper in his transactions with Charles H. Utterback to defraud or injure in any respect the estate of Armistead Utterback. As said before, he and said Charles were perfect strangers when they commenced dealing with each other in this transaction, one living in Baltimore, and the other in Fauquier county, Va. Cooper, so far as appears from the record, was not anxious to make the loan, and declared his intention not to make it unless or until all the liens upon the land, if any, were discharged and released. He required proper certificates to be produced in regard to such liens; and all the judgment liens which appeared to exist were paid out of the purchase money. Not satisfied with Utterback's account of the matter, or even with the certificates thus produced, he employed counsel in Baltimore to come to Virginia and inquire into an investigate the title. Upon ascertaining in that way the existence of the deed of trust to Phillips to secure a debt to his father, Armistead Utterback, which deed was still on record unreleased, he enquired about it of said Charles, who assured him that the said debt was satisfied; that three of the bonds (one-half of the debt) had been paid to his father in his lifetime; that he was his father's adminisrator, duly appointed and qualified, as was the fact; that he and his two brothers and a sister were the next of kin and distributees at law of his father, and as such entitled to his estate; that he had paid to his brothers and sister their portion, and he exhibited a receipt of each of them to himself as administrator on account of their distributive portions for the sum of $1,000; his two brothers being two of the three sureties in his administration bond; that he had placed his accounts and vouchers in the hands of a commissioner in chancery for the settle-
261 ment of his *administration account, with directions to charge him in such settlement with the remaining bonds to his father, which he placed in the hands of said commissioner for the purpose. And he produced and delivered to said Cooper a certificate from the commissioner, showing him that his representation in regard to such settlement was true, and that the commissioner would make and return the settlement accordingly. And he also produced and delivered to said Cooper the letter, of which a copy is inserted in this opinion, from his counsel, Mr. Brooke, a lawyer of distinction of Virginia, perhaps well known by reputation, if not to Cooper himself, at least to his counsel. On the production of these papers, the counsel of Cooper in Baltimore did not hesitate to certify the title of Utterback to the land, trusting, as well he might, that so soon as the settlement could be made and returned, the lien of the deed of trust to secure the debt to Armistead Utterback would be released. Accordingly the arrangement between Cooper and Charles H. Utterback was made with the advice and under the direction of the counsel of the former, and in accordance with the opinion of the counsel of the latter. Now in in all this transaction certainly Cooper acted in the most perfect good faith, and without any intention to defraud or injure in any respect the estate of Armistead Utterback, and without any knowledge of any such intention on the part of Charles H. Utterback, if any such existed. Charles H. being the complete personal representative of Armistead Utterback, had a perfect iegal right to receive debts due to his intestate's estate, and give acquittances for the same, even though due by himself, and all persons dealing with him in good faith must be perfectly safe in so doing, even though the administrator may himself
262 have been guilty of *fraud in regard to

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the estate, without any participation or knowledge on the part of such persons. If, therefore, Cooper was informed and verily believed either that Charles H. owed nothing to the estate of his father, or that he owed nothing beyond the amount of money actually paid by Cooper to said Charles H., and that the account and vouchers of said Charles H., as administrator of his father, were in the hands of commissioner Pugh for settlement, showing that the administrator had fully paid all that he owed to the estate of his intestate, and that the report of the commissioner would immediately be returned to and confirmed by the court; and if the honorable counsel of the administrator certified that his title to the land was such, as that Cooper could safely purchase it from him, surely Cooper was safe in making such purchase, no matter what was the actual state of accounts between the administrator and the estate of his intestate. As between the administrator and Cooper, the land belonged to the former, and he could convey a perfect title to the latter. He could sell it to him on whatever terms he pleased.

Thirdly. But even if the debt due by the administrator to the intestate for the land should not be considered, as between the administrator and Cooper, as having been fully paid at the time of the sale by the former to the latter, an ample amount of the purchase money to make such payment was paid by the latter to the former, whose duty it was to apply it accordingly; and it must be considered in law as having in fact been so applied, so far as the said Cooper is concerned. After making such application the surplus belonged to the administrator in his own right, who might invest it, or any
263 part of it, in purchase of stock of *the Navassa Phosphate company, or anything else he pleased.

In every view of the case, therefore, I am of opinion that the law of it, and also the equity and justice of it, are for Cooper; and I am for affirming the decrees appealed from.

STAPLES, J. This case was first heard when JUDGE BOULDIN was a member of this court. His sickness and death, and a division of opinion among the other judges prevented a decision at that time. The case has again been argued very recently before a full bench. The argument on both occasions, oral and written, was able and exhaustive. I shall not attempt to follow the learned counsel in these discussions. Such an undertaking would swell this opinion into the dimensions of a volume. I propose only to discuss such portions of the evidence as may be deemed must material, and to state the principles of law which in my judgment control the case.

It may be well in the beginning, perhaps necessary, to state some of the more material facts established by the testimony, and as to which there is no controversy. In the year 1859 Armistead Utterback, of the county of Fauquier, sold and conveyed to his son, Charles Utterback, a tract of land in that county at the price of $6,254.34, evidenced by six bonds of $1,042.39 each, payable annually, the first falling due the 1st of January 1863, and all bearing interest from the latter date. To secure the payment of these bonds, Charles Utterback executed a deed of trust upon the land, which was duly admitted to record. Armistead Utterback died in December 1862, intestate, but no administration was taken on his estate until the 25th September 1865.
264 when Charles Utterback *qualified as his administrator. It does not appear that he ever returned any inventory of the estate, or made any settlement of his accounts as administrator.

In May 1866, Charles Utterback went to the city of Baltimore to borrow money. He there met with Edward K. Cooper, the plaintiff, who after some negotiation, to be hereafter more particularly considered, advanced as a loan in money and stock the sum of eleven thousand dollars. In order to secure the payment of this sum, Cooper took a deed of trust upon the same tract of land embraced in the trust deed of Charles Utterback had previously executed for the benefit of his father. This loan as claimed by Cooper, was based not only upon the fact that Charles Utterback was administrator of his creditor, but upon certain representations made by him, and papers produced tending to show that the debt due Armistead Utterback's estate was satsified, and the deed of trust discharged.

It may be well here to mention that in February 1867 Charles Utterback was removed from his office of administrator, and Charles T. Green was appointed administrator *de bonis non* of Armistead Utterback. The controversy in this case is between Cooper on the one hand, asserting the priority of his deed of trust, and the administrator *de bonis non* and the sureties of Charles Utterback on the other, claiming that the debt of Charles Utterback to his father's estate has never been paid and the deed of trust in nowise released or affected.

The cause coming on to be heard at the September term, 1870, of the circuit court of Fauquier, the judge of that court was of opinion, that under the circumstances shown by the evidence, the debt due by
265 *Charles Utterback to his father's estate became assets in the hands of the said Charles H. Utterback upon his qualification as administrator; and that upon the debt aforesaid so becoming assets in the hands of the said Charles H. Utterback, the said deed of trust ceased to operate as a security, and that Cooper, the plaintiff, was therefore entitled to subject the real estate embraced in the deed of trust to the payment of his debt; and he decreed accordingly. From that decree an appeal was taken to this court.

The counsel for the appellee, in support of the decision of the circuit court, maintains, that when administration is granted the debtor upon the estate of his creditor, the administrator, being the person to *pay* and to receive, is considered as having paid the debt and as holding the amount in his hands as assets; and the debt having once become assets, no act of the party can return them back as an

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obligation. The necessary result of all which is, the debt being gone, the security for its payment is also gone. That this position is untenable can, I think, be demonstrated both upon authority and upon principle.

At common law, the appointment of the debtor as executor operated as a release or extinguishment of the debt. Various reasons have been assigned for this rule. By some it is said that the appointment suspends the right of action, and, being once suspended by the voluntary act of the creditor, is gone forever. By other judges it has been said that the appointment is to be regarded in the light of a specific legacy to the debtor for the purpose of discharging the debt. But whatever may have been the reasons for the rule, the rule itself was subject to well established exceptions. For example, it never applied as against the creditors of the testator, unless there **266** were sufficient *assets to pay the debts; because courts of equity would not permit the testator voluntarily thus to withdraw from his estate funds necessary for the payment of his creditors.

The rule did not apply where a different intent was manifest on the face of the will, as where a district legacy was given by the same instrument to the executor. LORD THURLOW in *Carey* v. *Goodinge*, 3 Brown Ch. Cas. 110, and SIR WM. GRANT in *Berry* v. *Usher*, 11 Ves. R. 87, 90, held that the appointment of a debtor to be executor is no more than parting with the action, and should not operate as a release even against legatees. It will thus be seen that courts of equity would not permit an extinguishment of the debt even in the case of executors; and I think there is as little doubt but that in favor of the creditors and legatees, they would when necessary keep alive and enforce all liens given for its payment. The rule itself has been long since abolished in Virginia by statute, and it is now provided, "The appointment of a debtor executor shall not extinguish the debt." Code of 1860, page 597. No such provision was made with reference to administrators because none was necessary. The granting of adminisration being the act of law, its acceptance by the debtor was never permitted to work a release or extinguishment of the debt.

This distinction is recognized by the best authorities everywhere. In 2 Williams on Executors, page 1126, the doctrine on this subject is thus laid down: "It must be remarked that where the debtor is appointed executor, the suspension of the remedy is the voluntary act of the creditor. and therefore the action is gone forever. But the effect is different where the remedy is suspended by the act of the law. Thus if administration of the effects of a creditor be committed **267** *to the debtor, this being the act of the law, is only a temporary privation of the remedy. Therefore if the obligor of a bond takes out administration to the obligee, and dies, the administrator *de bonis non* of the obligee may maintain an action for such debt against the executor of the obligor. In 1 Toller on Ex'rs 348, an author of acknowledged merit and accuracy, the same doctrine is laid down in language equally emphatic. I might quote to the same effect the unanimous decision of the court of common pleas, when SIR EDWARD COKE was chief justice, *Needham case*, 8 Rep.; *S. C.*, Browne 62, 64; also the opinion of LORD HARDWICKE, the greatest of English chancellors, *Hudson* v. *Hudson*, 1 Atky. R. 460; 1 West R. Hardwicke 156, 7, 8; but I will content myself with a simple reference to these cases.

This precise question has not been adjudicated by this court; but we have in 2 Lomax on Ex'rs 100, and in Robinson's Practice an unqualified approval of the English rule. In the last named work, the author quoting the authorities states: "But after the administration shall be no longer in force, either because of its repeal or of the administrator's death, then an action may lie, for the debt has all along subsisted, and then there may be a proper plaintiff, viz: the administrator of the first intestate." See also *Kelsey* v. *Smith*, 1 How. Miss. R. 68-86, *Bacon* v. *Fairman*, 6 Conn. R. 121.

In opposition to these cases, the learned counsel for the appellee has cited a number of decisions, or, rather, the *dicta* of certain judges. They are, however, confined to two or three states, principally Ohio and Massachusetts. In one of the Ohio cases, administrators are placed on the same ground with executors; and the reason assigned is, **268** that as the same hand is to *pay and receive, the right of action is suspended, and being once suspended is always suspended. *Bigelow's ex'r* v. *Bigelow's adm'r*, 4 Ohio R. 138. The learned court utterly misconceives the principle upon which the appointment of the debtor as executor operated to extinguish the debt at common law. It was because the right of action was suspended *by the voluntary act of the party*. But as the granting administration is the act of the law, and as the law does not permit its act to work a wrong, the remedy is only temporarily suspended when the debtor becomes administrator. In regard to the Massachusetts cases, the learned counsel for the appellant has demonstrated that the opinions of judges there fully sustain both views of this question. A careful examination of the decision will show that neither CHIEF JUSTICE SHAW nor CHIEF JUSTICE PARKER held to the view laid down in the Ohio case just cited. The opinion of CHIEF JUSTICE SHAW seems to have been, that as the same hand is to pay and to receive, the law presumes as against the *debtor himself*, that he has done that he was legally bound to do. The persons beneficially interested in the estate may require the administrator to account for his debt as assets, and to credit it in his administration account. They are not bound to do so; they may, if they please, waive this right, and proceed upon the original security for the debt. *Sigourney* v. *Wetherill*, 6 Metc. R. 553; *Goswick Man. Comp.* v. *Story*, 5 Metc. R. 310; *Stephen's adm'r* v. *Gaylord*, 11 Mass. R. 256; *Winship* v. *Bass*, 12 Mass. R. 194; *Kinney* v. *Ensign*, 18 Pick. R. 232.

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In the state of New York they have a statute like ours, abolishing the common law rule in regard to executors; but it further provides, that the debt shall be included in the inventory among the credits and effects of the deed, and the executor shall be
269 liable for *the same as so much money at the time the debt becomes due.

In the recent case of *Loverhill* v. *Suydam*, 59 New York R. 140, decided in 1874, the court of appeals in construing this statute say, that when an executor in the performance of his trust pays the amount due from him to the estate, his debt and all the liens on his individual property, by which the debt was secured, will, of course, be discharged. But before this is done, it was not the intention of the legislature, while preserving the debt, to discharge the liens by which it might be secured. Subjecting the executor as between him and those interested in the estate to liability for his debt, as for so much money in his hands, does not necessarily discharge a lien on the real estate by which the debt may be secured. That provision merely superadds to his original obligation a liability to account as executor for the amount of the debt, and was intended to facilitate the administration, and for the benefit of the estate, and not for that of his individual creditors, who may have subsequent liens on the property." In my judgment nothing could be more just and sensible than the view here presented. Every word that is said applies with equal force to the case of an administrator. The New York statute made no provision for the latter, not because it was intended to place the administrator upon a higher ground than an executor, but because, as already stated, his appointment was never deemed a release or discharge of the debt.

It is very true that an administrator, while his letters of administration remain in force, cannot at law be sued for the debt, because in these courts a party cannot be both plaintiff and defendant. But I can see no good reason why those interested in the es-
270 tate, *creditors and legatees, or distributees, cannot bring him to account, and enforce all the securities he has given for the payment of the debt. Is it possible that in such a case he can insist that the individual debt is paid, and the lien discharged by his qualification as administrator; that his sureties shall answer for a *devastavit* if he is insolvent; and if they are insolvent, creditors and legatees shall sustain the loss. But if on technical grounds there is any difficulty on this point, surely there is none where the administration is revoked, and an administrator *de bonis non* has been appointed. In the language of CHIEF JUSTICE SHAW, in *Kinney* v. *Ensign*, 18 Pick. R. 232, the holding the fact of a debtor taking administration upon the estate of a creditor to be a payment, may be deemed a legal *fiction* adopted for purposes of justice and convenience, but such a legal fiction will never be allowed to go so far as to work wrong and injustice.

It is the duty of a commissioner to charge the executor or administrator with all solvent debts due the estate, with or without direction. It is the duty of the executor or administrator to charge himself in such case. When the debt he owes the estate is well secured, parties interested in the estate may properly require he shall account for it as assets; and thus superadd to his individual obligation that of administrator. But the mere fact that the debt is credited in the administration account cannot destroy the original security given for the payment. That security will be kept alive by a court of equity so long as the debt is unpaid, particularly if the debtor has no other means of discharging the obligation. It would be most unjust to hold that the sureties upon the administration bond are liable for the administrator's debt as assets received whenever he charges himself with the
271 debt, *and at the same time hold that all the securities which made the debt solvent are by the same act extinguished. In the case of *Ipswich Man. Co.* v. *Story, executor*, 5 Metc. R. 310, 314, a decision much relied on by the appellee, CHIEF JUSTICE SHAW concedes that where the administrator has accounted for the debt as assets, and it is so credited to the estate *without objection*, yet if the administrator were to die or be removed from office before a decree of distribution or satisfaction of such decree, and it should turn out the administrator has no means to satisfy the amount due on his administration account, a court of equity might hold even in favor of the sureties on the administration bond, that a mortgage given to secure the debt should not be deemed to be discharged.

It is only remarkable there should ever have been any doubt upon the point. In the case of *Smith* v. *Gregory*, 26 Gratt. 248, this court expressed its entire disapprobation of the doctrine which accords to a fiduciary, at his pleasure, the right to change his liabilities, by charging himself in a particular character with a debt, and thus throw the burden on one set of sureties to the relief of another. A good deal of what is there said applies very strongly to the case under consideration.

Bearing these principles in mind, it may be affirmed with entire confidence, that when the negotiation with Cooper for a loan commenced in Baltimore, the debt which Charles H. Utterback owed the estate of his father, Armistead Utterback, was still subsisting as an individual liability, and the deed of trust given by him for its payment was in full force and effect. It is very true that Charles being the administrator of that estate, the right of action was temporarily suspended; but the obligation of the contract re-
272 mained. When, *in February 1867, the administration was revoked and an administrator *de bonis non* appointed, the right of action revived, and all the remedies and securities for the debt were as complete as though Charles H. Utterback had not been the administrator. This is so, indisputably, unless in the meantime some act was done which operated as an extinguishment of the

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individual liability and a consequent discharge of the deed of trust. Conceding for the present that the acts done by Charles H. Utterback as administrator, if *bona fide* done, would extinguish his individual liability and fix it upon him as administrator and upon the sureties to his official bond, it must also be conceded that these acts, if done *mala fide*, would have no such effect, even so far as Cooper is concerned, provided the latter had notice of the fraudulent purpose on Utterback's part. In the language of LORD THURLOW, in *Scott* v. *Tyler*, 2 Dickens' R., "fraud and covin will vitiate any transaction and turn it into a mere color. If one concerts with an executor by obtaining the testator's effects at a nominal price, or at a fraudulent undervalue, or by applying the real value to the purchase of other subjects in his behalf, or *in extinguishing the private debt of the executor, or in any manner contrary to the duties of the office of executor*, such conduct will involve the seeming purchaser and make him liable for the full value." But it must never be forgotten, it is not necessary that the person so concerting with the fiduciary shall have actual knowledge of the facts. If there be circumstances which in the exercise of common reason and prudence ought to put a man upon a particular inquiry, he will be presumed to have made that inquiry, and he will be charged with notice of every fact which that inquiry would give him. And this conclusion is a just and necessary one; for if a party means to deal
273 *fairly, self interest, the strongest principle of action, will prompt him to the inquiry; and if he means to deal fraudulently, the rule prevents him from voluntarily shutting his eyes and saying he had no notice. This is the doctrine laid down by this court in *Graff* v. *Castleman*, 5 Rand. 195, and affirmed over and over again in other cases. But further: I understand the rule to be, that if a man has notice that property is subject to an incumbrance, he deals with it at his peril; for he is affected with constructive notice of every fact to a knowledge of which he would have been led by an inquiry after the incumbrance itself, or other circumstance affecting the property of which he had actual notice. Kerr on Frauds and Mistake, 237, note.

How strongly these principles apply to the present case is now to be seen. Upon the arrival of Charles Utterback in Baltimore, in May 1866, in pursuit of money, he was told that Edward K. Cooper would accommodate him if he would take part of the loan in money, that is to say, $5,000, and the balance in the stock of the "Navassa Phosphate company," that is to say eighty-six shares at $70 per share, the whole amounting to the sum of eleven thousand dollars. Now what this Navassa Phosphate company was, what was its precise business, its capital stock, who were its stockholders, or when it was established, this record does not inform us. The only information we have is derived from Mr. Edward K. Cooper himself, or those in his interest. And he and they have not deemed it necessary to enlighten us upon these points. He tells us he was one of the executive committee, and originally owned 9,000 shares, of which he had sold five thousand. The greater part of which he had disposed of in connection with real estate —the owner or vendor receiving
274 *a certain proportion in money and the balance in the "Navassa Phosphate stock." Indeed Mr. Cooper, according to his own account, seems to have been extensively engaged in buying and selling this stock in a private way, never paying less than $45 nor more than $50 per share. A Henry M. Willis, who figured first as Utterback's agent in negotiating the loan for Utterback, and afterwards as Cooper's witness—and a most liberal witness he is—gravely tells us that in 1866 he believes he could have purchased one half the city of Baltimore, by giving that stock in part payment, on as favorable terms as Utterback took it. We have nothing in the record to show how much one half the city of Baltimore is worth, with its 400,000 inhabitants, and we can, therefore, only conjecture the magnitude of this calculation. And yet in the face of this assertion it is in proof, that whenever the stock was offered in market, the price varied from $26 to $35 per share. In but one single instance besides the present, was it ever sold for as much as $70 per share, and that was to a citizen of Virginia, who was anxious to borrow $10,000, but could only obtain the accommodation by taking one-half in stock at $70 per share: a desperate expedient to which a needy borrower was no doubt forced to submit by inexorable necessity. To show the estimate Cooper himself placed upon the stock when Utterback was hawking his eighty-six shares about the streets of Baltimore, unable to find a purchaser, he offered it to Cooper at $55 per share; but the latter declined to have anything to do with it, saying he had as much as he wanted, and Utterback at last sold the whole of it at $26 per share in the same market. What Cooper himself paid for the stock originally, he does not tell us. If it cost him as much as $50 per share, which is very improbable, he real-
275 ized *by the transaction with Utterback a profit of nearly $1,800. It is not surprising he sent an agent all the way to Virginia, at his own expense, to examine the land and "report whether it would be a sufficient security for the debt."

I am aware that a jury empanelled in the circuit court to try an issue between Cooper and Utterback, have found that this transaction is not usurious. How such a verdict could have been found upon the evidence furnished by Cooper himself—I say it with all respect—does indeed excite emotions of astonishment. It is proved by the plaintiff's own witnesses—it stands out indelibly impressed upon every feature of the transaction —that the purpose of the stock was a necessary consideration of the loan. However, it does not concern me to combat the finding of the jury on this point. At all events it was a hard and most unreasonable bargain

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imposed upon an improvident and insolvent man, anxious to obtain money, reckless of the means by which it was obtained, and utterly indifferent to the consequences which might flow from his conduct.

The terms of the loan being agreed on, the next question was as to the security. Utterback represented himself as the owner of two farms in Virginia. He produced a recorded deed from his father for one of them. (The other does not concern us here, for although he had a deed for that also, he had not paid for it.) He also produced a certificate of the clerk, showing judgment liens on the property amounting to some $1,700 or $1,800. The certificate said nothing about deeds of trust and mortgages, and he declared there was no other incumbrances on the property besides the judgments. He made no allusion to the deed of trust he had given his father
276 in 1859; *he deliberately suppressed all information touching its existence. This conduct was of itself sufficient to put Cooper on his guard. Of course if he, Utterback, was so unscrupulous as to deny the deed, he would not hesitate to make any representation which might show it was satisfied. Cooper did find out in some way there was such a deed, and he called Utterback's attention to the fact. Let us see how Utterback met the difficulty. I give his account in Cooper's own words: "Utterback, on having his attention called to this (the deed of trust), stated that it was only an apparent not an actual indebtedness, that the said Armistead Utterback was his father and was dead; that he, the said Charles Utterback, was the administrator of the said Armistead; that he had paid off all the distributees of the estate, and all the debts, and only awaited the meeting of the court to have the account formally closed and the apparent lien released. Utterback then went back to Virginia, and brought back with him certain papers, which he exhibited to Mr. Ridgley (Cooper's counsel) in confirmation of what he said to me." The transaction was then consummated.

This is Cooper's account. Now what were these papers brought back from Virginia by Utterback in confirmation of what he had said? First, the deed of trust to his father. He also produced a certificate of his letters of administration, granted on the 25th September 1865; a private letter from his attorney, written in Fauquier, and a certificate of John W. Pugh, a commissioner in chancery for that county, as follows:

"COMMISSIONER'S OFFICE,
Warrenton, Va., July 2d, 1866.

This will certify that Charles H. Utterback, administrator of Armistead Utterback,
277 has filed before me, as *commissioner in chancery for the county court of Fauquier county, three bonds for $1,042.39 each, due respectively on the first day of January 1866, first January 1867, and first January 1868, as vouchers in the settlement of his administration account of said Armistead Utterback's estate, and the said Charles H. Utterback has directed me to credit the amounts of the said three bonds in his said administration account, as receipts which have come into his hands as assets of said estate, and the same will be entered in said account as having been paid by said Charles H. Utterback to the estate of his said intestate.

Given under my hand, as commissioner aforesaid, the 2d day of July, 1866.

(Signed) JOHN W. PUGH."

Now it will be observed that this certificate says nothing about the payment of creditors and distributees. It makes no reference to the first three bonds embraced in the deed of trust, those due in 1863, 1864, 1865. It only mentions the three last, those due in 1866, '7 and '8. What had become of the first three would be the natural inquiry? Utterback was ready with his answer. I give it in the words of Mr. Ridgley, Cooper's attorney: "He said that he had paid the first three notes, and took them up in the lifetime of his father, but that in the ups and downs of the war they had been lost. In regard to the other three notes, they had been paid by himself as administrator of his father, and would be duly entered satisfied at the next term of the court. He said that he had more than paid to the other distributees of his father's estate their proportion thereof, and was a creditor of the estate." This was his statement upon his second visit to Baltimore.

It will be remembered that upon his
278 *first visit, when questioned as to the trust deed, he said nothing about the payment of the first three bonds to his father in his lifetime; he never hinted at it. His pretension then was, that he had paid all the creditors and distributees, and that he would produce satisfactory evidence of the fact, and thus show that the deed of trust represented only an apparent not an actual indebtedness." Does any one suppose that these men, client and attorney, shrewd, sagacious, thoroughly conversant with all business transactions, were at all deceived by these statements, that they did not at once detect their palpable inconsistency? Is any one so credulous as to believe they did not see through the transparent device by which this man was seeking to use his office as a means of perpetuating a gross fraud upon the estate he represented? Scarcely a word of his statement was true. He had not paid the creditors of his father's estate. At that very time its liabilities exceeded $10,000. He had not settled with the distributees, or any of them, so far as the record shows. It is very true that Utterback obtained from two of the distributees receipts showing payments made to them; but it is not pretended that any money was in fact paid, nor was Cooper ever misled, because he never saw the papers. He had returned no inventory of the estate; he had made no settlement. If he ever paid his father the first three bonds, or either of them, he has nothing to show it except his own unsupported statement, and that is so improbable and contradictory as to deprive it of all claim to belief, even conceding he is a competent witness.

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Armistead Utterback died in 1862 intestate; and we are to believe, without a word of proof, that at some period not stated Charles Utterback actually paid three
279 *bonds amounting to nearly $4,000 years before their maturity.

But this is not all. Throwing out of view all the contradictions and inconsistencies so palpable to any man of ordinary capacity, the statement in regard to the payment of creditors and distributees was not only unsupported by any proof, oral or documentary, but on its face was incredible. He had qualified on the 25th September 1865; he was in Baltimore in May 1866. Within the short period of seven months he, a resident of a section still then suffering from the disasters of the war, had found all the creditors of the estate, and with his own private means had paid them, had overpaid the distributees, and had actually anticipated repayment of the bonds falling due in the years 1867 and 1868. And these statements, we are told, Cooper confided in and advanced his money on the faith of them. The thing is incredible. But if he did it was a blind and foolish confidence and he must lie down under his own folly. He sent his agent all the way to Fauquier at his own expense to inquire into the value of the land—why did he not instruct him to inquire also into the condition of the deed of trust and the administrators accounts? Slight investigation, a little inquiry would have exposed the utter falsity of every material representation made by Charles Utterback. If the certificate of the commissioner had stated the administrator had laid vouchers before him showing payments to creditors and distributees, or the payment of the three bonds, there might have been some reason for giving credence to such a statement, but it says nothing of the kind. He has directed me (says the commissioner) to credit the amount of the three bonds in his administration account as assets re-
280 ceived, and the same will be entered *in said account as having *been paid by said* Charles H. Utterback to the estate of his said intestate. One cannot but be struck with the conclusion reached in this certificate from the premises stated. There is no pretence or intimation, that any money has been actually paid; but a direction having been given to credit the bonds as assets, they will be entered in the accounts as *having been paid.* No intelligent mind could fail to comprehend at a glance what was intended. A scheme, under the forms of law, by which the debtor released his property from a perfectly valid lien, without paying a dollar, commits a *devastavit* to the irreparable damage of his sureties, or creditors and distributees, and thereby obtains a loan upon the security of the same property, with which to indulge his passion for the frivolities and luxuries of a gay life in a city, while the party concerting with him reaps a profit of nearly $1,800, and the brokers, agents and attorneys, around him, pocket fees and commissions to the amount of between six and seven hundred dollars. And thus a fiction of law, which, in the language of CHIEF JUSTICE SHAW, has been established for purposes of justice, was to be used as an instrument for the infliction of a great wrong upon innocent parties. If this is not a just inference, why was not proof required of the payment of the first three bonds, of the payment to creditors and legatees? Why was not the settled accounts called for? They had been promised, and the trip to Virginia was made to procure them. Why were they dispensed with? The answer is, they could not be produced. But the same object could be readily effected in a different way. Charles Utterback, the individual, could pay the debt he owed his father, and discharge the lien by charging Charles Utterback, the administrator, with the
281 amount, and thus *all the impediments, in the way of a good title, be removed. It was but a scheme so to shape the administration account, as to throw upon the sureties, and if they were insolvent, upon creditors and distributees any loss that might accrue.

There is no statute or rule of law which gives any efficacy to the certificate of a commissioner in chancery. His duties and functions are pointed out. He receives vouchers and papers of the fiduciary; he publishes notice that all parties interested may appear and protect their interests. When he completes the settlement he then returns it to court, where it lies till another term, that a still farther opportunity of making their objections may be offorded those interested in the estate. If no objections are made it is then confirmed, and until so confirmed it has no sort of value, and even then it is only recognized as *prima facie* evidence, liable to be surcharged and falsified. Here an effort is made, however, to give to a mere certificate of a commissioner *in pais* an efficacy not even accorded to a record settlement.

It must be borne in mind that here no settlement of the accounts was made by the commissioner. Utterback withdrew the three bonds which he had delivered to that officer, and afterwards turned them over to the administrator *de bonis non.* This is denounced as an act of bad faith towards Cooper. It may be so. But if a fiduciary concerts with another to commit a fraud upon an estate, a court of equity would scarcely interfere to compel a specific execution of the contract. A refusal to consummate a fraud would receive the commendation of that court rather than its censure. So far from compelling Utterback to complete the transaction, whatever may have been his motives in re-
282 fusing, *this court would interpose to prevent its consummation.

Before leaving this branch of the case, it is proper to advert briefly to the letter written by Utterback's counsel. It is apparent that letter was a private one, intended only for the eye of the client. Upon what representations it was based it is impossible to say, unless we could know the statements made by the client to the attorney, which the latter cannot of course disclose.

The counsel did not represent, nor profess

to represent, the estate, nor those interested in it, but Utterback alone in his individual capacity. He was called on to see to the preparation of certain papers in due form, and the letter was a mere announcement to the client that they had been so prepared and were enclosed. It misled no one, and could not have done so, unless, indeed, upon a proposition of law rather hinted at than expressed. It certainly contained no statement of fact in the least calculated to produce a false impression. Cooper as perfectly understood the whole transaction without the letter as with it, and the use of it, under the circumstances, is but an attempt to give countenance to a scheme involving a gross breach of trust.

It is said, however, and great stress is laid upon the point, that the object of Charles Utterback in negotiating this loan, in part, was to pay the debt due his father's estate; that it was understood between him and Cooper the funds were to be applied first to the discharge of all incumbrances upon the land; and at all events he had money in his hands derived from the loan sufficient to pay that debt, and if he did not so apply it Cooper cannot be held liable for the misapplication, and the sureties to the official bond
283 must *bear the loss. Each one of these propositions is, I think, susceptible of a satisfactory answer. It is very true that Utterback now tells us his intention was to pay all his indebtedness; but he further tells us, that this intention was based upon the representations of Cooper that the stock would sell on market at the price of fifty dollars per share, and with this fund in connection with the money advanced, he expected to liquidate all his liabilities. It is very manifest, however, that this was an after-thought; and that he never at any time had any such intention. It is perfectly certain that Cooper himself never entertained any such idea. His pretension is that Utterback declared to him that the deed of trust was satisfied by payments to his father in his lifetime, and by the settlement of all the claims of creditors and distributees. Cooper could not therefore suppose that any part of the money was to be applied to a debt which he professed to believe was already settled.

The amount of money to be advanced by Cooper was $4,980—in round numbers $5,000. From this, however, was deducted the sum of $1,686.57, to satisfy the two judgments constituting liens on the land, and about $650 fees and commissions of brokers and attorneys, who assisted in negotiating the loan, so that the whole amount paid to Utterback was $2,683. What was to be done with this? Let Cooper himself answer the question. "He (that is, Willis, who professed to act for Utterback) said Utterback wanted the money, $5,000," to pay off some judgments against him, and the balance to improve his house, and convert it into a summer boarding house. Another witness, Robert W. L. Rasin, a partner and agent of Cooper, and an officer of the "Navassa Phosphate company," states in his deposition, that Cooper told Willis that
284 he must *ascertain from Utterback, before he would consent to sell him the stock, whether he desired it for *investment or sale*. Willis returned, and stated that he, Utterback, was willing to hold it as an investment, as the money he applied for was ample for all his purposes. Utterback himself afterwards came to the office and stated that he wanted the money to pay off certain judgments, *which were* the only liens upon his property, and of *improving the property*, and that the $5,000 which he had applied for would be ample for that purpose. Now I ask with what propriety can Cooper claim that this money ought to have been applied to the debt due Armistead Utterback's estate. But if every dollar had been applied in that direction it could not have paid one-half the debt.

But we are told there was the stock, the eighty-six shares, the proceeds of which might have been so appropriated. But this is all an afterthought. If Cooper himself is to be believed, if his witness and partner is reliable, one of the conditions imposed upon Utterback was that he should not sell the stock, but keep it as an investment; and the reason assigned was, that Cooper held large amounts of the stock, and was unwilling to have the value of it depreciated by permitting it to be sold to persons unacquainted with its value. Now in the face of these developments, with what show of reason can it be claimed that Cooper thought, or had the right to think for a moment that the money or stock would be applied to the discharge of any incumbrances upon the land. But in saying this I do not wish to be understood for a moment as conceding that Cooper believed it was Utterback's purpose to keep the stock. All this talk about the purchase of stock as an investment was a mere pretence, a device to cover the usury. Cooper knew well enough that no citizen of
285 Virginia *would go to Baltimore to buy Navassa Phosphate stock at $70 per share as an investment. Upon the cross-examination he was forced to admit that in no other sale ever made by him had any such conditions been imposed on the purchaser. And notwithstanding his great anxiety to prevent the depreciation of the stock by sales to persons unacquainted with its value, he permitted Utterback to sell his eighty-six shares at $26 per share.

That sale amounted to $2,210, from which, of course, would be deducted commissions and other charges. But adding the whole amount to the $2,683 received in money would make an amount of about $4,800. The amount of Charles Utterback's indebtedness to his father's estate in July 1866 was about $7,500; so that the whole sum derived from Cooper and from the sale of the stock would not have pair the deed of trust by nearly $3,000. In this calculation I assume, of course, that Utterback had not paid the first three bonds in his father's lifetime, as he represented. There is not a scintilla of evidence to sustain this pretended payment except the assertion of Charles H. Utterback himself. If a debt of $4,000, well secured and attested by bond and mortgage, may be defeated upon the testi-

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mony of the debtor himself after the death of the creditor, there is no safety under any kind of security. As has been already said, if Charles H. Utterback were a competent witness, his statement upon this point is improbable, contradictory, and unworthy of credence. For all the purposes of this investigation we must then assume that no part of the debt due Armistead Utterback was ever paid.

In *Graff* v. *Castleman*, 5 Rand. 195-207, JUDGE CARR, in alluding to the purchaser, said:

"He took a transfer of the trust property
286 as security for money to be *advanced to the private trade of the executor, a trade having not the slightest connection with the estate of the testator, or the objects of the trust." And so here I think it has been demonstrated that the money was loaned and the stock transferred for the individual use of the administrator; that the transaction had no connection whatever with the estate; and that the money would not be applied in any way for its benefit. And yet we are told, that as Utterback had the money in his hands derived from Cooper which he ought as an honest man to have applied to the debt due his father's estate, that debt, in Cooper's favor, must be deemed satisfied, although at the time he advanced the money he well knew it would not be so applied. This is certainly carrying the doctrine of the legal fiction beyond all precedent. If there is any proposition which ought to be regarded as settled law in Virginia, it is that a party concerting with an executor or administrator in a breach of trust, cannot claim credit for the money actually advanced by him. It is not for him to say the fiduciary ought to have applied the money to the purposes of the estate. When he aids him in any manner contrary to the duty of the executor, he takes upon himself all the hazards of a misapplication of the fund. All the cases, including *Graff* v. *Castleman*, 5 Rand.; *Pinckard* v. *Woods*, 8 Gratt. 140; *Fisher* v. *Barrett*, 9 Leigh 119; *Cocke* v. *Minor*, 25 Gratt. 246, and *Jones* v. *Clarke*, 25 Gratt. 642, established that proposition. In *Fisher* v. *Barrett* the purchaser was informed that the bond belonged to the administrator, and was so informed as to justify him in believing it; and yet he was decreed to surrender the security. In the case of *Jones* v. *Clark*, 25 Gratt., all the authorities are reviewed at great length by the president of the court,
287 *and the result of all of them, as there announced, is: If a person buying a bond from the executor was good reason to believe that the executor intends to apply the proceeds of sale to his own use, and thus commit a *devatavit*, it is incumbent upon him to stay his hand until he can ascertain by regular inquiries that the sale is to be made for the purposes of the estate. In all such cases the party dealing with the executor does not gain credit even for the money advanced, but is decreed to surrender the securities and account for the full value of the property received by him.

It is very true that most of the decisions referred to relate to the sale of bonds or assets of the estate; but the same principle applies to any improper dealing with the assets, or to any case in which a person concerts with an executor in a manner contrary to the duties of the office of executor or administrator. There can be no difference, upon reason or principle, between the case of an executor selling the assets for his own private purposes, and the case of an executor who seeks to destroy a lien he has given for the payment of a debt due his testator, with a view to raise money for his own individual uses. In either case it is a fraud, and the person who participates with him stands on no higher ground than the fiduciary himself.

It is said, however, that the jury have found that Cooper was not guilty of any fraud in the transaction. The jury did not pass upon the question we are now considering—they were not called on to do so. They found that Cooper had not perpetrated any fraud upon Charles Utterback, which might well be, and yet both Utterback and Cooper combining to perpetrate a fraud upon the estate; and if not so combining, Utterback himself perpetrating the fraud, and Cooper content to reap the benefit of it.

288 *Fraud is rarely the subject of direct proof. In general it can only be established by circumstances. If ever there was a case in which the circumstances and facts unmistakably disclose the real purpose and design of the parties, and the true nature of the transaction, it is the case before us.

Satisfied as I am that Utterback's sole object was to use his office of administrator in extinguishing his private debt and releasing the security for its payment, and upon the same property raise money for his own private purposes, and that Cooper had every reason to understand these designs, he can stand on no higher ground than Utterback, but must share the same fate.

Holding these views, I have not considered it any part of my duty to attempt an answer to the inquiries made by counsel in the course of the argument, how and when may an administrator pay his debt and release his land; how may he sell and convey a good title with a view to raise money and discharge the indebtedness? These questions do not arise in this case. It is not incumbent upon us to lay down rules for the guidance of fiduciaries, any further than is necessary to an adjudication of the matters in controversy. It is sufficient for us to decide this case and leave others to be decided as the occasion may demand. For the reasons stated I think the decree of the circuit court must be reversed.

ANDERSON, J., concurred in the opinion of MONCURE, P.

CHRISTIAN and BURKS, Js., concurred in the opinion of STAPLES, J.

The decree was as follows:

289 *The court is of opinion, for reasons stated in writing and filed with the record, that the deed of trust executed by Charles H. Utterback on the 2nd day of February 1859, for the benefit of Armistead Ut-

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terback constitutes a subsisting valid lien upon the lands therein mentioned, and that the same has priority over the deed of trust executed on the 5th day of July 1866, for the benefit of Edward K. Cooper; and that the circuit court erred in holding that the said first named deed of the 2nd February 1859, upon the qualification of Charles H. Utterback, as administrator of Armistead Utterback, dec'd, ceased to operate, or exist, as security for the debt named therein. Therefore it is decreed and ordered, that the said decrees be reversed and annulled, and that the appellee Cooper pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here; and that the cause be remanded to the said circuit court, for further proceedings to be had therein in conformity with the principles of this decree.

Which is ordered to be certified to the said circuit court of Fauquier county.

DECREE REVERSED.

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290 *The Brooklyn Insurance Co. v. Bidgood.

March Term, 1877, Richmond.

In April 1870 the B life insurance company, of New York employed W as their general agent, to act as such in a large defined territory in Virginia. W's duties, as defined in their agreement, were to solicit applications for life insurance policies, to deliver the same and collect the premiums thereon, also to constitute sub-agents throughout his whole field, such sub-agents to be under the pay and authority of W. And if the aggregate of commissions earned by W on policies taken by himself, and by the margin of his commissions over that of sub-agents on their work, should not amount to $3,000 for the first year, the company would make up the amount to that sum for that year. And W promised to devote his time, services, &c., to the interest of the company throughout the whole of the said territory, exclusive of any other business. In October 1870, the company having paid W $1,500 of his salary, and received only $423 of premiums from him, discharged him from his agency; and W then brought this suit to recover the balance of his salary. On the trial it appeared W had made very little effort to appoint sub-agents; and he contended it was not his duty to do so until directed by the company; and he said he did not travel through his territory because the company did not furnish him with money to pay his expenses—HELD:

1. **Life Insurance—General Agent—Duties.**—By the contract the appointment of sub-agents was committed to W, and he was not to wait for instructions from the company; and he therefore failed in his duty in not appointing them.

2. **Same—Same—Contract.**—By the contract W was to pay his own expenses; and he again failed in his duty in not traveling through the territory assigned him to ascertain proper points for agencies and employing sub-agents. He was, therefore, properly discharged.

This was an action of covenant in the corporation court of the city of Norfolk, brought by William J. Bidgood against the Brooklyn Insurance Company, to *recover an amount which he claimed to be due to him for his services as general agent of the said Company in a prescribed part of Virginia. The pleadings in the case were very voluminous; but no question upon them was considered by this court. When the cause was called for trial the parties dispensed with a jury and submitted the case to the court; and the court having heard the evidence, rendered a judgment in favor of the plaintiff for $1,694.75. The defendant thereupon took an exception to the opinion and judgment of the court, and applied to a judge of this court for a writ of error and *supersedeas*; which was allowed. The facts are sufficiently stated in the opinion of JUDGE STAPLES.

Scarburg & Duffield, for the appellant.
Holladay & Gayle, for the appellee.

STAPLES, J., delivered the opinion of the court.

This is an action of covenant brought in the corporation court of Norfolk by Wm. J. Bidgood against the Brooklyn Life Insurance Company of New York. The plaintiff's original declaration contained two counts, to each of which the defendant demurred. The demurrer to the first count was sustained, and that to the second was overruled. The plaintiff then filed an amended declaration containing three additional counts. The defendant demurred to the whole declaration, and to each of the three counts. It also demurred to a part of each of the three counts, and pleaded to the residue. It also filed seventeen special pleas in writing: upon which issues were joined by demurrers, special and general replications. This *court has laboriously looked through all this mass of special pleas, demurrers and replications, only to see that every defence they suggest could have been made, and the merits of the case fully presented, upon the pleas of covenants performed, and *non damnificatus*.

The points of controversy are few and simple, turning almost exclusively upon a proper construction of the language of the covenant. On the 25th day of April 1870, the defendant appointed the plaintiff its general agent for that portion of the state of Virginia embraced and bounded on the south by the James river and the Blackwater river, on the west by the Blue Ridge, on the north by the Potomac river, and on the east by the ocean. It being understood that his duty as such general agent shall be to solicit applications for life insurance policies, to deliver the same, and to collect the premiums thereon, or any other moneys for said company; also to constitute sub-agents throughout his whole field; such sub-agents being under the pay and authority of the plaintiff.

And it was further agreed that if the aggregate of commissions earned by plaintiff on policies taken by himself and by the margin of his commission over that of sub-agents on their work, shall not amount to

See monographic note on insurance appended to Mutual Assur. Co. of Va. v. Holt, 26 Gratt. 612.

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the sum of $3,000 for the first year, the company will make up the amount to that sum for said year. Further in consideration of the terms and agreement mentioned, and territory granted, the plaintiff agreed and promised to "devote his time, services, energies and abilities to the interests of the company throughout the whole of the aforementioned territory, exclusive of every other life insurance company or other business, faithfully, honestly, industriously." There
293 *are other provisions in the contract, but they are not very material to the present inquiry.

The defendant, on the 26th of October 1870, revoked the agency and discharged plaintiff from its employment. It had, however, in the meantime paid him the sum of $1,500, one-half of the agreed compensation for a year. The plaintiff brought this suit for the balance of $1,500, claiming that he was discharged from the service of defendant without sufficient cause.

The first ground of contention relates to the provision of the contract for the appointment of sub-agents; the defendant insisting that the plaintiff failed to make such appointments according to the true intent and meaning of the contract. The plaintiff admits that he appointed agents only for a very small number of the counties embraced within the boundaries of his territory. According to his own statement, he appointed seven sub-agents for some half-dozen counties lying contiguous to the city of Norfolk. He made no appointments for the region of country bordering on the state of North Carolina, or for the tier of counties at the foot of the Blue Ridge, or those on the Potomac, or for the cities of Richmond, Petersburg, Lynchburg, Danville, Charlottesville, and the section of country surrounding them. He did not even attempt to make such appointments. The reason for this failure is, that the contract only required him to establish such agencies when and where he was directed by the officers of the company; and that he was not at any time directed by the company to appoint such agents.

We are of opinion that the covenant does not admit of any such restricted interpretation. The provision in question is, that the duty of the plantiff, as such general agent, shall be to solicit applications for life insurance policies; also to constitute such
294 agents *throughout his whole field; such sub-agents being under the authority and pay of the plaintiff. The defendant, located in New York, could scarcely be expected to know when and where such agents might be most judiciously appointed, and in what localities they could most successfully operate. One of the chief objects in appointing a general agent, in whom the defendants could repose entire confidence, was to perform this work, to perform it industriously and faithfully. There can be no doubt but that much of the profit expected by defendant from this arrangement was to be derived from the appointment of these sub-agents, judiciously selected in proper localities, and having constant communication with the people. It is difficult to imagine why the plaintiff should have been appointed a general agent at a salary of $3,000, unless it was that being a resident of the state, acquainted with the people and the business of insurance, he would understand when and where these agents should be appointed. The plaintiff himself so construed the contract in the beginning. He not only appointed agents for the counties contiguous to Norfolk without direction by the company, but according to his account he offered appointments to a hundred others in that locality. We are relieved of any inquiry in this case as to the extent and nature of the plaintiff's duty in making these appointments, because his claim is not that he had made them, but he was not bound to do so until directed by the officers of the company. We are clearly of opinion that this is not a proper construction of the contract, and that the plaintiff has failed in the performance of this part of his covenant.

The other provision of the contract, which is the subject of controversy here, is that in which the plaintiff undertakes to devote
295 his time and services to the *interest of the company, throughout the whole of the territory laid down as the limit of his operations. And here again we must rely upon the plaintiff's own account. His statement is, that he traveled in Norfolk, Princess Anne, Nansemond, Southampton and Isle of Wight; his residence being in Portsmouth at the time. It is not extravagant to say that he could not have been occupied two months altogether in the canvass of these counties. He went no where else. None of the large cities and towns were visited by him. No part of the Valley or the Piedmont section, or the region on the upper James, was ever seen by him; but a few counties which no doubt had before been thoroughly explored embraced the area of his labors. The result of his entire operations, including agents, was a return of twenty-one policies, yielding to the company premiums amounting to $423, for which it incurred an expense of $1,608.78 cents, of which plaintiff received $1,500, and over $100 paid medical fees for examining applicants.

The excuse given by the plaintiff for his failure to canvass the territory assigned may be stated in his own words. "I did not go to distant parts of the state because the company did not pay my expenses. I expected orders from the company to travel to distant parts of the state within my limits, but received none." His view of the contract seems to have been, that he was under no obligation to travel unless directed by the company; and not even then, unless his travelling expenses were paid by the company.

The provision of the contract is, that he is to devote his time and services to the interest of the company throughout the territory mentioned. Nothing was said either in reference to instructions from the company or the payment of expenses. It is true there is,
296 *in another part of the writing, an agreement to pay actual railroad or

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steamboat fares of the plaintiff, when travelling by order of the officers on business of the company. But it is clear this was only intended to apply to occasions when the company required the performance of some special service not embraced in the regular routine of duties stipulated in the contract; and even then the obligations extended no further then the payment of the railroad and steamboat fares. The insertion of such a provision is of itself very persuasive evidence that the parties did not contemplate the payment of the plaintiff's expenses by the company incurred in the discharge of his regular duties. Inasmuch as the plaintiff was required to appoint sub-agents whose pay depended upon the commissions, and as a very large territory was assigned him as the field of his business, the company guaranteed a compensation of $3,000. With this he might reasonably expect to pay all his expenses, and at the same time realize a liberal remuneration for his services. If this was not the whole object of the salary, it is very difficult to understand how the company was to be indemnified for an outlay greater than the compensation paid to nine-tenths of the officers of the state of Virginia.

The idea that the plaintiff was to wait for instructions, as has been seen, is utterly inconsistent with the whole scope of the contract and the end and aim of his appointment.

In answer to all this it is said the company did not revoke the agency upon the grounds here stated, but, as its letter will show, because the small number of policies would not justify it in longer continuing the agency. At the time *that* letter was written, the company, it is reasonable to suppose, did
297 not and could not *know how far the plaintiff had failed in the performance of his contract. It could not know what counties he had or had not visited, or how many or few agents he had appointed. It could only judge by results; and those results plainly showed that the arrangement was productive only of great pecuniary loss. The testimony of the plaintiff explained in a great measure the causes of the failure, and fully vindicated the justice of the company's action in revoking the agency. If the company was ignorant of the plaintiff's failure to perform his duty, it was because he had not disclosed it. Their failure to assign his breach of the contract as a ground of removal cannot entitle him to damages, if in fact he is not so entitled. The true question is not whether the defendant assigned a sufficient reason for the discharge of the plaintiff, but whether his conduct was of a sort to justify such discharge; and if it was, it matters but little in the decision of the issue joined whether the defendant was or was not at the time apprized of such conduct. It is said again, that the defendant, at the time of the revocation of the agency, proposed to renew the appointment of the plaintiff. The proposition to renew the appointment was, however, based upon the condition that the plaintiff would act without a fixed compensation, only receiving such commissions as the business might afford. Such an arrangement would, of course, involve no loss to the company. Had the company, therefore, known at the time the plaintiff had not complied with his contract, no unfavorable inference could be drawn from the offer to continue the agency.

For these reasons, we are of opinion, the plaintiff is not entitled to receive any further compensation, and that the defendant was justified in revoking his agency. As the whole matter of law and fact was re-
298 ferred to *the judge below, and as all the evidence is in the record, final judgment may now be entered for the defendant. This view renders it unnecessary to consider the alleged errors of the court with respect to the pleadings. If such errors were committed, they were to the prejudice of the defendant; but as the judgment here is in its favor upon the merits, these errors are, of course, immaterial.

The judgment of the circuit court is reversed, and judgment to be entered for the defendant.

JUDGMENT REVERSED.

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299 *George & als. v. Pilcher & als.

[26 Am. Rep. 350.]

March Term, 1877, Richmond.

Absent, ANDERSON, J.

1. **Interpleader—When Plaintiff Is Necessary Party.**—The plaintiff in a suit of interpleader continues to be a substantial and necessary party until he has fully rendered the debt, duty or other thing required of him.
2. **Removal of Causes.**—P filed a bill of interpleader in the circuit court of Richmond against various persons, made parties defendants, of whom some were citizens and residents of Virginia, others of Pennsylvania, and others of states other than either Virginia or Pennsylvania. The defendants, who were citizens and residents of Pennsylvania, answered the bill, and at the same time filed their petition in due form for the removal of the cause from the state to the Federal court—HELD: Whether P is regarded as a substantial or as a mere nominal party, there is no right of removal either under the act of congress of March 2, 1867, or of July 27, 1866.
3. **Deposition—Admissibility.**—Upon the trial of an issue directed in the said suit, a deposition of one M, who was then dead, was offered, whereby it was sought to show that L, one of the defendants, in the presence of W, another of the defendants, had, in an interview at Richmond, made to M certain admissions material to the issue. These two defendants were strangers to the witness, and on cross-examination describing them he said: "They were not black negroes. I think the brother-in-law had the lightest skin of the two. I think they were not bright mulattoes, but dark mulattoes." It was proved by other witnesses that the brother-in-law spoken of (W) was a white man, and that L was so bright that he could hardly be distinguished from a white man. It was further proved that about the time at which the witness said he had the interview with the two men they were both in Rich-

mond inquiring for him. Upon an objection to the reading of the deposition on the ground that the witness did not sufficiently identify the persons whose admissions were sought to be proved
300 by him, it was held that *the evidence was *prima facie* sufficient to authorize the deposition to go to the jury.

4. **Admitting Evidence after Argument—Discretion of Court.***—On trials before a jury, when the evidence on both sides has been closed, and the argument has commenced, as a general rule no further evidence should be received from either party; but the presiding judge, in the exercise of a sound discretion, may relax the rule and admit additional evidence, if the nature of the case and the ends of justice require it; but if the introduction of such additional evidence take the adverse party by surprise, he should be allowed time and opportunity if desired, to meet it with further evidence on his side.

5. **Impeaching Witness.**†—Whenever the character of a witness for truth is attacked, either by direct evidence of want of truth, or by cross-examination, or by proof of contradictory statements in regard to material facts, or by disproving by other witnesses material facts stated by him, or, in general, whenever his character for truth is impeached in any way known to the law, the party calling him may sustain him by evidence of his general reputation for truth.

The case is stated by JUDGE BURKS in his opinion.

Ould, White and *Shippen,* for the appellants.

C. Robinson, Jones and *Crump,* for the appellees.

BURKS, J., delivered the opinion of the court.

William O. George, a citizen of Virginia and resident of the city of Richmond, died in said city intestate on the 16th day of August, 1869. At the time of his death, he was possessed of some personal estate, and was the owner of real estate supposed to be worth from sixty to seventy-five thousand dollars. Caroline Jackson, a negro and former slave of William O. George, was the mother of two children, Lee and Adelaide, of whom the said William O. George was the father. He removed the mother and her two children to the city of Philadelphia in the year 1854 or 1855, where they have ever since resided.

301 *In a very short time after the death of William O. George, the woman Caroline and her two children, her daughter, Adelaide, having intermarried in Philadelphia with one Constance C. Willamin, set up a claim to the estate of William O. George, based on an alleged marriage of the said William O. George and the said Caroline in the city of Philadelphia on the 21st day of April, 1869.

The claim was disputed by Dr. Miles George, a half-brother, and others, descendants of another half-brother, and half-sister of the decedent, who denied that any such marriage had ever taken place, or if it had, that it conferred any title under the laws of Virginia, to the real estate of the decedent in Virginia, and they claimed to be the only heirs at law and distributees of the decedent.

John M. Pilcher, a tenant of William O. George at the time of his death, was indebted for rents, some of which were due at the death of said decedent, some fell due after his death, and another portion was payable at a future day. To recover the rents in arrear, Lee George, who had become the administrator of the personal estate of the decedent, sued out a distress warrant against Pilcher and levied it on his goods and chattels; and thereupon Pilcher filed his bill in the circuit court of the city of Richmond against the rival claimants of the estate of William O. George, praying that they might be required to interplead and have their claims settled by the court, and offering to abide the judgment of the court touching the rent owing by him; he further prayed an injunction to stay all further proceedings on the distress warrant.

The injunction was granted, and an order made directing the parties to interplead and assert their respective claims.

302 *Caroline George, Lee George, and Willamin and wife at once filed their answers to the plaintiff's bill, asserting their claim, which has been before stated, and at the same time filed a petition for the removal of the cause into the circuit court of the United States. The motion for removal was resisted by the other defendants, and was overruled. The other defendants did not file their answer until the 11th day of November, 1873, after all the depositions had been taken in the case.

In their answer they set up the claim on their part before stated, and controverted the claim of the other defendants. Whereupon the court directed the parties, the said Caroline George and the other Pennsylvania claimants, as plaintiffs on the one side, and the other parties as defendants on the other side, to proceed to trial before a jury on the following issue: "Whether the ceremony of marriage was duly solemnized between the said William O. George and the said Caroline, in the city of Philadelphia, in the state of Pennsylvania, on the 21st day of April 1869."

The trial was had as ordered, and resulted in a verdict for the defendants in the issue. The plaintiffs moved to set aside the verdict, upon the ground that it was contrary to the evidence; which motion was overruled; and they excepted. Other bills of exceptions were taken to rulings of the court in the progress of the trial, which will be noticed further on.

The chancellor entered a decree approving the verdict of the jury, and, adjudging that the alleged marriage did not take place; that

*__Admitting Evidence after Argument—Discretion of Court.__—The ruling of the principal case embodied in the fourth headnote was distinguished in Steptoe v. Pollard, 30 Gratt. 705, and also in Fry v. Leslie, 87 Va. 279. The same ruling was cited and approved in Schonberger v. Com., 86 Va. 492.

†__Impeaching Witnesses.__—The ruling in the fifth headnote was cited and distinguished in Reynolds v. Railroad Co., 92 Va. 405; Danville Bank v. Waddill, 31 Gratt. 483.

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Miles George and other defendants in the issue were the lawful heirs of William O. George, deceased, and ordered payment of the rents to them. An ap-
303 peal from this decree, allowed *to Caroline George and the other plaintiffs in this issue, brings the case here for review.

The first error assigned is the refusal of the court below to order the removal of the cause into the circuit court of the United States.

The petition for removal was filed under the second section of the act of congress approved March 2, 1867. 14 Stat. at Large 558. An affidavit was filed according to the provisions of said act. The petition recited the affidavit, stated the cause relied upon for the removal, and was otherwise regular.

The record shows, that some of the defendants not uniting in the petition were also non-residents.

On motions for removal of two causes made in this court at the August term 1872, it was held, that where there are several plaintiffs in a suit in a state court, some of whom reside in the state and some out of it, and all of the defendants reside in the state, the non-resident plaintiffs are not entitled to have the suit removed into the United States court under the act aforesaid. *Beery & als.* v. *Irick & als.* and *Newton's ex'or* v. *Bushong & als.*, 22 Gratt. 484.

Afterwards, at the October term 1873 of the supreme court of the United States, in a case which was the converse of the case in 22 Gratt. *supra,* that court held, that where the plaintiff and one of the defendants in a suit were residents of the state in which the suit was brought, and the other two defendants were non-residents, the non-resident defendants were not entitled to have the case removed under said act. *Case of Sewing Machine Companies,* 18 Wall. U. S. R. 553.

MR. JUSTICE CLIFFORD, in the conclusion of the opinion of the court delivered by him, says: "Either the non-resident plaintiff or non-resident defendant may
304 *remove the cause under the last named act (act of 1867), provided *all* the plaintiffs or *all* the defendants join in the petition, and *all* the parties petitioning are non-residents, as required under the judiciary act; but it is a great mistake to suppose that any such right is conferred by that act where one or more of the plaintiffs or one or more of the petitioning defendants are citizens of the state wherein the suit is pending, as the act is destitute of any language which can be properly construed to confer any such right *unless all the plaintiffs or all the defendants are non-residents and join in the petition.*"

This would seem to be conclusive against the petitioners in the case before us. The plaintiff, Pilcher, is a resident of this state, and *all* of the defendants are *not non-residents,* and *all* did *not join* in the petition.

But it was argued at the bar on behalf of the petitioners (the appellants here), that while the suit is in the name of Pilcher as plaintiff, against all the other parties as defendants, yet Pilcher is a nominal plaintiff; and that the suit is really and substantially a controversy between the petitioners on the one side, all of whom are non-residents, and the other defendants on the other side; and the case must be considered as if it were a suit by the petitioners against the other defendants, or *vice versa;* and that if it does not come within the latter, it is at least within the spirit of the act of 1867.

This argument is plausible, but not sound. It is true that in a bill of interpleader proper the plaintiff claims nothing adversely to the defendants, and admitting that he owes a debt, or duty, or other thing, which is claimed from him by two or more persons by different or separate interests, and that he is ready to render it, but not knowing which of the
305 claimants has *the better right, to save himself from injury he prays that the claimants may be required to interplead and state their claims, and that the court may adjudge to whom the debt, duty, or other thing, belongs. Story's Eq. Plead., § 291.

When the case is matured, if the defendants do not deny the statements of the bill, the ordinary decree is, that the defendants do interplead; and the plaintiff withdraws from the suit. Story's Eq. Plead., § 297.

But he cannot "withdraw from the suit," we apprehend, until he has fully rendered the debt, duty, or other thing, required of him. Pilcher was ordered, by the decree directing the interpleader, to deposit in bank the amount of rents then due, and afterwards *"from time to time"* to deposit the accruing rents when due; and the like order was made as to other tenants. So that when the petition for removal was filed, Pilcher was still a necessary party to the suit, and continued to be so; and it does not appear that any order was ever made allowing his withdrawal from the suit.

But, even if it be conceded, that he was a mere formal party to the cause and his presence not necessary for the determination of the controversy between the defendants, and that this controversy between the defendants was substantially a suit between them within the meaning of the act of congress, still it would not be a case for removal under the act. For although the appellants, treating them either as plaintiffs or defendants in the controversy, were all non-residents and *all* united in the petition, yet *all* of the opposing parties were not residents of the state of Virginia. To authorize a removal under the act, as we understand it, all of the petitioning parties must be non-residents and all of the other parties must be residents of the state *in which the suit is brought.* See 18 Wall., *supra,*
306 *and especially what MR. JUSTICE CLIFFORD says on page 585.

It was further argued by the counsel for the appellants, that although the petition was framed under the act of 1867, it states a case which would authorize a removal under the act of July 27, 1866. The last named act applies to a suit by a citizen of the state, in which the suit is brought against defendants, some one or more of whom are residents of the said state, and the other non-residents; and it allows a removal on the petition of the

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non-resident defendant or defendants as to him or them, "if the suit is one in which there can be a final determination of the controversy, as far as it concerns him (or them), without the presence of the other defendants as parties in the cause;" and it is expressly provided, that "such removal of the cause, as against the defendant petitioning therefor, into the United States court, shall not be deemed to prejudice or take away the right of the plaintiff to proceed at the same time with the suit in the state court as against the other defendants, if he shall desire to do so."

If Pilcher is to be regarded as a plaintiff, and all the other parties as defendants, within the purview of this act, the appellants were not entitled to a removal of the cause for two reasons: 1. The controversy, so far as it concerns the appellants, could not be finally determined in the Federal court without the presence of the other defendants as parties in the cause. In fact, there is no real *controversy* between Pilcher (the plaintiff) and the appellants. The only controversy is between the appellants and the other defendants. Each party is asserting his own claim, and each contesting the claim of the other, and in such a controversy the claim of neither can be
307 finally adjudicated in the suit *without the presence of the other as a party in the cause. Moreover, if the suit should be removed as to the appellants, and the Federal Court should render a final decree in their favor, the chancery court of Richmond might at the same time proceed with the cause as to the remaining defendants, and render a final decree in their favor; and thus we should have the anomaly of a final decree in the same suit in favor of each of the opposing claimants to the same estate. 2. The act confers the right of removal on the non-resident defendants only, and *all* who are non-resident must unite in the petition for removal. Some of the non-residents in this case did not unite in the petition.

If, on the other hand, Pilcher is not to be considered as a plaintiff, within the meaning of the act, and the controversy between the defendants is to be regarded as a suit between them, then as *defendants* only can have a cause removed under this act, we must regard the appellants as defendants, and the other parties as plaintiffs. If so regarded, then plainly there would be no right of removal, because the appellants would be the *only* defendants, whereas the act provides for removal in suits where some of the defendants are residents of the state in which the suit is brought, and others are non-residents.

It appears clear to us, therefore, that in no aspect of the case, were the appellants entitled either under the act of 1866 or under the act of 1867, to a removal of the cause into the circuit court of the United States, and that the prayer of their petition was properly denied.

We proceed to consider the several objections presented by the bills of exceptions taken to the rulings of the court on the trial of the issue.

The court, notwithstanding objection
308 made by the *plaintiffs, permitted the defendants to read in evidence to the jury the deposition of Joseph Mayo, who was dead at the time of the trial. The witness in his deposition detailed a conversation which was had between himself and one of the defendants Lee George, in the presence of Constant C. Willamin, (another of the defendants), soon after the death of William O. George, in which conversation Lee George was represented as having made important admissions, touching the disputed marriage, which was the only question to be determined by the jury on the trial of the issue. Those two defendants were strangers to the witness, and on cross-examination, describing them, he said, "They were not black negroes. I think the brother-in-law had the lightest skin of the two. I think they were not bright mulattoes, but dark mulattoes." It was proved by other witnesses, that the brother-in-law spoken of (Willamin) was a white man, and that Lee George was so bright that he could hardly be distinguished from a white man. It was further proved that about the time at which Mayo says he had the interview with the two men, Lee George and Willamin were both in Richmond inquiring for Mayo. The reading of the deposition as evidence was objected to because the witness did not sufficiently identify the parties whose admissions were sought to be proved by him. We think the deposition was properly admitted. The evidence of identity was *prima facie* sufficient to authorize the deposition to go to the jury. 1 Greenleaf on Ev. § 575 and notes, and cases cited by counsel for appellees, *Reynolds* v. *Staines, &c.*, 2 Carr and Kirwan 745, 61 Eng. C. L. 744; *Hamber* v. *Roberts*, 7 Man. G. and S. 861, 62 Eng. C. L.; *Collier* v. *Nokes, &c.*, 2 Carr and Kirwan, 1012, 62 Eng. C. L. 1011.

As it is more convenient we will dis-
309 pose of the *question raised by the third bill of exceptions taken by the appellants before noticing the second.

The question will be more fully presented and better understood by copying the bill which is in these words:

Be it remembered, upon the trial of this cause, after plaintiffs and defendants had closed their evidence, and C. White, Esq., (one of the counsel for the plaintiffs) was proceeding to address the jury, and was arguing that by a proper construction of Byrd George's will, his son (W. O. George) could not have disposed of the property by his will, being unmarried, here the counsel for the defence asked leave to introduce in evidence three deeds, viz: W. O. George to W. P. Goodman, dated December 15th, 1862; the same to A. P. Rowe, dated June 6th, 1863; and the same to Henry White, dated June 13th, 1862. The plaintiffs objected, but the court admitted the deeds after said White and Holladay had spoken (the deeds were made a part of the record), with the declaration that the said counsel who had spoken might, if they thought proper, comment on the said deeds, inasmuch also as the purpose for which the will of Byrd George was introduced

was not disclosed until the argument began; to which opinion of the court the plaintiffs excepted, and prayed that this their bill of exceptions may be signed, sealed and enrolled. Which is accordingly done.

The deeds referred to in the bill of exceptions purported to convey in fee to the grantees lands devised by the will of Byrd George to his son Wm. O. George, and although the object for which they were offered as evidence does not distinctly appear by the bill, yet it sufficiently appears that 310 they tended to show that the *construction put upon the will by the plaintiffs' counsel was not the construction given to it by William O. George; and the deeds were therefore competent evidence to rebut the inference drawn by the counsel from their construction of the will. It would seem that the objection was rather to the time of the introduction of the evidence than to its competency. On trials before a jury, when the evidence has been closed on both sides and the argument of the cause has commenced, as a general rule, no further evidence should be received from either party; but the judge presiding at the trial, in the exercise of a sound discretion, may relax the rule under peculiar circumstances, and receive additional evidence, if the nature of the case and the ends of justice require it. But if the introduction of such additional evidence takes the adverse party by surprise, he should be allowed time and opportunity, if desired, to meet it with further evidence on his side. *Commonwealth* v. *Ricketson*, 5 Metc. (Mass.) 428-9; *Taylor &c.* v. *Shemwell*, 4 B. Monr. R. 575; *Fleck &c.* v. *Hollenkemp*, 13 B. Monr. R. 219; *Larman* v. *Huey's heirs*, Id. 436; *McDowell's ex'or* v. *Crawford*, 11 Gratt. 377, 408-9.

It does not appear that the introduction of the deeds in this case took the plaintiffs in the issue by surprise, or that their rights were at all prejudiced thereby. They did not claim that the admission of the deeds rendered any further evidence on their part necessary, or that they had any such to offer, nor did they ask for any delay, or postponement of the argument, or of the trial, on account of the introduction of the deeds.

We think the court committed no error in permitting the deeds to go in evidence to the jury.

In the course of the trial, after the 311 plaintiffs in issue *had read to the jury the depositions of Charles Mink and others, and, amongst other exhibits accompanying the depositions, the certificate of marriage of William O. George and Caroline Jackson, and there rested their case, and the defendants had introduced sundry witnesses who testified in their behalf, and the plaintiffs had closed with their rebutting evidence, they (the plaintiffs) offered to read to the jury the depositions of eighteen witnesses, to prove that the said Charles Mink (whose deposition had been read by the plaintiffs in evidence to the jury) "was a man of good character for truth and veracity, and a man of the strictest integrity." To the introduction of these depositions as to the character of Mink, the defendants objected, the objection was sustained, the depositions were excluded; and the plaintiffs excepted. Were the depositions properly excluded, is the question for us to determine, and the one mostly argued at the bar.

A witness may be impeached in many ways. "The credit of a witness may be impeached," says Mr. Starkie, "either by cross-examination, subject to the rules already mentioned, or by general evidence affecting his credit, or by evidence that he has before done or said that which is inconsistent with his evidence on the trial; or lastly, by contrary evidence as to the facts themselves." 3 Starkie on Ev. (Metcalf's ed.), side page 1753. See also 1 Greenleaf's Ev., §§ 461, 462; Phillips' Ev., pp. 291, 293.

When a witness is thus impeached, the party calling him has the right to sustain him, and for that purpose it would seem but just and reasonable that he should be allowed to introduce evidence of the general reputation of the witness for truth.

All the authorities concur, that such corroborating evidence is admissible where 312 the character of the witness *is attacked by direct evidence; but there is much conflict among them as to its admissibility where the attack is made in any other mode. The rule is laid down by the elementary writers in general terms thus: A party cannot bring evidence to confirm the character of a witness before the credit of that witness has been impeached, either upon cross-examination or by the testimony of other witnesses; but if the character of a witness has been impeached, although upon cross-examination only, evidence on the other side may be given to support the character of the witness by general evidence of good conduct. 1 Starkie Ev., Metcalf's edi., side page 148. If the character of any witness for credibility be impeached, either by direct evidence or upon cross-examination, his testimony may be supported by general evidence that his character is such that he is worthy of credit. Roscoe Crim. Ev., 95.

In answer to the evidence of contradictory statements, and for the purpose of corroborating the testimony of the witness whose veracity has been thus impeached, it seems reasonable to be allowed to show that he is a man of the strictest integrity and of scrupulous regard to truth. 1 Phillips on Ev., 306, 307.

See 1 Greenleaf's Ev., § 469 and notes (Redfield's edition).

Many of the decisions in the American states hold, that the evidence is admissible only when the general character of the witness, or his character for truth, is assailed by direct evidence as to such character, or by proof on cross-examination of extrinsic facts going to general character; and that it cannot be received to sustain a witness on account of inconsistencies in his own statements on cross-examination, or on account of statements proved to have been made by him out of court contradictory of state- 313 ments made by him *in court, or on account of proof by other witnesses of material facts irreconcilable with the facts

proved by the witness, although such proof may impute fraud or falsehood to the witness. *People* v. *Hulse*, 2 Hill's R. 309; *People* v. *Gay*, 3 Selden's R. 378; *Russell* v. *Coffin*, 8 Pick. R. 143; *Rogers* v. *Moore*, 10 Conn. R. 13; *Brown* v. *Mooers*, 6 Gray's R. 451; *Heywood* v. *Reed*, 4 Gray's R. 574; *Atwood &c.*, v. *Dearborn*, 1 Allen's R. 483; *Boardman* v. *Woodman*, 47 New H. 120; 9 Watt's Penn. 124; *Wertz* v. *May*, 21 Penn. St. R. 274.

Other state authorities, however, lay down a much more liberal rule. In the case of *Paine and others* v. *Tilden and others*, 20 Verm. R. 554, JUDGE REDFIELD says: "It is now well settled, that whenever the character of a witness for truth is attacked *in any way*, it is competent for the party calling him to give general evidence in support of the good character of the witness. And we do not think it important whether the character of the witness is attacked by showing that he has given contradictory accounts of the matter out of court, and different from that sworn to, or by cross-examination, or by general evidence of want of character for truth." *State* v. *Rowe*, 12 Verm. R. 93; *Sweet* v. *Sherman*, 21 Verm. R. 24, *accord*.

In Tennessee, in a case in which a witness had been subjected to a severe cross-examination, with a view to impair his credit, and general evidence of character had been offered to sustain him, which was objected to, GREEN, J., in delivering the opinion of the supreme court, said: "The record shows that Hamilton was subjected to a searching cross-examination by defendants' counsel, in which many questions were asked as to the situation of the building, his motives for being in the place where he witnessed the
314 facts, to which he *deposed, &c., all going strongly to evince that no credit was given to his statements, and tending to make that impression on the jury. A witness may be impeached by proving that he is not worthy of credit, or that the facts to which he desposes are not true, or by cross-examination, in which he may be involved in inconsistencies. 3 Starkie 1753, 7, 8. In this case, the cross-examination was of a character from which the counsel manifestly intended to argue that the witness had sworn falsely." *Richmond* v. *Richmond*, 10 Yerg. R. 343.

In a case in Alabama, where evidence was adduced to *contradict* a witness on an *immaterial* point, the party who called him was allowed to introduce witnesses to sustain his general character, although the opposite party disclaimed any intention of discrediting him. *Newton* v. *Jackson*, 23 Alab. R. 335.

And in North Carolina, in a case decided in 1869 by the supreme court of that state, it was held competent to sustain a witness by evidence of character, where it was sought to impeach him by the very question put to him. *State* v. *Cherry*, 63 North Car. R. 493.

The most recent case coming under our notice, in which this question was considered, is one decided by the court of appeals of Maryland at the April term 1873.

JUDGE ROBINSON, delivering the opinion of the court, said: "Mere contradiction among witnesses furnishes no ground, as a general rule, for admitting general evidence as to their character; though if fraud or other improper conduct be imputed to any of them, such evidence will be received. *Annesley* v. *Arglosia*, 17 How. St. Trials, 1348. The credit of a witness, however, may be impeached by evidence assailing his character for veracity;
315 or by proof of contradictory *statments in regard to the material facts; or by disproving by other witnesses material facts stated by him in his direct or cross-examination. Here the purpose of the state was to discredit the witness Harrison, by disproving material facts testified to by him, and it was competent, therefore, for the prisoner to sustain the witness by proof of his general character for veracity." *Davis* v. *Slate*, 38 Mar. R. 15.

We are not aware that the prescise question passed upon by these decisions, has ever come before this court for determination until now, and in the conflict of authorities in other states, we are called upon to declare the true rule in Virginia; and we are of opinion, that whenever the character of a witness for truth is attacked either by direct evidence of want of truth, or by cross-examination, or by proof of contradictory statements in regard to the material facts, or by disproving by other witnesses material facts stated by him in his examination; or, in general, whenever his character for truth is impeached in any way known to the law, the party calling him may sustain him by evidence of his general reputation for truth. The rule as we declare it, has, we believe, been generally regarded as the true rule by the bench and the bar in this state, and has been generally followed in the practice.

We proceed to inquire whether under this rule the character of the witness Charles Mink was impeached in any way in the proceedings in the court below, so as to make it proper to let in the evidence of good character which was offered to sustain him and which was excluded. No direct evidence of character was given with a view to impeach him, nor were any contradictory statements made by him proved. If he was impeached at all, it was in some other way.

316 *The only question presented by the issue and to be determined by the jury, was, whether or not a marriage between William O. George and Carolina Jackson had been duly solemnized in the city of Philadelphia on the 21st day of April 1869. The main witness relied on by the plaintiffs in the issue to prove the marriage, was Charles Mink, an alderman of said city. In his examination in chief, he testifies that as alderman he solemnized the marriage between William O. George and Caroline Jackson, in the city of Philadelphia, on the 21st day of April 1869, and on the same day and after the marriage, he made out a certificate of the marriage, signed it in his official character, caused it to be attested by a witness, John Garrigan, or Gogran, and delivered it to the said Caroline, and the certificate, which is a part of the record, being produced, he identified is as the one

made out and signed by him on the 21st day of April 1869; and that he afterwards made return of the marriage to the proper office in the city of Philadelphia. It was proved by other witnesses, and not doubted, that according to the laws of Pennsylvania, aldermen are vested with the power to solemnize marriages in that state. Now if this testimony of alderman Mink is true, the marriage was fully proved, and hence all the evidence adduced by the defendants was to prove that it was not true.

The witness was subjected to the most searching cross-examination, and no man can read it without being satisfied that the main object and purpose of it was to impeach the credibility of the witness. This design is patent from the character and form of the questions put to him, and from the whole course of the examination. He was particularly interrogated as to the time and place of the marriage, the number, 317 *names and description of the persons present at the ceremony. He was asked if he kept any record in a book of the marriages celebrated by him, and if so, to produce the book. The witness having replied that he had kept such a book, but when he went out of office he gave all his records to his constable to be sold for old paper, and therefore he could not produce the book; he was then asked who that constable was, and if he did not know before he went out of office that there was some dispute about the marriage? The witness answered that he did know it. He was then asked why he did not preserve the marriage book. He was further interrogated as to the number of marriages recorded in that book, the names of the parties married, and the times at which the entries were made, how many before and how many after the entry of the marriage of William O. George and Caroline Jackson? The witness having testified that besides Gogran there was a colored man present at the marriage; he was asked why he did not make this colored man a witness to the ceremony as well as Gogran or Garragon, and whether he had ever on any previous marriage occasion put the namé of a witness of the ceremony on his book? Many other questions of like character were propounded on the cross-examination, and in the course of it, in the questions propounded, the marriage is spoken of as the "alleged marriage," the parties married as the "alleged parties," and the entry by the witness as the book kept by him of the marriage as the "alleged record," &c. But we have said enough to show that the intent and object of the cross-examination was to discredit the witness before the tribunal in which the deposition was to be read.

It was further attempted to discredit him by showing by another witness, George 318 E. Chambers, that the *statement made by him, Mink, about the refusal of the registration officer to receive returns of marriages made by him was not true.

In fact all the evidence offered by the defendants to disprove the marriage, to which Mink testified, went to discredit him. Such of necessity was the effect of the evidence offered to show the declarations of William O. George, after the date of the alleged marriage, that he had never been married, and evidence of the like character.

We are clearly of opinion that the corroborating evidence offered by the plaintiffs, and which was excluded, should have been received. The defendants denied from the beginning, that any marriage between William O. George and Caroline Jackson had ever taken place, and this denial of necessity involved the character of Mink, by whom the marriage was attempted to be proved. Indeed, after his deposition had been taken and filed, the defendants in their answer to the bill, after speaking of the marriage, and the certificate of it, use this language: "And *upon investigation* these defendants have discovered that the said certificate of marriage was a *base fabrication*, concocted after the death of the said William O. George, and the discovery that he had died intestate, and the result of a *conspiracy* on the part of the said Caroline and her children and Willamin, in *which they procured the help of the said alderman, one Mink of Philadelphia*, to cheat these defendants and Ella Ferguson, the heirs of the said William O. George, of his estate, and possess themselves of it." Such was the charge in the answer, which, although not read in evidence to the jury, was substantially repeated by the counsel for the defendants in the opening statement of the case to the jury; for it appears by the certifi- 319 cate of the chancellor, *presiding at the trial, that "in the opening statement of the case to the jury the defendant counsel assailed the certificate of marriage of William O. George to Caroline Jackson by *alderman Mink as *false and fraudulent, and repeated it throughout.*

The attempted disproof of the marriage and of the certificate given by Mink was a charge upon the record and before the jury that Mink was guilty of fraud, conspiracy, forgery and perjury; and if the party calling a witness who thus attempted to be impeached cannot sustain him by evidence of good character for truth, we cannot conceive of a case where such evidence would be admissible. The certificate of the chancellor, that "there was no evidence impeaching the character of the witness, alderman Charles Mink," must be understood as referring only to direct evidence as to character.

It is needless to say much as to the refusal of the chancellor to set aside the verdict of the jury and order a new trial of the issue. He did not certify the *facts*, because the evidence was conflicting; and there is no certificate of the evidence. Some of the evidence given is shown by the bills of exceptions in the case, from which it also appears that other evidence was given; but what that evidence was does not appear. If there had been no error in rejecting the corroborating evidence offered by the plaintiffs, in the absence of any certificate either of the evidence or of the facts proved by it, there would have been no error in the chancellor's decree. But for the error committed in excluding the

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corroborating evidence aforesaid the decree must be reversed and annulled, and a new trial of the issue directed.

The decree was as follows:

320 *This day came again the parties by their counsel; and the court, having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that on the trial by the jury of the issue ordered by the said chancery court of the city of Richmond on the 11th day of November, 1873, the said court erred in excluding as evidence from the jury the deposition of Joseph Clittermary and others, offered by the plaintiffs in the issue to sustain the character of the witness Charles Mink, whose deposition had been read by said plaintiffs in evidence to the jury; and that the whole of the decree aforesaid based upon the verdict of the jury rendered on said trial, except such part thereof as relates to the appointment of the receiver therein mentioned and the directions given to such receiver, is erroneous. It is therefore adjudged, ordered and decreed, that the said decree, so far as it is hereinbefore declared to be erroneous, be reversed and annulled, and that the same be affirmed in all other respects; and that the appellees (except John M. Pilcher) pay to the appellants their costs by them expended in the prosecution of their said appeal here. And this court proceeding to pronounce such decree as the said chancery court ought to have pronounced, it is further adjudged, ordered and decreed, that the verdict of the jury rendered on the trial of the issue aforesaid be set aside, and that the parties in said issue proceed again to the trial thereof at the bar of said court, and upon said trial that the said court proceed in conformity with the opinion hereinbefore expressed. Which is ordered to be certified to the clerk of the said chancery court of the city of Richmond.

DECREE REVERSED.

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321 *City of Petersburg v. Applegarth's Adm'r.

[26 Am. Rep. 357.]

March Term, 1877, Richmond.

1. **Owners of Wharves—Obligations as to Hidden Obstructions.**—According to the principles of the common law, the owner of a wharf who receives or is entitled to receive wharfage for vessels moored to said wharf, is bound to use at least ordinary care and diligence in keeping the water adjacent to such wharf in which vessels lie while moored thereto, free from obstructions, and is liable for any damage done to any such vessel by reason of the neglect of such duty; and the same principles apply, whether such owner be an individual, or a corporation, whether such corporation be private or municipal.

2. The city of Petersburg owns a wharf in the Appomattox river, for the use of which the city is authorized to charge and does charge wharfage. In October 1872 the vessel of A not being able to get to the wharf at which she was to deliver her loan on account of an obstruction in the stream by another vessel, drew up to the city wharf and moored to it, and whilst waiting there she sunk on the next low water, from a pile going through her bottom. This pile was oak, being about two feet from the wharf, in the stream where a vessel at the wharf would probably lie, and was visible at low water, though it was some two feet or more above the bed of the river, and was firmly fixed there—HELD:

1. **Obstructions—Liability of Municipal Corporations.***—The allowing such an obstruction in the place where it was, was negligence; and the city of Petersburg being the owner of the wharf, is liable for the damages occasioned by it.

2. **Same—Same—Delegating Duties.**—The fact that the city had appointed a port warden whose duty it was to attend to the removal of obstructions in the stream, and to attend to the duties of the city in regard to the city wharf, does not exempt the city from liability for the damages. The port warden in this matter is but the agent of the city, and the principal is always bound for the acts and neglects of his agent. The same rule which applies to a private principal, applies to a corporation, whether ordinary or municipal, and *a fortiori* to a corporation which can only act by an agent.

322 3. **Same—Same—Same.**—The fact that it has been made by statute the duty of the Lower Appomattox company to dredge and remove obstructions from the river at and below Petersburg, cannot relieve the city from her liability. The city is in fact the company owning all the stock and appointing the officers of the company. But even if it was an independent organization, its obligation to perform a duty which the city is also bound to perform on common law principles, would not relieve the city from its common law liability for the non-performance of such a duty.

4. **Same—Same—Federal Appropriations.**—Nor can it make any difference that the United States have made appropriations to the improve-

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***Torts—Municipal Liability—Wharf Owners.**—See the opinion in Terry v. City of Richmond, 94 Va. 537, in which the court discusses fully the liability of a municipal corporation for its torts, citing and distinguishing the principal case and many other Virginia cases. As to duties of wharf owners, see 29 Am. & Eng. Enc. Law 86. In Mendil v. Wheeling, 28 W. Va. 250, the court says that the principal case "gives no countenance to the claim, that a municipal corporation owning and operating its waterworks and receiving 'water rent' for water furnished, is responsible in damages to a property owner for loss by fire through the failure of the city authorities to keep the water pipes in proper condition and repair." In Ravenswood v. Flemings, 22 W. Va. 69, the principal case is cited for the proposition that municipal corporations are held to the strictest liability for any injury occasioned by reason of the bad repair of wharves owned by the city. See Maia v. Eastern Hospital, 97 Va. 510, for an instance of the non-liability of a public corporation for injury occasioned by its negligence on the ground that the said corporation acted exclusively as an agent of the state. See also, Richmond v. Long, 17 Gratt. 375; DeVoss v. Richmond, 18 Gratt. 344; Noble v. Richmond, 31 Gratt. 278; Orme v. Richmond, 79 Va. 89.

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ment of the navigation of the river, and have occasionally dredged it. This does not relieve the city from its common law liability in regard to the city wharf.

5. **Same—Same—Receipt of Wharfage.**—Nor does it make any difference, that in this case no wharfage was actually received by the city, and that it does not usually charge wharfage in cases where the vessel mooring at her wharf is not to be unloaded there. It is sufficient that the city was entitled to charge wharfage.

This is a *supersedeas* to a judgment of the circuit court of the city of Petersburg, rendered on the 4th day of June 1873, in an action of trespass on the case brought by William Applegarth against the city of Petersburg.

The declaration contained four counts. The first was in substance as follows: that before and at the time of the committing of the grievances, hereinafter mentioned, the defendant was the owner, and was possessed of a certain wharf for the landing, mooring, loading and unloading of vessels on the banks of the Appomattox river, within the corporate limits of the city of Petersburg, and known as the city wharf, near to which said wharf there was then a certain obstruction, to wit: a pile before then, by the defendant carelessly and negligently placed, and then being at and upon the bottom of said river, over which pile, at certain states of the tide of said
323 river, the vessel of the *plaintiff hereinafter mentioned would float, but at other states of said tide said vessel would not float, of all of which premises said defendant had notice at and before the time aforesaid; that at the time of the committing of said grievances, and while the defendant so owned and possessed the wharf aforesaid, the plaintiff owned and possessed a certain vessel called the North Carolina, of great value, to wit: of the value of $5,000, then being lawfully, by sufferance and permission of said defendant, at and along side said wharf for reward to said defendant in that behalf; and said defendant had the management and control of said wharf, and the mooring and stationing of vessels at and near the same, whilst such vessels were at such wharf for the purpose of using the same, and said defendant had the legal right to charge and demand of the said plaintiff wharfage therefor; yet the said defendant, at the place aforesaid, and on the 15th day of October 1872, unskilfully, negligently and improperly moored and stationed said vessel of said plaintiff in that part of said river near said wharf and over said obstruction, to wit: over said pile, and unskilfully, negligently and improperly detained said vessel for a long and improper time over said pile, and until said vessel on the day and year aforesaid, upon the natural and usual fall of the tide in said river came, fell and lodged upon, and struck against, said pile at the bottom of said river, and there remained and continued upon, and striking against, said pile for a long time, and thereby became, and was greatly strained, bulged, broken, pierced and injured, and was sunk; in consequence and by reason of which injuries, done by said defendant, said plaintiff necessarily sustained great damage, to wit: a loss of $1,262.43, which said sum he avers he necessarily expended in raising said vessel and her cargo, and in
324 *repairing said vessel, and the further great sum, to wit: the sum of $650, special damage which said plaintiff necessarily sustained by being deprived of the use and enjoyment of said vessel, and her ordinary gains and profits to said plaintiff during the time that she was sunk, being raised and repaired.

The second, third and fourth counts are very nearly to the same effect with the first, and it is unnecessary to state the particulars in which they differ from each other.

The plaintiff having died shortly after the institution of the action, his death was suggested, and the action was revived in the name of his administrator, George S. Bernard.

Thereafter the defendant filed a demurrer to the third and fourth counts of the declaration, in which demurrer the plaintiff joined. The court sustained the demurrer to the third count, and overruled the demurrer to the fourth count; and thereupon the defendant pleaded not guilty to each count of the declaration, except the third, and issue was joined on the said plea. The issue was tried by a jury, which, on the 3d day of June 1873, found a verdict in these words: "We, the jury, find for the plaintiff, and assess his damages at eighteen hundred and eighty-five dollars and eighty-six cents, with legal interest thereon from December 16th, 1872, till paid." Whereupon the defendant moved the court to set aside the verdict and grant a new trial, upon the ground that the verdict was contrary to the law and the evidence in the cause; which motion was overruled, and judgment was thereupon rendered according to the verdict.

Two bills of exceptions were taken by the defendants to certain rulings of the court in the progress of the trial, and were made
325 a part of the record. One *related to the instructions which were given or refused by the court to the jury, and the other to the ruling of the court in regard to the motion to set aside the verdict and grant a new trial. In the former, so much of the evidence was set out as was deemed to be necessary or proper to show the relevancy of the instructions. In the latter, is contained a certificate purporting to be of all the facts which were proved on the trial. That certificate is in substance as follows:

"The court certifies that after the jury were sworn to try the issue joined in this cause, the following facts were proven before the jury on the part of the plaintiff, viz: That the vessel of the plaintiff's decedent, Wm. Applegarth, called the North Carolina, which was in thorough order and repair, and of the value of $3,500 or $4,000, arrived at Petersburg about two o'clock A. M. of 15th October 1872, with a cargo of 131 tons of coal, consigned to Marks & Friend, of that city. That she was not able to get to their wharf, in consequence of the river being blockaded by a dredging machine lying alongside the steam-

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er Fanny Lehr, at the wharf rented by the Powhatan Steamboat Company from the city, and made fast to another wharf of the defendant, below, known as the city wharf. That next morning, 15th October 1872, the tide being low, she could not get up to Marks & Friend's wharf; and while waiting for the next high tide, Marks & Friend sold the coal to B. S. Burch, with the understanding that Burch was to send a tug at the next high water to tow her down the river; but Burch failing to do so, and the captain of the vessel, concluding not to wait, commenced, about three o'clock P. M. of 15th October 1872, to haul up to Marks & Friend's wharf, and had proceeded in that direction about twenty feet, perhaps half the length of the whole **326** vessel, which is eighty-six feet *long, when he received a message from Burch that he would tow her down on the next high water, which would be about two o'clock A. M. That the vessel was immediately made fast to the city wharf, where she sunk on the next low water, about nine o'clock P. M., from a pile going through her bottom. And that on discovering that she was leaking, which was about twenty minutes to nine o'clock, her pumps were started, but she sunk in about twenty minutes. That every effort was made by the captain and crew to save the vessel and cargo and prevent their sinking, and every proper effort made to raise the vessel and cargo and repair the injuries done to the vessel by the sinking as quickly and cheaply as the same could be done. That the actual and necessary costs of raising and repairing the vessel was $1,235.86, and the actual and proper amount of demurrage was $650. That neither the captain nor owner of the vessel paid any wharfage, but they were liable to pay wharfage under the city ordinance. That she was sunken by an oak pile through her bottom, which was sawed off by divers about eighteen inches or two feet from the bottom of the river, and the divers traced the pile, by feeling, about eighteen inches or two feet in the sand, and that the inclination was from the wharf, and that the pile entered the vessel about nine or ten feet from the keel and about five feet from her main mast, and that an old piece of log lying between the pile and the wharf, about three feet long and eight inches in diameter, was pulled out by them; that the pile that entered the vessel inclined in the direction of the opposite side of the river, and was an oak pile, and in the opinion of an expert was a fender pile, or part of the city wharf, and that from where the pile entered the vessel to the wharf was about two and a half feet; that the pile **327** *that entered the vessel was visible at low tide: that the river appeared to have been dredged not nearer than two feet from the city wharf, but did not appear to have been dredged level, but in holes, and the dredging on the outside of the pile would have caused it to incline outwards; that about two or three years ago, when one of the plaintiff's witnesses named Brown was at Petersburg, in command of another vessel, E. H. Stainback, the port warden of the city of Petersburg, directed him to haul his vessel about another length astern, as there was an obstruction or something else in the way, but what was not recollected, and that after the sinking of the North Carolina witness reminded Stainbeck of it; but it was also proved by the defendant that that pile was at a different place from the one where the North Carolina was sunk; that after the sinking of the North Carolina, some two or three inches of a stob under the water, and about two feet from the wharf, was seen by a witness, but the size of the stob, or whether it entered the vessel or not, could not be seen, and that the stob was five or six feet from the guards of the vessel, and that the stob seen under the water was an oak pile and inclined outward from the wharf. And it was further proved, that on the 25th day of October 1872, whilst the said vessel was being raised, the late William Applegarth addressed and caused to be delivered to E. H. Stainback, port warden of said city, and to Franklin Wood, the mayor thereof, true copies of a notice which is in the words and figures following to wit: 'To the Hon. Franklin Wood, mayor of the city of Petersburg: Dear Sir:—This letter will inform you, and through you the city of Petersburg, that I shall hold said city responsible for all damages which I have sustained or shall sustain by reason of the **328** sinking of *my schooner the 'North Carolina' and her cargo (one hundred and five tons of coal), whilst lawfully lying at the wharf of said city known as 'the city wharf,' on the 15th day of October 1872. Said sinking was caused by the carelessness and negligence of said city. I am now engaged in raising said vessel and her cargo, and will be glad to have from said city whatever assistance she may render. Very respectfully, yours, Wm. Applegarth, by Jones & Bernard, his attorneys.'

"And the court further certifies that the defendant, to maintain the issue on his part, proved the following facts, viz: That when the wharf of the defendant at which the North Carolina was sunken was built, all its fender piles were oak, and all the piles on which the string timbers rested were pine. That the fender piles were placed about thirty feet apart, and are there still and none of them missing, and that the fender piles are all visible at high water, and that the oak pile on which the vessel sunk is smaller and not like the fender piles at said wharf. That some time between 20th and 30th September 1872, that part of the river along the whole length of the city wharf at which the North Carolina sunk, had been dredged to within about two feet of said wharf; and that the reason why it was not dredged nearer the wharf was for fear said wharf might be undermined and caused to fall; and that it was more than probable if the pile on which the North Carolina sunk had been there when the dredging was done, the shovel of the dredge would have struck it; that one of the witnesses was a member of the board of directors of the Lower Appo-

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mattox company, whose president and directors are appointed by the common council of the city of Petersburg, and that the said city, for the last three years, has furnished the money to open and keep open
329 *the Appomattox river; but that since December 1871, the United States government has had charge of the river, and commenced operations in opening and cleaning out; that the dredging aforesaid, between 20th and 30th September 1872, was made by said witness under contract with the Lower Appomattox company; that he had no orders to dredge the river regularly; but when he did so, it was under a special contract with the Lower Appomattox company, and that under a like contract he dredged out another vessel that was sunk in the river at a different point between the first and latter part of October 1872; that the pile which sunk the North Carolina did not resemble the fender piles of said city wharf; that about eight or ten days before the sinking of the North Carolina, a three-masted schooner lay near the same spot of the sinking, but received no injury as far as known; that timbers often floated down the river from above; that during the late war the Confederate government built two bridges across the river, not far from the city wharf, at which bridge oak piles were driven down.

"It was also proved that E. H. Stainback was the port warden of the city of Petersburg since 1865, and that the conversation which took place two or three years ago, as proved by the plaintiff's witness Brown, between him and E. H. Stainback, the port warden of Petersburg, occurred in November 1870, and the obstruction referred to by the witness Brown was reported to the Lower Appomattox company with directions to have it taken out, and it was never seen there afterwards by the port warden; that no demand was made by the city for wharfage of the captain or officers of the North Carolina, because she had no cargo
330 *to be landed there, and it was not the custom of the port warden to claim wharfage in such cases."

The foregoing are all the facts certified in the second bill of exceptions. In the first, besides the other evidence therein set forth, it is stated that "the plaintiff further gave in evidence section 20, page 8, and section 30, page 11, of the charter, and chapter 16 of the printed ordinances of the city of Petersburg, in the words and figures following, to wit:

"Section 20, page 8, city charter:

"20. The common council shall have authority to provide by ordinance for the appointment of such officers as shall be necessary or proper to carry into full effect any authority, power, capacity or jurisdiction which is or shall be vested in the said city, or in the common council, or in the mayor or aldermen thereof, except as hereinafter provided for; to grant to the officers so appointed the powers necessary and proper for the purposes above mentioned; to define their duties, to fix their terms of office, to allow them reasonable fees and compensation, and to require and take of all or any of them such bonds, obligations or other writings as they shall deem necessary or proper to ensure the proper performance of their several duties. All officers so appointed may be removed from office at the pleasure of the common council; and unless their terms of office be otherwise fixed by ordinance, they shall be considered as holding their respective offices at the pleasure of the common council.

"Section 30, page 11, city charter:

"30. It shall be lawful for the com-
331 mon council to *establish and construct landings, wharves and docks, on any ground which does or shall belong to the said city, and to repair, alter or remove any landing, wharf, or dock which has been, or shall be so constructed, and to lay and collect a reasonable duty on the vessels coming to and using the same; and they shall have power to pass and inforce such ordinances as shall be proper to keep the same in good order and repair; to preserve peace and good order at the same, as well as at all other wharves and landings in said city, and to regulate the manner in which they shall be used. They shall have power also to appoint as many port wardens for the port of said city as may appear necessary; to prescribe their duties, fix their fees, and make all regulations in respect to such officers, as to them may seem expedient.

"CHAPTER XVI.—*Concerning the city wharf.*

"§ 1. Vessels lying at the city wharf shall for every twenty-four hours that they may lie there, pay two cents per ton, one half of which shall be retained by the port warden, in full for his services. If any such vessel shall remain at said wharf a less time than twenty-four hours, her master or owner shall pay the same rates as for twenty-four hours.

"§ 2. If any master or owner of any such vessel shall refuse or neglect to pay the said rates on application by the port warden, he shall be liable to pay double the said rates.

"§ 3. It shall be the duty of the port warden to remove obstructions to the navigation of the river within the city. If any master or owner of a vessel throw ballast overboard in any part of the river within the city, or suffer it to be done, he shall forfeit ten
332 dollars *for every such offence. If any vessel, boat or lighter be sunk in any part of the river within the city, the owner or master thereof shall remove the same within thirty days after notice from the port warden so to do. If he fails so to do, the port warden shall cause the same to be done, and draw on the chamberlain for the expense, retaining possession of the vessel. If the expense be not refunded, with ten *per cent.* damages, within ten days after such removal, the port warden shall sell the vessel at public auction, and out of the proceeds of sale shall refund the said expenses, with ten *per cent.* damages, and shall pay the balance to such master or owner. If the proceeds of sale be not sufficient to pay the said expenses, and ten *per cent.* damages, the chamberlain may recover the residue from the owner or master of such vessel. If the port warden shall fail to perform any duty hereby required

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of him, he shall forfeit ten dollars for every such offence, and each week of such failure shall constitute a distinct offence.

"§ 4. All goods landed on the city wharf, and remaining thereon longer than the space of forty-eight hours, after notice to the owner or consignee thereof to remove the same, shall be liable for the payment of twenty-five cents for every ten feet along said wharf occupied by such goods, for every twenty-four hours the same shall so remain, longer than the said space of forty-eight hours. If the said rate be not paid on application, the goods, or so much thereof as may be necessary, may be sold to pay the same.

"§ 5. When the city wharf shall be rented, the lessee thereof shall be the port warden, and shall be entitled to all the profits arising therefrom, agreeably to the rates hereby established."

333 *The counsel for the plaintiff moved the court to instruct the jury as follows:

No. 1. If the jury believe from the evidence, that the vessel of the plaintiff's decedent (Wm. Applegarth, dec'd,) was on or about the 15th of October 1872, lawfully lying at the wharf known as the city wharf, and was, whilst so lying at said wharf, injured by a sunken pile or other obstruction in the Appomattox river, at or alongside of said wharf, and if they further believe from the evidence, that at the time of the injury said wharf was owned by the defendant (the city of Petersburg), and that the said city had possession of and exclusive supervision and control over said wharf, including the right to demand and collect wharfage of and from vessels lying at said wharf, and had like supervision and control over that part of said river adjoining said wharf, and in which vessels lying at said wharf usually float, and if they further believe from the evidence, that at the time of such injury it was the duty of said city, or of any officer or agent of said city, appointed and removable by said city, and subject to her control, to remove obstructions to the navigation of said river at and near said wharf, they must find for the plaintiff, unless they further believe that said Applegarth, or some agent of his in charge of his said vessel at the time of the injury, by his fault contributed thereto.

No. 2. The owner of a wharf receiving tolls for its use, or having the right to demand and collect wharfage of vessels lying thereat, is bound to keep it in reasonably good condition, so that, as far as by the use of ordinary care, vigilance and skill, such owner can make it so, it shall be fit for the use of any vessel, of the class usually frequenting and mooring at such wharf, and having the right of access thereto; and the

334 *existence of piles or other obstructions under the water, and projecting above the ground at the bottom in that part of the river adjoining said wharf, and in which vessels lying at the wharf usually float, is presumptive evidence of negligence on the part of such owner; and it is not sufficient excuse to show that the owner did not place the obstruction there, or even know of their existence.

No. 3. If such wharf owner by his servants has the means of knowing the state and condition of his wharf, and of the river at, adjoining and near thereto, that is to say, in that part of said river in which vessels lying at said wharf usually float, and is negligently ignorant thereof, and an injury is occasioned by the imperfect condition of said wharf, or by an obstruction in the water at and near said wharf, and in said part of said river, such ignorance makes the wharf owner responsible to the same extent as if such owner knew of such imperfect condition of said wharf, or of the existence of such obstruction at or near said wharf, and in said part of said river, and negligently suffered the same to exist.

No. 4. If such wharf owner knew of the existence of an obstruction to the navigation of the river at and near his wharf, in that part of said river in which vessels lying at said wharf usually float, and leave the same open and accessible to all vessels accustomed to move and lie thereat, without notice or warning to such vessels of such obstruction, and any damage arise in consequence thereof, said wharf owner is responsible therefor.

No. 5. A municipal corporation, unless exempted by statute, is responsible for the acts and omissions of its servants, upon the same principle and to the same extent as a private individual. But it is necessary,

335 in *order to make a corporation liable for the negligence of an officer, that the officer should be appointed and removable by the corporation, and subject to its control in the details of the particular work.

No. 6. If the jury find for the plaintiff, they must give damages that will remunerate the estate of the late William Applegarth for the loss necessarily incurred in raising the vessel and repairing her, and for the use of the vessel during the time necessary to make the repairs and fit her for business.

And thereupon the counsel for the defendant objected to the court giving the said instructions, Nos. 1, 2, 3, 5, and 6, or either of them, and moved the court to instruct the jury as follows:

1st. If the jury shall believe from the evidence, that the vessel of the plaintiff was sunk and damaged by striking against a pile in the Appomattox river, but that said pile was no part of the wharf of said city, nor used as a part thereof, then they must find for the defendant, unless they believe from the evidence that the defendant or its agents, under its authority or instructions, placed or caused said pile to be placed in said river, or unless said defendant or its agents, having knowledge or notice of the same, permitted it to remain, and failed or neglected to notify the plaintiff, or the captain or officers of the vessel of its existence there; and it is incumbent on the plaintiff to prove affirmatively that the defendant or its agents, under its authority, placed or caused said pile to be placed in said river, or had such knowledge or notice, and permitted it to remain, or failed or neglected to notify the plaintiff or

the captain or officers of the vessel as aforesaid.

2d. If the jury shall believe from the evidence, that the vessel of the plaintiff was 336 sunk and damaged by a *pile in the Appomattox river, but that such pile was no part of the wharf of the defendant, nor used as a part thereof, and that the duty was imposed by law on the port warden for the port of Petersburg, appointed by the common council of said city, under an act of the legislature of Virginia, to keep said river free from obstructions, and that said port warden neglected his duty in that respect, and in consequence thereof said pile was permitted to remain in said river, and said vessel was sunk and injured thereby, the jury must find for the defendant.

3d. If the jury shall believe from the evidence, that the vessel of the plaintiff was sunk and injured by striking against a pile in the Appomattox river, and that such pile was a part of the wharf belonging to the defendant, or was used by the defendant in connection therewith, but that said pile was *latent*, then they must find for the defendant, unless they shall also believe from the evidence that the defendant or its agents had express notice of the existence of said pile, or unless its existence was so notorious as to be evident to all who had occasion to pass the place where it was; and it is incumbent on the plaintiff to prove affirmatively such notice or notoriety of existence.

4th. The law does not require the defendant to scour and drag the river opposite to or alongside of its wharf continually, to ascertain what obstructions might be there, or keep guard along the banks of the river to prevent the commission of injuries by others; and if the jury shall believe from the evidence that the vessel of the plaintiff was sunk or injured by striking against a pile in the Appomattox river, and that said pile was not visible to persons or vessels navigating said river or on the shore, and that there is no satisfactory evidence as to how such pile 337 came to be *where it was, or of the probable cause of its being there, or that the defendant or its agents knew it was there, then the jury must find for the defendant; unless they shall be satisfied from the evidence that the defendant or its agents had failed or neglected to use reasonable care and caution to keep the river in suitable condition for safe navigation of vessels opposite and alongside of said wharf; and it is incumbent on the plaintiff to prove affirmatively such failure or neglect.

5th. That in order to establish negligence against the defendant it is incumbent on the plaintiff to prove some fact which is more consistent with negligence than with the absence of it; and if the evidence in the cause is equally consistent with the existence or non-existence of negligence on the part of the defendant or its agents, then the jury must find for the defendant.

6th. If the jury shall find for the plaintiff, then the amount of damages which they shall assess shall be the amount necessarily incurred in raising and repairing the vessel, and the gross freight which she might have earned during that time, less the expenses and charges which she would necessarily have incurred in earning the same.

7th. The allegations in the plaintiff's declarations and his proof must agree.

But the court overruled the objections of the defendant's counsel to the first, second, third, fifth and sixth instructions asked for by the plaintiff's counsel, and gave the same to the jury, together with the 4th instruction asked for by said plaintiff's counsel, to which no objection was made by the defendant's counsel; and also overruled the motion of the defendant's counsel as to the first, second, third and fourth instructions 338 *asked for by the defendant's counsel, and refused to give the same to the jury, but gave the fifth, sixth and seventh instructions asked for by the defendant's counsel to the jury; and also, of its own motion, gave the following instruction to the jury, viz:

"If the jury shall believe from the evidence, that the vessel of the plaintiff was sunk and damaged by striking against a pile in the Appomattox river, in that part of the river over which vessels necessarily floated in reaching said wharf, and near to and used as a part of said wharf of the defendant, and that said defendant was authorized by law to establish and keep open, and did so establish and keep open, said wharf, and were entitled to demand and receive wharf fees for landing and discharging at the same, then they may find for the plaintiff such damages as he may have incurred in raising and repairing said vessel, and also the value of the use of the vessel whilst undergoing said repairs."

To the giving of which to the jury the defendant's counsel objected.

Verdict and judgment having been rendered in favor of the plaintiff against the defendant as aforesaid, the latter applied to a judge of this court for a *supersedeas* to the said judgment; which was accordingly awarded.

Jones & Bouldin, for the appellant.

Bernard and *Hinton*, for the appellee.

MONCURE, P., delivered the opinion of the court.

After stating the case he proceeded: The court is of opinion, that according to 339 the principles of *the common law, the owner of a wharf who receives, or is entitled to receive, wharfage for vessels moored to said wharf, is bound to use at least ordinary care and diligence in keeping the water adjacent to such wharf, in which vessels lie while moored thereto, free from obstructions, and it liable for any damage done to any such vessel by reason of the neglect of such duty; and that the same principles apply, whether such owner be an individual or a corporation, whether such corporation be private or municipal.

In Sherman and Redfield on Negligence, § 585, the law is thus laid down by those authors, who seem to be fully sustained by the authorities cited in their notes to that section:

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"The owner or lessee of a dock, pier or wharf, receiving tolls for its use, is bound to keep it in reasonably good condition, so that, as far as by the use of ordinary care, diligence and skill, he can make it so it shall be fit for the use of vessels, and safe for all persons to enter upon who have a right of access. If the wharf owner receives tolls from the public generally, he owes this duty to the public, and is liable to any one specially injured by his neglect to fulfill it." "It is negligence to permit anything to project from the side of a wharf in such manner as, by any probable combination of circumstances, to endanger the safety of vessels moored to the wharf. They are entitled to the unobstructed use of the water, whether it rises or falls. A wharf or dock owner receiving toll, does not fulfill his obligations by simply keeping the wharf or dock clear of obstacles and defects, which are visible upon an external inspection. If the general experience of persons in charge of wharves and docks has made it a fact of common notoriety among them, that such property is liable to become defective and dangerous from causes
340 that cannot *be detected from a mere external inspection, the owner is bound to make such further examination as is usual among owners of like property, having interests of their own to protect from damage, of equal magnitude, with those of the community in general, which are exposed to danger in the particular case. A dock ought to be dredged and cleaned with sufficient frequency to enable all such vessels as are accustomed to enter it to do so without stranding or dragging. And if for any reason the owner of the dock cannot do this, or claims to be released from the obligation to do so, he must withdraw all express or implied invitation for the entry of vessels; and if they are accustomed to enter, paying toll, he must close the dock, or in some other way distinctly warn them to keep out of it. The existence of piles or other obstructions under the water, and projecting above the ground at the bottom, is presumptive evidence of negligence; and it is not a sufficient excuse to show that the owner, at the time of an injury thus caused, did not place the obstructions there, or even know of their existence. He should have tested the safety of the dock. But the owner of the dock does not insure vessels against injury in it, and, if he has taken all the care that can reasonably be expected of him, he is not liable for damage done to a vessel by an obstruction in the dock. The master of a vessel has a right to presume that all parts of a dock are safe, and is not guilty of contributory negligence by taking a place which might, under other circumstances not anticipated by him, be less safe than another." In the notes to this section the following among other cases are cited, which were much relied on in the argument of this case, and seem to be very important. *Parnaby* v. *Lancaster Canal Co.*, 11 Ad. & El. 223; *Mersey Docks Trustees*
341 *v. *Gibbs*, Law Rep. 1 H. of L. 93; and *Pittsburgh* v. *Grier*, 22 Penn. St. R. 54. In *Parnaby* v. *Lancaster Canal Co.*, in which the complaint in the declaration was of a breach of duty alleged to have been created by a statute, the court of exchequer chamber (affirming the judgment of the court of Q. B.) held that such duty was not created by the clause of the statute referred to in the declaration, but arose upon a common law principle, that the owners of a canal, taking tolls for the navigation, were bound to use reasonable care in making the navigation secure, the want of which reasonable care might be collected from the declaration, although the complaint was ostensibly founded on the statute. In the *Mersey Docks Trustees* v. *Gibbs*, in which the judgment of the court of exchequer chamber was affirmed by the House of Lords, it was held that the principle on which a private person, or a company is liable for damages occasioned by the neglect of servants, applies to a corporation which has been entrusted by statute to perform certain works, and to receive tolls for the use of those works, although those tolls, unlike the tolls received by the private person or the company, are not applicable to the use of the individual corporators, or to that of the corporation, but are devoted to the maintenance of the works, and, in case of any surplus existing, the tolls themselves are to be proportionably diminished. *Parnaby* v. *The Lancaster Canal Co.* (*supra*) which was the case of an ordinary corporation, was approved of, and the principal of liability for negligence there established, was applied to a corporate body entrusted by statute with the performance of a public duty, and receiving therefrom no profits or emoluments for itself. And it was further held, that if knowledge of the existence of a cause of mischief makes persons respon-
342 sible *for the injury it occasions, they will be equally responsible when, by their culpable negligence, its existence is not known to them. And in *Pittsburgh* v. *Grier*, it was among other things held (BLACK, C. J., delivering the opinion of the court), that a city being in possession of a public wharf within its limits, exercising exclusive supervision and control over it, and receiving tolls for its use, is bound to keep it in proper condition for use; that the corporation is liable for special injury sustained by an individual in consequence of its neglect to keep the wharf in order, and *case* may be sustained therefor; that it was not material whether the city had adopted ordinances for the regulation of the wharf, or having such, neglected to enforce them—the responsibility is the same in either event; and that when the plaintiff has sustained injury from the neglect of a public duty, which the defendant has impliedly promised to perform, either *case* or *assumpsit* may be maintained. In that case, a steamboat was landed at a moderate stage of water, at a proper place at the Monongahela wharf at Pittsburgh, on which piles of iron metal had been lying for a long time, and nearer to the water's edge than was allowed by the ordinances of the city. The river afterwards rose, and the boat struck on the iron, and to avoid such danger was backed into the stream, where it

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was struck by a floating body, and further injured and sunk. It was held that the wharf, being under the exclusive control and regulation of the city authorities (whether rightfully or not, held not to be material), who derived a revenue from its use, the wharfage of the boat having been paid, the city authorities having been guilty of negligence in not having the iron removed, the corporation was liable in an action on the case to the owners of the boat for the
343 injury sustained; *that though some other place on the wharf might have been more secure, the captain of the boat had a right to select the one in question, which was at the time safe, the faith of the city being pledged to render it secure; and that it was not material that the city authorities did not foresee the danger as likely to occur.

There are other sections of S. & R. on Negligence, which have a material bearing on this case, among which are §§ 120, 135 and 137. In § 120 it is stated, among other things, that "there is nothing in the character of a municipal corporation which entitles it to an immunity from liability for such malfeasances, as private corporations or individuals would be liable for in a civil action." Many cases are referred to in the notes to that section, and among them is the case of *Mersey Docks Trustees* v. *Gibbs, supra,* of which there is a very full statement, the decision in which case was afterwards followed in *Coe* v. *Wise,* 1 Q. B. L. R. 711. In § 135, it is stated that "the rules of law governing the relation of master and servant, and principal and agent, are as applicable to corporations as to natural persons; and a municipal corporation is liable for the carelessness or neglect of its agents, on the same principle that a natural person is liable for damages resulting from the carelessness, unskillfulness or wrong doing of his agents. § 137 is to the same effect. Of course municipal corporations in the exercise of their political, discretionary and legislative authority, are not liable for the misconduct, negligence or omissions of the agents employed by them. But municipal corporations, in discharge of ministerial or specified duties, assumed in consideration of the privileges conferred by their charter, *are* liable for the misconduct, negligence or omissions of
344 their agents; and this *though there be the absence of special rewards or advantages. The distinction is so stated in *The City of Richmond* v. *Long's adm'rs,* 17 Gratt. 375. The remarks just made by us, concerning the liability of a municipal corporation, apply only to cases arising under the second branch of the distinction, the principles of which are strongly applicable to a case in which a municipal corporation is a wharf owner, entitled as such to receive wharfage. See Dillion on Municipal Corporations, ch. 23, and notes.

We have examined the authorities referred to by the learned counsel for the city of Petersburg, to wit: *Home* v. *Richards,* 4 Call 441; *Mayor* v. *Cunliff,* 2 Comst. 165; Sh. & Red. on Negligence, §§ 123, 126, 147, 148 and 407; Wharton on Negligence, § 52; *City of Richmond* v. *Long's adm'rs,* 17 Gratt. 375; *Fowle* v. *The Common Council of Alexandria,* 3 Pet. R. 398; *The City of Providence* v. *Clapp,* 17 How. U. S. R. 161; *Coe* v. *Wise,* 5 Best & Smith (117 E. C. L. R.) 439; *Weightman* v. *The Corporation of Washington,* 1 Black's R. 39; *Mayor* v. *Sheffield,* 4 Wall. U. S. R. 189; *Withers* v. *The North Kent Railway Company,* 3 Hurlst. & Nor. 969. But without stating the purport of these authorities, it is sufficient to say that we do not consider any of them to be in conflict with what we have stated, as in our opinion the law and the authorities cited by us in support thereof. None of the cases referred to by the counsel are cases of a wharf owner, receiving or entitled to receive wharfage; in which case the obligation of such owner to keep his wharf in repair, and to keep the water adjacent thereto free from obstruction, as before stated, seems to be well settled. And though in an action for negligence in such a case, the burden of proving such negligence, devolves, of course, on the plaintiff, yet proof of
345 the existence of an obstruction *in such a case is, generally at least, *prima facie* evidence of such negligence.

That it is made the duty of the port warden to see that the navigation of the Appomattox river, in the city of Petersburg, is kept free from obstruction, and to attend to the duties of the city, in regard to the city wharf, can make no difference. The port warden in this matter is but the agent of the city, and a principal is always bound for the acts and neglects of his agent in the execution of the agency. The same rule on this subject, which applies to a private principal, applies to a corporation, whether ordinary or municipal, and *a fortiori* to a corporation, which can only act by an agent.

Nor can it make any difference that it has been made the duty of the Lower Appomattox company to dredge and remove obstructions from the river at and below Petersburg, under the acts passed December 8th, 1824 (acts 1823-'4, p. 45, ch. 48), and March 28th, 1851 (acts of 1850-'51, p. 72, ch. 91). It seems that the city is now in effect the Lower Appomattox company, owning all the stock of that company, and electing its directory, which company, therefore, is a mere agency of the city. But even if it were a separate and independent organization, its obligation to perform a duty, which the city is also bound to perform, on common law principles, would not relieve the city from its common law liability for the non-performance of such a duty. If so, a party affected by the neglect of such duty might be injured by this substituted liability of the company.

Nor can it make any difference that the United States have made appropriations to the improvement of the navigation of the river, and have occasionally dredged it. While such operations are beneficial to
346 *the city, they do not relieve it from its common law liability in regard to the city wharf.

That no wharfage was actually received by the city in this case, and that it does not usually charge wharfage in such cases, can make no difference. It is sufficient that the

city was entitled to make the charge, and that wharfage was due by the vessel owner. He could not know that no wharfage would be received by him. He came to the city with his vessel, laden with a cargo of coal consigned to merchants of the city, and not being able to go up at once to the wharf nearest his consignees, he moored his vessel to the city wharf, relying on the city for the safety of his vessel, expecting and intending of course to pay the legal wharfage.

The court is further of opinion that the circuit court did not err in overruling the demurrer to the fourth count of the declaration. Without setting out the substance of that count here, it is sufficient to say that it sets out a good cause of action, and is free from just ground of objection. The demurrer to the third count was sustained, and there was no demurrer to the first or second count.

The court is further of opinion, that the circuit court did not err in giving the six instructions asked for by the plaintiff; nor in refusing to give the first, second, third and fourth instructions asked for by the defendant; nor in giving the instruction which it gave of its own motion. These instructions, taken altogether, correctly expounded the law, and were not calculated to mislead the jury. (The court here read the instructions, and commented briefly upon them.)

The court is further of opinion, that the circuit court did not err in overruling the motion of the defendant to set aside the verdict and grant a new trial upon the ground that the verdict is contrary to the
347 *law and the evidence in the cause. It is not necessary to decide whether the certificate is of evidence or of facts. Regarding it as a certificate of facts so far as it is possible so to regard it, and even viewing it most favorably for the defendant, still we think it fully sustains the verdict. The plaintiff's vessel while lawfully lying at the city wharf, struck against a pile at the bottom of the river, about two and a half feet from the wharf, which penetrated the bottom of the vessel, and caused it to sink. It is probable from the certificate of facts, that the said pile was a part of the wharf, at least originally. But whether so or not it evidently had been there a long time. It was buried more than two feet in the sand, projected from a foot and a half to two feet above the bottom, and leaned from the direction of the wharf towards the opposite side of the river. There had been no dredging at that point, nor within two feet of the wharf, either by the defendant or by the Lower Appomattox company, or the United States, or any other agency. Due diligence on the part of the wharf owner required that there should be such a dredging at reasonable intervals of time; for the existence of such an obstruction occasionally might reasonably have been expected, and the risk of injury to vessel owners who are invited to come to the wharf required the exercise of such diligence. Had there been such dredging during the year next preceding the injury complained of, the obstruction which occasioned it would no doubt have been discovered, and might have been removed in time to prevent the injury. In fact it could be seen from the surface of the water at low tide.

Upon the whole, we are of the opinion that there is no error in the judgment, and that it ought to be affirmed.

JUDGMENT AFFIRMED

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348 *Grigsby & als. v. Simpson, Ass'nee, &c.

March Term, 1877, Richmond.

Witnesses—Competency.*—In an action on a bond by the assignee of a deceased obligee, the obligors are incompetent witnesses to testify in their own behalf under the statute. Code of 1873, ch. 172, § 22.

This was an action of debt upon a bond by Harrison M. Simpson, assignee of Alfred Moss, deceased, against A. S. Grigsby, R. H. Cockerille, and two others, surviving obligors of themselves and J. C. Gunnell. The bond was for $6,600, bearing date the 26th of April 1859, and payable one year after date. It was made to Alfred Moss, and was by him assigned to Simpson on May 9th, 1859. The pleas were payment and usury.

The case was tried on the 4th of June 1873, when there was a verdict and judgment for the plaintiff; and the defendants applied for and obtained a writ of error and *supersedeas* to the judgment.

On the trial the defendants took three bills of exception to rulings of the court excluding evidence tendered by them. The grounds of these exceptions are sufficiently set out in the opinion of JUDGE CHRISTIAN.

Meredith and *Claughton*, for the appellants.

S. F. Beach, for the appellee.

CHRISTIAN, J., delivered the opinion of the court.

349 *This is a writ of error to a judgment of the circuit court of Fairfax county.

Two questions are presented for our decision, and both arise upon the exclusion of certain testimony offered by the plaintiffs in error.

The action was debt upon a bond executed by A. S. Grigsby and four others, payable to Moss, and assigned by Moss to Simpson. The suit was brought by the assignee against the obligor, Moss, the obligee being dead. Defendants pleaded usury, and on the trial offered two of themselves as witnesses on their own behalf. The court, on motion of the plaintiff,

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***Witnesses—Death of One Party to a Contract—Competency.**—The principal case is cited and approved in Grand Staff v. Ridgely, 30 Gratt 1, and *note*; Morris v. Grubb, 30 Gratt. 286, and *note*; Carter v. Hale, 32 Gratt. 115, and *note*; Ellis v. Harris, 32 Gratt. 684, and *note*; Boyd v. Townes, 79 Va. 118; Insurance Co. v. Oliver, 95 Va. 445. See Burkholder v. Ludlam, 30 Gratt. 255. The principal case is distinguished in Hall v. Rixey, 84 Va. 790; Reynolds v. Callaway, 31 Gratt. 441. See also, Simmons v. Simmons, 33 Gratt. 451, and *note*.

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excluded both, which is the ground of the first assignment of error.

This presents the question as to the true construction to be given to the 22d section of ch. 172, Code 1873. The 21st section provides, that "no witness shall be incompetent to testify because of interest." The 22d section contains the following provision: "And where one of the original parties to the contract or other transaction, which is the subject of the investigation, is dead, or insane, or incompetent to testify by reason of infamy, or other legal cause, the other party shall not be permitted to testify in his own favor, or in favor of any other party having an interest adverse to that of the party so incapable of testifying, unless he shall be first called to testify on behalf of such last mentioned party; and when one of the parties is an executor, administrator, curator or committee, or other person representing a dead person, an insane person, or a convict in the penitentiary, the other party shall not be permitted to testify in his own favor unless the contract or other transaction in issue, or subject of investigation was originally made or had with a person who is living and com-
350 petent to testify, *except as to such things as have been done since the powers of such fiduciary were assumed."

The two witnesses offered in this case were two of the obligors. Moss, the obligee, was dead. The *contract*, which was the *subject of investigation* in this case, was the bond executed by these two witnesses with three other obligors, payable to Moss, the obligee. Moss was one of the "original parties to the contract," and he was dead. Certainly the case comes within the precise terms of the statute, and upon its *literal* interpretation these witnesses must be excluded, because one of the original parties to the contract made by and with them (Moss, the obligee) is now dead. But it is insisted by the learned counsel for the plaintiffs in error, with much ingenuity and plausible reasoning, apparently sustained by decisions from other states, that this literal interpretation ought not to be given to this statute; and that *for the purposes* for which these witnesses *were introduced* they were competent to testify.

It was proposed to show by these witnesses (under the plea of usury) that the money was loaned by Simpson, the assignee, and not by Moss; that the *"transaction"* was in fact between the obligors and Simpson, and *not* between them and Moss, and that Simpson, the real party to that transaction, being then living, the obligors were competent witnesses, as they could be confronted with Simpson. To sustain this position, the learned counsel rely upon the decisions of other states. We have carefully examined the statutes of these states upon which these decisions arose. First, as to the New York cases, most confidently relied on by the learned counsel for the plaintiff in error. The statute, under which these decisions were made, is as follows: "A party to
351 an action may *be examined in his own behalf, or in behalf of any other party, in the same manner, and subject to the same rules of examination as any other witnesses, except that a party shall not be examined against parties who are representatives of a deceased person in respect to any transactions *had personally between the deceased person and the witness*; and except also, that neither husband nor wife shall be required to disclose any communication made by one to the other." Law of N. Y., 83d Sess., 1866, p. 787.

In the North Carolina statute, removing disqualification on account of interest, the exception forbids a party from testifying "as to a transaction or communication between him and a person deceased," &c. 64 North Car. R. 641, secs. 342, 343, C. C. P.

In Arkansas, the restriction as to general competency of parties interested, is "as to any transactions with, or statements to," the deceased person. Art. VII Const., sec. 22, 26 Ark. 478.

In Missouri, the exception in the statute relates and is confined to persons who are parties to the suit, the issue arising on which is on trial, and not to others who were merely parties to the original contract. Wag. St., 1872, § 1, 47 Missouri 145.

It must be observed that in these statutes of these several states there is no prohibition as in ours, as to "parties to the original contract" not being permitted to testify when one of such parties "is dead." Consequently the decisions made under these statutes cannot be relied on as guides to the construction of ours. After careful examination we find that the Massachusetts statute on this subject is more nearly like ours than that of any other state. In that state the statute admits parties to testify, except "where one of the
352 original *parties to the contract or cause of action in issue and on trial is dead." Genl. Stat., c. 131, § 14.

In construing this statute in *Granger and others, ex'ors* v. *Bassett*, 98 Mass. R. 468, the court says: "The test of competency is the cause of action in issue and on trial, *not* the fact to which the party is called to testify. If the cause of action was a matter transacted with a person who has deceased, the other party to that transaction being also a party to the suit, is not admitted as a witness at all, and cannot testify to any fact in the case. Otherwise, he is admitted as a witness, and being so admitted, the statute contains no restriction nor limitation as to the facts to which his testimony may or may not be directed. His competency must be determined in advance by the nature of the controversy and the questions in issue."

We think this rule of construction must be applied to our statute. The plain purpose of the legislature was to declare, that where the lips of one party to the original contract or transaction, which is the subject of investigation, are closed in death, the adverse party shall not speak at all.

The object and purpose of the statute was undoubtedly to put the parties on terms of equality in regard to the opportunity of giving testimony. Where parties have contracted with each other, each may be supposed to have

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an equal knowledge of the transaction, and both, if living and sane, are allowed to testify. But if one is precluded by death or insanity, the other is not entitled to the undue advantage of being a witness in his own case. While the statute has removed all restrictions as to interest, and opened the lips of all parties to "the contract or other transactions, which is the subject of investi-
353 gation," when *death comes and closes the lips of one, even-handed justice requires that the mouths of all should be sealed.

Under our statute, as under that of Massachusetts, which it nearly resembles, the test of competency is not the fact to which the party is called to testify, but the true test of competency is, is one of the "parties to the original contract or transaction, which is the subject of investigation," dead? By this fact his competency must be determined in advance. If the contract or transaction was with a person who has deceased, the other party is not admitted *as a witness at all,* and cannot *testify to any fact in the case.*

The principles herein declared, as settling the true construction of the statute under consideration, have already been adopted by the court. In a very recent case, *Mason and others* v. *Wood,* to be reported in 27 Gratt. (783,) JUDGE ANDERSON, delivering the opinion of the court, said in reference to this section (22d): The language of the statute seems to be explicit—"Where one of the original parties to the contract * * * is dead, * * the other party shall not be admitted to testify in his own favor," &c. The legislature may have intended to limit the incompetency to testify to transactions between the living and deceased party, or to the acts and declarations of the deceased party, and not to have otherwise restricted his general competency, as declared by the 21st section; but if so intended it is not so expressed. By the terms and express letter of the law, parties in such cases are declared to be incompetent to testify in their own favor. There is no limitation of incompetency as to the subject-matter of the testimony. It is general and unrestricted. They are declared to be incompetent to testify in the cause in their own favor. It might have been reasonable in the legislature to have
354 *restricted the incompetency to such matters as the other party, if not incapacitated, might be qualified to speak to, as acts and declarations imputed to him, or transactions in which he acted a part, and left untouched his competency as to other matters; and such restriction might comport with the spirit of the act; but the legislature has not so said, and the court is not disposed to extend the operation of the act beyond its terms and express provisions; and the incompetency of parties to testify in their own favor in such cases being declared by the act in express terms, they must be held incompetent to testify to any matter bearing upon the issues in the cause."

These views, so recently expressed by the unanimous judgment of the court, are decisive of the questions raised in the case before us.

The court is therefore of opinion, that the circuit court did not err in excluding the witnesses, Grigsby and Cockerelle, both of whom were obligors in the bond payable to Moss, who was dead, which bond was the subject of the suit.

Nor does the fact, that Cockerelle was the administrator of Moss, affect the question of his competency. He stood in a double relation. He was a defendant obligor in the suit, and he was administrator of the deceased obligee. The fact that he occupied this latter relation did not relieve him from restrictions of incompetency applicable to him in the former. Both Cockerelle and Grigsby were incompetent, because both were obligors in the bond payable to Moss, in which the suit was brought, and Moss was dead.

The court is further of opinion, that the circuit court did not err in excluding the memorandum in writing and figures proved to be in the handwriting of E. R. Fred. It was proved that the plaintiff had no knowl-
355 edge *of, and had never seen this paper, and it was in fact an offer to introduce the declaration of Fred, which was clearly inadmissible.

Upon the whole case, the court is of opinion there is no error in the judgment of the circuit court, and that the same be affirmed.

JUDGMENT AFFIRMED.

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356 *Carter, Trustee, &c. v. McArtor & als.

March Term, 1877, Richmond.

Absent, ANDERSON, J.

I. **Deeds—Mistakes.***—For the principles on which a court of equity will act on an application to correct a mistake in a deed, see the opinion of STAPLES, J.

II. In March 1844, by an agreement in writing, D sells a tract of land to M, for which M is to transfer to D bonds of K, secured by a deed of trust on real estate, and gives his bond for the balance of the

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***Deeds—Mistakes—Correction by Court of Equity.**—In Donaldson v. Levine, 93 Va. 477, the court quotes with approval from the opinion of JUDGE STAPLES concerning the principles on which a court of equity will act on an application to correct a mistake in a deed, and says further on its own part: "The burden of proof is throughout on the complainant, who must rebut the presumption that the writing speaks the final agreement by the clearest and most satisfactory evidence. It must not only appear that the parties entertained a different intention in the first instance, but that it was not changed at or before the execution of the instrument; for otherwise the legal and natural inference is, it was laid aside for that expressed in the writing." Citing Story's Eq. Jur., sec. 160; Leas v. Eidson, 9 Gratt. 277; Mauzy v. Sellars, 26 Gratt. 641; Hearne v. Ins. Co., 20 Wall. 488; Lyman v. United Ins. Co., 2 Johns. Ch. 630; 2 White and T. leading Cases in Equity Pt. 1, p. 980 (Ed. 1877); Pomeroy's Eq. Jur. sec. 859. The principal case is cited with approval on the same questions in Pulaski Iron Co. v. Palmer, 89 Va. 386; French v. Chapman, 88 Va. 322; Railroad Co. v. Dunlop, 86 Va. 352; Major v. Ficklin, 85 Va. 738. Citing also, Whitney v. Smith, 33 Minn. 124; Stiles v. Willis, 66 Ind. 552. See also, Fudge v. Payne, 86 Va. 303.

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purchase money, payable in ten years with interest; and M is to convey the land in trust to secure the payment of the bonds of K, and the balance of the purchase money. In December 1844, M conveys the land in trust to secure to D a bond of $6,000, payable in ten years with interest, but no reference is made in the deed to the bonds of K. The real estate on which the bonds of K are secured diminishes in value, and when sold by D in 1852, brings only one-third of the amount due on the bonds. In 1858 C, trustee, claiming under D, files his bill against M and others, claiming that by mistake the deed of trust executed by M omitted to secure the K bonds. A witness who drew the agreement, but was not present when the deed was drawn and executed, says he in 1845 called attention to the mistake, and was told the agreement was sufficient to bind the land—HELD:

1. **Same—Presumption.**—The presumption is, that the intention to secure the K bonds by the deed was relinquished before the deed was drawn and executed; and the evidence is insufficient to rebut that presumption.
2. **Same—Laches.***—The parties having known, as early as 1852, that the real estate on which the K bonds was secured was not sufficient to discharge them, and they having delayed until 1858 before they filed their bill, they are precluded by their laches from any relief.

By a memorandum of agreement un-
357 der seal bearing *date the 12th of March 1844, between Daniel Hitt of the first part, Robert McArtor of the second part, and Richard De Butts of the third part, all of the county of Fauquier, it was witnessed that De Butts had sold to Hitt and McArtor, to be equally divided between them, two parcels of land containing three hundred and nineteen acres, at $50 per acre. And De Butts agreed to purchase of Hitt a tract of two hundred and thirty-five acres, at the same price, and to pay Hitt the difference. And for the moiety of the land, of one hundred and fifty-nine acres, purchased by McArtor, he was to pay as follows: six bonds of W. A. Kerchival, supposed to amount in all to $1,150 or $1,200; also one negro woman and two children at $600, and the balance in ten years, with interest payable semi-annually. And McArtor was to guarantee the prompt payment of the Kerchival bonds, and to give a deed of trust upon the land to secure the payment of the whole purchase money, including the amount of the Kerchival bonds.

*__Equitable Relief—Laches.__—In Perkins v. Lane, 82 Va. 62, the court, citing the principal case, lays down the law regarding laches as follows: "Those who invoke the jurisdiction of a court of chancery must do so within a reasonable time, instead of lying by until by their supineness and negligence there can no longer be a safe determination of the controversy." Citing also, Carr v. Chapman, 5 Leigh 176; Caruthers v. Lexington, 12 Leigh 617; Smith v. Thompson, 7 Gratt. 112; Foster v. Rison, 17 Gratt. 321; Bargamin v. Clarke, 20 Gratt. 544; Harrison v. Gibson, 23 Gratt. 212; Stamper v. Garnett, 31 Gratt. 550; Hatcher v. Hall, 77 Va. 573; Morrison v. Householder, 79 Va. 627; Nelson v. Kownslar, 79 Va. 468; Wissler v. Craig, 80 Va. 22. See also, Morgan v. Fisher, 82 Va. 423, citing principal case and Badger v. Badger, 2 Wall. 87; Sullivan v. Railroad Co., 94 U. S. 806; Brown v. Buena Vista, 95 U. S. 157.

The Kerchival bonds and the negro woman and children were delivered to De Butts, and he having conveyed the land to McArtor, McArtor and wife by deed bearing date the 18th of December 1844, conveyed the land to Thomas N. Latham, in trust to secure the payment to De Butts of a bond of $6.000, bearing date April 1st, 1884, and payable with interest in ten years. In this deed no allusion is made to the Kerchival bonds.

In May 1855, Richard De Butts conveyed to Edward Hall this bond for $6,000, with other property, in trust for the separate use of Mrs. Sarah M. C. De Butts; and Richard H. Carter was subsequently substituted in the place of Hall.

In March 1858, Richard H. Carter,
358 as trustee for *Mrs. De Butts, instituted a suit in equity in the circuit court of Fauquier county, against Robert McArtor, Mr. and Mrs. De Butts, Latham and Kerchival. In his bill he set out the agreement and deed of trust aforesaid, and says that from some mistake, omission, accident, or some other cause, McArtor failed to secure on the said land the ultimate payment of the said Kerchival bonds, with the interest on the same, which, by the terms of said agreement, he bound himself to do. That after his appointment as trustee as aforesaid, De Butts assigned and delivered to him the said bonds. That when McArtor assigned them to De Butts they were secured by deed of trust on certain property in the village of Paris, executed to L. P. Payne as trustee, under which an informal sale was made, when the property was bid in by McArtor at $450. But this sale proving invalid, another sale of the property was made under a decree of the court in a suit brought by De Butts, at which sale, on the 20th of December 1852, the said De Butts became the purchaser at $500, leaving a large balance, which he states, still due upon the bonds. That at the time of the delivery by McArtor to De Butts of the said bonds, Kerchival was utterly insolvent, and so continues; that it would have been vain to attempt to coerce the payment of the money mentioned in the bonds by process of law when they fell due; and the property conveyed in the deed of trust was wholly inadequate to secure them.

The prayer of the bill is, that McArtor may be decreed to pay the amount due upon said bonds, and in default of payment, that the land aforesaid, upon which he bound himself to secure the payment, may be decreed to be sold for the satisfaction thereof; and for general relief.

359 *McArtor demurred to the bill for want of equity, and he also answered. He admits he passed to De Butts the Kerchival bonds, part payment of the purchase money of the land purchased by him; but he denies that "from mistake, omission, accident, or some other cause," there was a failure to secure by the deed of trust which he executed to Latham upon the land purchased by him, as is alleged in the bill, the ultimate or any payment of the Kerchival bonds. On the contrary, respondent's dis-

tinct recollection is, that Latham, the trustee, who wrote the deed, prepared it in the presence and under the direction of the parties, with the contract between the parties before him; and he insists that if there had been an agreement to embrace the Kerchival bonds, which he does not admit, it was at the time of executing the deed of trust abandoned.

He further says, that a short time before he transferred the Kerchival bonds to De Butts, he had sold the property, on which they were secured by deed of trust, to Kerchival for $1,200, and Kerchival had put upon it, prior to the transfer, valuable repairs, greatly enhancing its value. That De Butts, about the year 1845, caused a sale of the property to be made, at which sale respondent being liable, as assignor of said bonds, attended and bid in the property at $650, instead of $450, as stated in the bill; at which sum respondent was well content to keep the property, and pay De Butts the balance due upon the bonds; but the sale having been made without the presence of the trustee, it was deemed to be void, and was not consummated for six years afterwards. The said De Butts took no steps to collect the said bonds, either by a sale of the real estate or proceedings against Kerchival; during all which time the real es-
360 tate was *constantly diminishing in value. It was subsequently sold, as stated in the bill. And he relies upon the statute of limitations as a bar to the claim.

A number of witnesses were examined in the case; but the only evidence in relation to the difference between the agreement and the deed of trust, is that of Edward Hall, who wrote the agreement. His testimony is sufficiently stated by JUDGE STAPLES in his opinion.

The cause came on to be heard on the 2d of February 1872, when the court held that there was not sufficient evidence to reform the deed of trust to Latham, so as to charge the same with the Kerchival bonds; and therefore dismiss the bill with costs. And *Carter* thereupon applied to this court for an appeal; which was allowed.

Brooke & Scott and *Mosby*, for the appellant.

Wm. H. Payne, for the appellees.

STAPLES, J., delivered the opinion of the court.

The court is of opinion, that although a deed or other instrument may be reformed, when through mistake or accident it does not accurately represent the agreement of the parties, it is necessary that both the agreement and the mistake shall be made out by the clearest and most satisfactory testimony. Where the mistake is established by other preliminary written agreements, equity more readily interferes than in cases where the mistake is to be established by parol evidence. But even where there is a preliminary article of agreement or settlement, it must be made plainly to appear that the parties intend-
ed in their final instrument merely to
361 carry into effect the control *or arrangement set forth in the prior agreement. The very circumstance that the final instrument of conveyance differs from the preliminary contract, affords of itself some presumption of an intentional change of purpose or agreement, unless there is some recital in it, or some other attendant circumstance, which demonstrates that it was merely in pursuance of the original contract. Story's Eq. Ju., § 160; *Leas' ex'or* v. *Eidson*, 9 Gratt. 277; *Mauzy* v. *Sellars*, 26 Gratt. 641.

In leading cases in equity, vol. II, part I, page 980 (E. 1877), the rule is thus expressed. The burden of proof is throughout on the complainant, who must rebut the presumption that the writing speaks the final agreement by the clearest and most satisfactory evidence. It must not only appear that the parties entertained a different intention in the first instance, but that it was not changed at or before the execution of the instrument; for otherwise, the legal and natural inference is, it was laid aside for that expressed in the writing.

The court is further of opinion, that applying these principles to the case before us, there is no error in the decree of the circuit court. According to the memorandum or articles of agreement, entered into on the 12th March 1844, it was provided that the deed of trust to be executed by the appellee, McArtor, to secure the payment of the purchase money due his vendor, Richard De Butts, was also to include the amount of the Kerchival bonds. That deed was not executed until the 18th of December 1844. It does provide for the payment of $6,000, part of the purchase money, but it makes no provision for the Kerchival bonds. It makes no reference whatever to
them. Whether this omission was ac-
362 cidental, or whether *the parties were satisfied the Kerchival bonds were already amply secured by deed of trust, it is impossible to say. As has been already said, the presumption is, that the deed speaks the final agreement of the parties. It devolves upon the appellant to rebut that presumption by satisfactory evidence. It is incumbent upon him to show that the intention expressed in the memorandum was not changed before the execution of the deed. As one or the other must be held to express the true agreement, the legal and natural inference is, that the one last executed is the proper one. There is nothing in the deed to rebut this inference. Had the recitals therein made disclosed a purpose to provide for the payment of the purchase money, there would be greater reason to conclude the omission was accidental. But nothing is said about purchase money. All the provisions relate to a bond of $6,000; the date, time and mode of payment of which are minutely stated. From all which it may be fairly concluded that the parties in preparing and executing the deed had reference to the original agreement, were then fully apprized of all its terms, and waive the provision touching the Kerchival bonds.

The only testimony adduced by the appellant, to controvert the correctness of this view, is found in the deposition of Edward

Hall, the father-in-law of De Butts. This deposition was taken in the absence of the opposing party and his counsel, upon three days' notice given to a daughter of McArtor in his absence, without explanation, and all the interrogatories and answers alleged to be wholly in the handwriting of counsel. The deposition was excepted to upon these grounds. Whether the exceptions were ever called to the attention of the court below, or were passed upon,
363 *does not appear. Waiving any inquiry upon those points, and giving to the appellants the benefit of the evidence, it is altogether insufficient to establish the alleged mistake, especially against the positive denials of the answer. The deposition was taken twenty-two years after the date of the contract, and relates to transactions, the most material of which occurred in the absence of the witness, and of which he had no personal knowledge. He does not pretend that McArtor's attention was called to the mistake, or that the latter had ever admitted a mistake was committed in the preparation and execution of the deed of trust. He does say that when he, the witness, saw the deed of trust, shortly after its execution, he called attention to the omission, and was told it made no difference, as the contract was a sufficient guarantee for the payment of the Kerchival bonds. If this be so, it may serve in some measure to explain the reasons influencing the parties in confining the deed as a security for the $6,000 bond.

Notwithstanding the appellants, or those under whom they claim, had actual notice of the alleged mistake as far back as January 1845, no suit was brought, and no claim was ever asserted to have it corrected until the year 1858, a period of fourteen years, when this bill was filed. No excuse is given or attempted for this long delay. This is the more surprising, because, as early as 1852, the property conveyed to secure the payment of the Kerchival bonds was sold, and an amount realized from the sale sufficient to pay only about one-third of the debt. And yet with full knowledge of this deficiency the parties delayed the assertion of this claim for nearly six years. There is but one satisfactory theory upon which such conduct can be explained. At the
364 time the deed of *trust was executed, the property pledged for the payment of the Kerchival bonds was, on all hands, regarded as sufficient for that purpose. As by the contract of sale and assignment De Butts became the owner of the bonds, and entitled to the deed of trust, with the privilege of enforcing the same at his pleasure, it might well be that he was content with the security thus given him, while McArtor, on the other hand, was unwilling to subject his own propery to the hazards of any delay on De Butts' part in collecting the Kerchival bonds. When, therefore, the deed of trust was to be given, no provision was inserted in it for their payment. If such was the view taken, the result fully justified the caution of McArtor. The Kerchival property was at the time amply sufficient for the payment of that debt; and yet in consequence of De Butts' delay in enforcing the collection, the property, from mismanagement or other causes, became so impaired in value, that when the sale was made in 1852, De Butts himself being the purchaser, it brought but one-third of its original value. This of itself would be sufficient to prevent the interposition of a court of equity in correcting the mistake, even if clearly established. A party having a just claim to invoke the jurisdiction of that court upon equitable grounds, must exercise reasonable diligence in the assertion of his demands. If by his laches injustice may be done the defendant the court declines to interfere. And this principle is justly applied to bills to reform contracts on the ground of mistake as to other cases.

The court is therefore of opinion there is no error in the decree of the circuit court, and the same must be affirmed.

DECREE AFFIRMED.

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365 *Cole's Committee v. Cole's Adm'r.

March Term, 1877, Richmond.

Absent, ANDERSON, J.

1. **Confederate Bonds—Accounting.***—W, committee of a lunatic C, settled his account in 1858, which showed him indebted to C in the sum of $1,761.72. In 1863 W again settled his account, showing a balance against him of $1,394.71, as of the 1st November 1863, the only charges against him in this account being the balance of the previous account. In March 1864, upon the petition of W, the judge of the circuit court made an order, authorizing him to invest the amount of $1,000 in Confederate or State bonds; and in the same month W deposited this sum with the treasurer of the Confederate States, and received a certificate showing he was entitled to receive a *four per cent.* bond of the Confederate States; but it does not appear that the bond was ever issued—HELD: The money in the hands of W having been received in good money, the order of the judge was not authorized by the statute, and W must account for it in good money.

2. **Appeal—Exceptions—When Unnecessary.**†—The commissioner, in settling the account of W, makes two statements, the only difference in them being, that in one he gives W credit for the

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***Fiduciary Funds—Investment in Confederate Securities.**—See Carter v. Dulaney, 30 Gratt. 192, and *note*, citing principal case in regard to its rulings on the investment of fiduciary funds in Confederate bonds. See also, McClure v. Johnson, 14 W. Va. 432.

†**Appeal—Commissioner's Report—Exceptions.**—See Simmons v. Simmons, 33 Gratt. 451, and *note*, for cases holding with the principal case that commissioner's reports not excepted to in the lower court cannot be impeached before the appellate court in relation to matters which may be affected by extraneous testimony. See also, Bar. Ch. Pr. (2nd Ed.) 698, and Shipman v. Fletcher, 91 Va. 490, and cases cited. The principal case is cited with approval in Nickels v. Kane, 82 Va. 315; Ashby v. Bell, 80 Va. 815; Liberty Savings Bank v. Campbell, 75 Va. 543; Gilmer v. Baker, 24 W. Va. 93, citing also, McCarty v. Chalfant, 14 W. Va. 531; Ward v. Ward, 21 W. Va. 262. See also, Evans v. Shroyer, 22 W. Va. 584,

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$1,000 Confederate bond, and in the other he omits it; and he refers the question of W's right to the credit to the court. The court adopts the statement, giving him the credit, and decrees accordingly. On appeal held, an exception to the report was not necessary, and the appellate court may correct the decree.

3. **Same—When Necessary.**—The accounts, settled in 1858 and 1863, speaks of W as trustee of C; but in the account by the commissioner he is treated as committee of C. There having been no exception to the report for bringing into the latter account the charges in the first two, W's adm'r cannot object to the report on this ground in the appellate court, he not having excepted in the circuit court.

4. **Chancery Practice.‡**—A bill says: "Your complainant C, who being a person of unsound mind, sues by his next friend and committee A." It will be considered and treated as a suit by the committee.

366 *This was a suit in equity in the circuit court of Charlotte county, brought by Paul V. Adams, committee of Meriweather Cole, a lunatic, against the administrator of Walter W. Cole, deceased, a former committee of the lunatic, for a settlement of the account of said Walter W. Cole. The only matter of controversy in the circuit court seems to have been whether Walter W. Cole was entitled to a credit for $1,000, invested under an order of the judge in a Confederate bond. The court below allowed the credit, and Adams, the committee, obtained an appeal to this court. The case is stated by JUDGE BURKS in his opinion.

W. W. Henry, for the appellant.
Wood Bouldin, Jr., for the appellee.

BURKS, J., delivered the opinion of the court.

This is an appeal from a decree of the circuit court of the county of Charlotte, pronounced on the 1st day of April 1871, in a suit brought in the name of the appellant, a person of unsound mind, by his next friend and committee, against the appellee, as administrator of Walter W. Cole, deceased, the former committee of the appellant.

The only object of the suit was to hold the estate of the said Walter W. Cole to account for the sum of $1,000, alleged by the administrator to have been invested by his intestate for the appellant in a bond of the Confederate States, under an order of the judge of said court made in vacation on the 8th day of March 1864, upon an *ex parte* petition of the said Walter W. Cole, under
367 the act of the general assembly *passed March 5th, 1863, entitled "an act authorizing fiduciaries to invest funds in their hands in certain cases, and for other purposes." Acts of 1862-'63, ch. 46, p. 81.

A commissioner of the court was ordered to take an account of the transactions of the said Walter W. Cole as committee, "showing what estate of Meriwether Cole (the lunatic) went into the hands of said committee, and his disposition of the same, and particularly when and from what source, and in what kind of funds the sum of $1,000 was received," alleged to have been invested as aforesaid.

The account was taken as ordered, and by the report of the commissioner, and the evidence in the cause, it appears that the said Walter W. Cole qualified as committee of the appellant in the year 1854. He made two *ex parte* settlements of his accounts, one in the year 1858, and the other in the year 1863. By the first of these, it appears that the only estate of the lunatic, that ever came to the hands of the committee, was the sum of $1,952.41, received June 1st, 1854; and the balance found against him on the first settlement, to wit: $1,761.72, as of the 1st day of November 1858, was carried into the account stated in the second settlement, which last named account as stated showed a balance against him of $1,394.71, as of the 1st day of November 1863.

This last named balance therefore, of $1,394.71, was payable in specie or its equivalent. It had never been invested, so far as appears, and it was therefore a *specie debt*, owing by the committee to the estate he represented.

The petition, on which the order of the 8th of March 1864 was made, does not appear in the record. A copy of the order, how-
368 ever, is filed, in which the petition *is merely referred to, not recited, and the petitioner by that order was authorized to invest in his name as committee $1,000 in interest-bearing bonds of the Confederate States, or State of Virginia, "to be held by him according to law."

It does not appear that the investment as ordered was ever completed. The certificate of a depositary of the Confederate States, dated 11th March 1864, is filed, showing that the sum of $1,000 was paid into the office of the depositary on that day by the said Walter W. Cole, which entitled him to registered bonds of the Confederate States, bearing *four per centum per annum* interest from that date. But no such registered bonds were filed, nor does it appear that any such were ever issued in pursuance of the certificate.

We have then the naked case of a fiduciary owing a *specie* debt to the estate he repre-

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citing the principal case, and Peters v. Neville, 26 Gratt. 549; Savings Bank v. Campbell, 75 Va. 534; Wyatt v. Thompson, 10 W. Va. 645; Ogle v. Adams, 12 W. Va. 213; Chapman v. R. R. Co., 18 W. Va. 184. This case, (Evans v. Shroyer, 22 W. Va. 583) states the rule to be that a commissioner's report *erroneous upon its face* may be objected to in the appellate court, though no exception was taken in the court below, citing White v. Johnson, 2 Munf. 285; Reitz v. Bennett, 6 W. Va. 417.

‡**Chancery Practice—Suit in Behalf of Lunatic.**—In Hinton v. Bland, 81 Va. 591, the principal case and Bird's Committee v. Bird, 21 Gratt. 712, are cited as authority for the proposition that a suit on behalf of a lunatic respecting his person or estate must be in the name of the committee, if there be one. But in Bird's Committee v. Bird, 21 Gratt. 712, it was held that where no committee of a lunatic has been appointed, or where the committee appointed has been removed, or a committee has interests adverse to the lunatic, a suit may be brought in the name of the lunatic, by his next friend approved by the court. See also, Cooper v. Hepburn, 15 Gratt. 551; Barton's Chan. Pr. 194, 274, 590; Ashby v. Harrison's Com., 1 Pat. & H. 1.

sented, attempting to discharge that debt by substituting therefor an incomplete investment in *four per cent.* Confederate bonds of his own Confederate notes, depreciated to such an extent as to be of coparatively little value.

The circuit court of Charlotte allowed the amount of this pretended investment as a credit to the estate of the committee in the settlement of his accounts, and this is the only assignment of error relied on by the appellant here.

If this had been the first case in this court in which the validity of such an investment as was made by this committee was questioned, we should have had no difficulty in holding that it was of no force. But the invalidity of such investments has been already settled by repeated decisions of this court. *Campbell's ex'ors* v. *Campbell's ex'or*, 22 Gratt. 649; *Crickard's ex'or* v. *Crickard's legatees*, 25 Gratt. 410; *Kirby* v. *Goodykoontz & als.*, 26 Gratt. 298.

369 *It is insisted however by the counsel for the appellee, that the error complained of by the appellant cannot be corrected on this appeal, because the appellant did not except to the commissioner's report in the circuit court. The facts were shown by the report and the evidence in the cause. The commissioner did not undertake to pass upon the validity of the investment, but that being a question of law, arising upon the facts stated, he expressly referred it, as he had the right to do, to the court for decision; and for the convenience of the court, in applying the law, he made alternate statements of the accounts, in one of which the committee was credited with the amount of the investment claimed, and in the other no such credit was allowed. This was the only difference in the two accounts as stated. In such case no exception by either party in regard to the investment was necessary. The alternate statements, in respect of the credit for the investments allowed in the one, and disallowed in the other, was to that extent, and no further, conflicting, and so far as each operated as an exception to the other; and in deciding the question of law, submitted by the commissioner, the court must of necessity have adopted one statement and rejected the other.

It was further argued by the counsel for the appellee, that the evidence in the record does not show that the appellee's intestate was at all indebted as *committee* to the appellant; that the *ex parte* settlements appear on their face to have been of accounts of the said intestate as *trustee* of the appellant, and that the balance carried by the commissioner into the account stated by him of the transactions of the said intestate as *committee*, was a balance which appeared to be owing by said intestate as "trustee" and not as "com-

370 mittee." *We think it does sufficiently appear, looking to the whole record, that this balance was owing by the appellee's intestate as "committee," and although in these *ex parte* settlements the appellee was styled "trustee" by the commissioner who stated the accounts, yet the settlements were really of transactions as committee. However that may be, whether the appellee's intestate was ever at any time a *trustee* for the appellant, and whether the transactions embraced in the *ex parte* settlements were transaction of such *trustee*, or whether they were really transactions as *committee*, were matters which might be affected by extraneous testimony, and when the commissioner by his report treated them as transactions of said intestate in his character of committee, the appellee, if he intended to make any objection on that account, should have excepted to the report. No such exception was filed in the circuit court, and the objection now made here, and made for the first time in the cause, comes too late. 2 Rob. Prac. (old ed.) 383; *Peters* v. *Neville's trustees & als.*, 26 Gratt. 549.

If the objection now made here had been made in the circuit court, both parties would have had an opportunity of taking proof touching the matters presented by the exception, and, no doubt, the truth, either one way or the other, if it did not already sufficiently appear, could have been readily established.

It was further objected by the appellee's counsel in argument, that upon the authority of *Bird's committee* v. *Bird*, 21 Gratt. 712, the suit in this case could only be maintained by the committee of the appellant, and that the bill of the complainant should have been dismissed.

The bill is in the name of "Meriwether W. Cole, who being a person of un-

371 sound mind, sues by his next *friend and *committee*, Paul V. Adams," &c. This would seem to be substantially a suit by the committee in the name of the lunatic. It was so treated by the judge of the circuit court—for in the decree complained of, he ordered the committee to settle his accounts as such. The objection is certainly of the most technical character, and if there was any defect in the form of the bill, the objection should have been made in the circuit court, where, by amendment, the error, if any, might have been corrected. *Bird's committee* v. *Bird, supra.*

It appears that the appellee, as administrator of Walter W. Cole, turned over to the present committee of the lunatic a bond of James R. Neal and A. R. Neal, for about the sum of $498, with interest from some day in the year 1858, payable to the said Walter W. Cole, as "trustee or committee," upon which bond suit was instituted and a judgment recovered. What amount, if any, has been realized on the judgment, whether the obligors are solvent, or whether if insolvent they were insolvent when the bond was executed, does not appear. So it is, the administrator of Walter W. Cole received no credit for it, or any part of it, in the account settled by the commissioner, and the judge of the circuit court therefore properly ordered an inquiry as to this judgment, with a view of giving credit to the appellee for whatever amount it might be ascertained on the inquiry he was entitled to.

We are of opinion that the decree com-

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plained of is erroneous, except such part thereof as directs the inquiry aforesaid; and, with this exception, the decree must be reversed and the cause remanded to the circuit court of the county of Charlotte for further proceedings to be had therein in conformity with the principles herein declared.

372 *The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing, and filed with the record, that the said circuit court of the county of Charlotte erred in the decree aforesaid in sanctioning the investment of $1,000 therein mentioned, and in confirming the report of commissioner J. W. Marshall, so far as said report ascertained the balance due from the appellee's intestate to the appellant to be $394.79, as of the 1st day of November 1865; and the said circuit court further erred in said decree in not wholly rejecting the statement of the account returned by said commissioner with his said report, in which the said sum of $1,000 was credited to the appellee's intestate, and is not approving and adopting the other statement of the account filed by said commissioner with his said report, in which the said sum of $1,000 was not credited to the said intestate, and by which the balance, owing by the said intestate to the appellant, is shown to be $1,394.79, as of the said 1st day of November 1865; and while the said court did not err in directing the inquiry into the debt owing by James Neal and A. R. Neal, yet when the true value of said debt shall be ascertained, it should be deducted from the said sum of $1,394.79, and the remainder will be the sum which should be decreed to be paid with interest to the committee and next friend of the appellant by the appellee out of the estate of his intestate. It is therefore decreed and ordered, that the said decree of the circuit court of the county of Charlotte, so far as it is hereinbefore declared to be erroneous, be

373 reversed and annulled, *and that the same be affirmed in all other respects; and that the appellee out of the estate of his intestate, in his hands to be administered, pay to Paul V. Adams, the next friend and committee of the appellant, the costs of the appellant by him expended in the prosecution of his said appeal here. And this cause is remanded to the said circuit court of the county of Charlotte for further proceedings to be had therein in conformity with the opinion and principles herein declared, which is ordered to be certified to the said circuit court of the county of Charlotte.

DECREE REVERSED.

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374 *Watkins, &c. v. Elliott & al.

March Term, 1877, Richmond.

Absent, ANDERSON, J.

Mistake—Correction.—A case in which a mistake of one of the parties to an agreement for the adjustment of a matter of account, clearly proved, was corrected; and the account was adjusted according to what the agreement was intended to be.

This was a suit in equity in the circuit court of Charlotte county, instituted in 1861, by William J. Watkins, suing for the benefit of his trustees, against Allen W. Elliott and Charles C. Henderson's administrator, to have an account between them settled. It appears that Watkins had made a contract with Henderson, by which Henderson sold to Watkins the timber on a certain part of Henderson's land, which Watkins expected to saw up for certain purposes. The contract, at Watkins insisted, and as it was in fact, was that he was to pay a certain price per thousand feet for the timber he sawed; and according to this view of the contract, Watkins owed him for the timber he had taken from the land, $277.78.

Some time in 1860, Watkins sold his saw mill and fixtures to Henderson & Elliott for $1,200; and it was removed to the land of Henderson. Very soon after this Henderson became very ill, and in order to have a settlement of the transactions between him and Watkins, Richard V. Gaines, one of the trustees in the deed of Watkins conveyi-

375 ng his property for the benefit *of his creditors, entered into a written contract with Allen W. Elliott, acting for himself and Henderson, by which it was agreed that Watkins, instead of paying for the timber at a stipulated price, should be charged at eight dollars an acre of the land on which he was to cut timber, it being supposed there was about fifty acres in the parcel of land; but in fact according to the boundaries of it given by Elliott, and inserted in the agreement, there were one hundred and twenty acres; these boundaries including about seventy acres lying inside of a fence enclosing Henderson's field. The facts in relation to this agreement are stated in the opinion of the court.

In the progress of the suit there was an order for an account; and the commissioner returned his report in which he charged Henderson's estate with $1,200, the price of the mill, and some other small items, and credited him with the timber at the price per thousand originally agreed upon between Watkins and Henderson, and thus making his estate debtor to Watkins $965.69. To this report the defendant excepted: 1st, To the small items charged, as being without proof; and 2nd, Because the commissioner had not allowed Henderson's estate a credit for one hundred and twenty acres of timber at eight dollars per acre, to wit: $960.

The cause came on to be heard on the 2nd of October 1872, when the court sustained the exceptions of the defendant to the commissioner's report, and having a statement made showing the debt of the plaintiff reformed according to the opinion of the court, made a decree in favor of the plaintiff for $240, with interest from the 20th of December 1860. And thereupon Watkins' trustees applied to one of the judges of this court for an appeal; which was allowed.

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376 *J. R. Watkins*, for the appellants.

W. W. Henry, for the appellees.

MONCURE, P., delivered the opinion of the court.

The court is of opinion that the contract, which is the subject of controversy in this case, being the exhibit marked "B" in the proceedings mentioned, was made under a mutual mistake of the parties, or else under a mistake of one of the parties, to wit: of Richard V. Gaines, acting for himself and his co-trustee, Thomas Watkins, and for William J. Watkins, the grantor in the deed of trust for the benefit of his creditors, and by means of a fraud committed by the other party, to wit: by Allen W. Elliott, acting for himself and for Charles H. Henderson; and that instead of rendering a decree in favor of the said trustees for the sum of $240, with interest from the 20th of December 1860, that being the price, $1,200, of the saw mill on that day sold by the said William J. Watkins to the said Henderson & Elliott, after deducting therefrom nine hundred and sixty dollars as the price of timber cut by said Willam J. Watkins from the land of said Henderson, the said price of the timber being ascertained by estimating the quantity of the land on which the timber was cut at 120 acres, that being the area of the whole plat marked "exhibit C" in the proceedings mentioned, and by charging for the said timber at the rate of eight dollars per acre of the said quantity of land, the circuit court ought to have rendered a decree in favor of the said trustees for the sum of $800, with interest from the 20th of December 1860, that being the said price of the said saw mill, after deducting therefrom four hundred dollars as the price 377 *of the said timber, ascertained by estimating the quantity of the land on which the timber was cut at fifty acres, that being about the area of that portion of the said plat which is designated by the letters "A, B, C, D," and by charging for the said timber at the said rate of eight dollars per acre of the said quantity of fifty acres.

It appears from the evidence in the record that William J. Watkins purchased the timber of Henderson by the foot, instead of by the acre of the ground from which it was cut, and in fact owed but $279.78 for the said timber. The trustee, Richard V. Gaines, had been informed and believed that the amount due therefor was $377, and was willing to allow that sum as a credit in his attempt to settle the matter with Elliott; but Elliott refused to settle, unless the credit for the timber was ascertained by multiplying the number of acres of the land from which it was cut by eight dollars per acre. He estimated the quantity of the land at fifty acres, and said that it would not at farthest exceed fifty-five or sixty acres. Gaines had been informed by William J. Watkins that he had stepped off the land, and that the quantity was about fifty acres; and he, and the other parties having the same interest with him, desiring very much to settle the matter before the death of Henderson, the only solvent one of the two partners, Henderson & Elliott, and who was then in extreme illness, and expected soon to die, he consented to settle the matter with Elliott, by allowing credit for the timber at the rate of eight dollars per acre of the said land, described in the said contract, as "estimated at fifty acres, be the same more or less." For the purpose of effecting a settlement of the matter in the lifetime of Henderson, Gaines was willing to give up one or two hundred dollars 378 *of the debt, that being the difference between the amount of the credit to which Henderson was really entitled on account of the timber aforesaid, estimated by the foot and the amount of the credit to which he would be entitled on account of said timber, estimated by the quantity of fifty acres of land at eight dollars per acre. Accordingly contract B was entered into; but in order to secure to Henderson, if he got well, the right to settle the matter by paying the difference between $1,200, the price of the mill, and $377, the supposed amount really due for the timber, a condition to that effect was added to the contract. After the contract was made, and before the land was surveyed, Elliott said to Morton, the administrator of Henderson, that he thought there was upwards of one hundred acres in the bounds of the said land set out in the said contract. The survey was made in April 1861, when it was ascertained that the quantity of land contained within the said bounds was one hundred and twenty acres, making the amount of the credit claimed, if estimated by the acre, nine hundred and sixty dollars, instead of four hundred dollars. Had the quantity been a few acres more, that is, one hundred and fifty, instead of one hundred and twenty acres, the amount of the credit calculated by the acre would have been precisely equal to the price of the mill. Such a result as that could never have been in the contemplation of the parties. It certainly was not in the contemplation of Gaines; and it could not *honestly* have been in the contemplation of Elliott. Gaines was prepared for a result of the survey, which would show the quantity to be a few acres more or less than fifty, such a difference as is authorized by the expression "more or less." Evidently the piece of land which was contemplated by William J. Watkins 379 *as the piece for the quantity of which he was to be charged at the price of eight dollars per acre, if that mode of ascertaining the amount of the credit should be adopted, was the piece contained within the boundaries A, B, C, D, on the plat, which piece contains about fifty acres, and is separated from the residue of the land in the plat by the fence on the line C, D. That is the piece which had no doubt been stepped off by William J. Watkins, who thus ascertained that it contained about fifty acres, and he so informed Mr. Gaines, who supposed it was the same land included in the boundaries designated in the contract. All the timber which had been cut by William J. Watkins from the land of Henderson, with the exception of a few trees only, had been cut on that piece of land, and on that side of the

said fence which protected the crop of the said Henderson. There was really very little timber on the land included in the said plat, and on that side of the fence next to the crop; and it could never have been intended by said Watkins, or even by Henderson, that the former should be charged for any timber on that side of the fence except by the foot. Gaines never saw the land until some time after the contract was made, and seems to have lived at a distance from it. Elliott lived only two-and-a-half miles from it, and knew all about it. It was understood by the parties, when they made the said contract, that on the next day they would ride over the land; but on the next day Elliott excused himself from taking the ride, because he had no horse, and it being a very cold day, with snow on the ground, Gaines did not ride over the land.

Under these circumstances we think there can be no doubt about the justice of the case. The utmost extent of any cred-
380 it which Henderson & Elliott can *justly claim on account of the timber is four hundred dollars. That is greater than the true amount; but it is what Gaines agreed to pay by the settlement aforesaid, and it is therefore the amount of the credit which, and which alone, ought, in justice, to have been allowed.

We also think that the claim of the appellants is not only well founded in justice, but is also fully sustained by authority; and that they are entitled to relief on the ground of mistake on the part of one of them, Gaines, acting for himself and the rest, if not of fraud also on the part of Elliott.

If there was fraud on the part of Elliott, there can, of course, be no doubt of the right of the appellants to relief.

We think there can be little if any doubt of their right to relief on the ground of mistake. There are many authorities on this subject, which we deem it unnecessary to review. In 1st Story's Eq. Jur., Library edition, § 141, it is said that "if the mistake be in the quantity of the land sold, as four acres instead of eight, this is sufficient to justify a court of equity in rescinding the contract. it being proved that the deficiency was material in the object of the purchase; and this would be so, although the land was described as being eight acres, "more or less" —these words being confined to a reasonable allowance for small errors in surveys, and for variations in instruments."

See also *Quesnel* v. *Woodlief*, 6 Call 218; *Blessing's adm'rs* v. *Beatty*, 1 Rob. R. 287; and other cases cited by the counsel for the appellants; also *Belknap* v. *Sealey*, 14 New York 143.

The court is therefore of opinion, that so much of the decree appealed from as is in conflict with the foregoing opinion is
381 erroneous, and ought to be reversed *and annulled, and the residue thereof affirmed; which is decreed accordingly.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the circuit court erred in not rendering a decree in favor of the trustees of William J. Watkins' creditors for the sum of $800, with interest from the 20th day of December 1860, that being the true balance due on account of the price of the saw mill in the proceedings mentioned, instead of $240 with interest from that day, for which latter sum and interest, as such balance, the decree appealed from was actually rendered.

Therefore it is decreed and ordered that so much of the said decree appealed from as is in conflict with the foregoing opinion, and as is therein declared to be erroneous, be reversed and annulled, and the residue thereof affirmed; and that the appellee, George W. Booker, late sheriff of Prince Edward county, and as such administrator of C. H. Henderson, deceased, out of the assets of said decedent in his hands to be administered, and A. W. Elliott, out of his own estate, do pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here.

And this court, proceeding to render such decree as ought to have been rendered by the said circuit court, in lieu of so much of the decree appealed from as is reversed as aforesaid, it is further decreed and ordered that the defendant's second exception to the commissioner's report be overruled, and their third exception to said report be sustained; and that the said George W. Booker, late sheriff and administrator as aforesaid, out of the assets of the said C. H. Hen-
382 derson, *in the hands of said Booker, to be administered, and the said A. W. Elliott, out of his own estate, do pay to R. V. Gaines and Thomas Watkins, trustees of William J. Watkins' creditors, the sum of eight hundred dollars, with interest thereon from the 20th day of December 1860 till payment.

Which is ordered to be certified to the said circuit court of the county of Charlotte.

DECREE REVERSED.

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383 *Thomas v. Jones.

March Term, 1877, Richmond.

Absent, ANDERSON, J.

1. **Adverse Possession—Statute of Limitations.***—J has held possession of a piece of ground in a city for forty years, which in all that time has been within his enclosure, claimed by him and cultivated as his own property. His said possession has been and is adverse to T and those under whom he claims, claiming the land, and the statute of limitations is bar to any claim which T might otherwise have to the land; and the title of J

*__Adverse Possession—Statute of Limitations.__—In Va. Midland R. Co. v. Barbour, 97 Va. 123, the court lays down the law as follows: "The record in the case shows that the possession of the appellees and those under whom they claim was inconsistent with the title of the appellant; that it was accompanied by a claim of title exclusive of the rights of all others; was definite, notorious, and continued for more than the statutory period. It also shows

thereto, even if it may not have been originally good, has thus matured, and become perfect by adverse possession and by lapse of time, and the operation of the statute of limitations.

2. **Affidavits of Jurors—Setting Aside Verdict.†**—A verdict will not be set aside and a new trial awarded, on the affidavit of one of the jury made after the verdict was rendered, that he did not consent to it.

This is a *supersedeas* to a judgment of the court of hustings for the city of Portsmouth, rendered on the 27th day of October 1871, in an action of ejectment in which William H. Thomas was plaintiff, and Robert Jones defendant. The action was brought for a parcel of land in said city, described in the declaration. The defendant put in the plea of not guilty, on which issue was joined, on which issue a verdict and judgment were rendered in favor of the defendant. The plaintiff moved for a new trial on two grounds: first, because one of the jurors did not consent to the verdict, as he stated in an affidavit made by him after the verdict was rendered, and exhibited in support of the motion; and, second, because the
384 verdict was contrary *to the law and evidence. The court overruled the motion; and the plaintiff excepted to the opinion and action of the court in that respect. The court certified the facts proved on the trial of the cause, which are as follows: "That the land in dispute is in that part of Portsmouth called Newtown," and is in the square which is bounded on the north by Wythe street, which runs east and west; on the east by Second street, which runs north and south; on the south by Harrison street, and which runs parallel with Wythe street; and on the west by Third street: That according to the plan of Newtown, the distance from Second and Third streets was three hundred and sixty feet, and the distance from Wythe to Harrison street was two hundred and forty-two feet; and the above mentioned square contained eight lots, each with a breadth from north to south of —— feet, and with a depth from east to west of one hundred and eighty feet, and numbered in said plan: That the defendant, and those under whom he claims, bought two of said lots, numbered according to said plan 86 and 87. The first of said lots is situated at the south-west intersection of Wythe and Second streets, and fronts on said Second street —— feet, and runs back one hundred and eighty feet, westwardly. The second of said lots lies south and adjacent to the first of said lots, and it also fronts on Second street —— feet, and runs back westwardly one hundred and eighty feet: that the wife of M. Cooke owned lots designated in said plan as Nos. 88 and 89: that said lot 88, according to said plan, is bounded on the east by the western boundary of said lot 86, and runs westwardly one hundred and eighty feet to Third street; and lot 89 is bounded on the east by said lot No. 87, lies south, and adjoins lot 88, and runs back westwardly one hundred and
385 eighty *feet to Third street: that the deeds under which the defendant claims, by the courses and disances and description in said deeds, give the western boundary of their lots as binding on said lots 88 and 89; that, prior to 1825, the defendant's house was the only one then on the said square, and all the rest of said square was unimproved and in bushes. At that time Third street and Second had not been surveyed and laid off. In said year M. Cooke had the said Third street laid off by the county surveyor. and as so laid off it remains to this day; but it has been found out by a survey made in this cause, that the said Third street was not accurately laid off, and instead of having been run according to the plan of said town, parallel with second street, it was so run as to make as to said square the distance from Third street, as laid off to Second street. three hundred and seventy-six feet, instead of three hundred and sixty feet; that, in A. D. 1825, M. Cooke wishing to improve the said property of his wife, and to sub-divide the same, establish the eastern boundaries of said lots, 88 and 89, by measuring from Third street, as laid off by said survey, one hundred and eighty feet eastwardly; and having thus established the said eastern boundary of said lots, he built on said eastern boundary a fence and a house; which line thus established was by the said M. Cooke in his lifetime, and by those under whom the plaintiff claims, until a short time before the institution of this suit, supposed to be the true boundary between the defendant's and the plaintiff's lot. The line thus established by M. Cooke, left between the said line and the western boundary of the defendant's lots 86 and 87, the narrow strip of land now in dispute, and which is the same that is described in the declaration; so there-
386 after, and before 1830, the defendant *in enclosing his lots extended his enclosures to the said fence and house established and built by M. Cooke, so as to embrace the said strip of land now in dispute, claiming the same as his own, and has ever since continuously held the same within his enclosures, cultivating and clearing the same: that according to the survey made in this cause, the said Second street was properly laid off according to the plan of said town, and that the defendant has all the land called for by his deeds, exclusive of the land in dispute; and the said disputed land lies wholly outside of the boundaries called for by his deeds, and is a part of the said lots 88 and 89, according to the original plan of said town: that lots 88 and 89 were inter-

that the land was actually inclosed during that period. Under the authorities this was sufficient to bar the right of the appellant to the land in controversy, however good its title may have been originally," citing the principal case and Creekmur v. Creekmur, 75 Va. 430; Taylor v. Burnsides, 1 Gratt. at side page 190-2.

†**Affidavits of Jurors—Setting Aside Verdict.**—See Steptoe v. Flood, 31 Gratt. 323, and *note*. See Probst v. Braeunlich, 24 W. Va. 360, citing the principal case and Thompson's Case, 8 Gratt. 641; Bull's Case, 14 Gratt. 613; Read's Case, 22 Gratt. 947; Shobe v. Bell, 1 Rand. 39; State v. Robinson, 20 W. Va. 713; Reynolds v. Tompkins, 23 W. Va. 229; State v. Cartright, 20 W. Va. 33.

sected by a lane running from Wythe to Harrison street: that that portion of said lots, which lies between the said lane and the defendant's lots, was assigned to P. H. Cooke as one of the heirs of the wife of M. Cooke: that the said P. H. Cooke conveyed the same to one Smith, and the said Smith conveyed the same to the plaintiff: that the boundaries given in said deeds are in the following words and figures: "Beginning at the intersection of Wythe street, and a lane dividing this lot from the lot of John H. Myers, and running east along Wythe street to the line of Robert Jones' lot; thence south, along the line of said Jones to the line of Cavendy's lot; thence along the line of the said Cavendy's lot west, to the line of the aforesaid lane; thence north, along the line of said lane to the beginning." That the said Robert Jones, referred to in said deeds, is the defendant in this suit. The plaintiff applied to this court for a *supersedeas* to the judgment; which was accordingly awarded.

In the petition for a *supersedeas* two errors are assigned in said judgment as follows:

387 *"First, that the evidence in the cause does not show that the defendant's possession of the premises was an *adverse* possession—in this, that the said possession was without color of title—a colorable claim of title.

"And secondly, the refusal of the court to set aside the verdict for reasons appearing in the affidavit of the juror in the record shown."

Goodwin and *Crocker*, for the appellant.

Holladay and *Gage*, for the appellee.

MONCURE, P., delivered the opinion of the court.

The court is of opinion that the defendant having, for more than forty years next preceding the institution of this suit, been in the peaceable and uninterrupted possession of the land in controversy, which during all that time has been within his enclosures, claimed by him, and cultivated as his own property, his said possession has been and is adverse to the plaintiff and those under whom he claims the said land, and the statute of limitations is a bar to any claim which the plaintiff might otherwise have to said land; and the title of the defendant thereto, even though it may not have been originally good, has thus matured and become perfect by adverse possession and by lapse of time, and the operation of the statute of limitations.

The court is further of opinion, that the affidavit of one of the jurors, that he did not consent to the verdict which was found by the jury, afforded no good ground for setting aside the said verdict; and the court below was therefore right in refusing to set it aside on that ground. See *Bull's case*, 14 Gratt. 613, p. 626-634, and cases therein cited.

388 *The court is therefore of opinion that there is no error in the judgment of the court below.

Therefore it is considered that the said judgment be affirmed, and that the defendant recover against the plaintiff in error, thirty dollars damages, and his costs by him about his defence in this court expended.

Which is ordered to be certified to the court of hustings for the city of Portsmouth.

JUDGMENT AFFIRMED.

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389 *Manhattan Fire Ins. Co. v. Weill & Ullman.

[26 Am. Rep. 264.]

March Term, 1877, Richmond.

Absent, ANDERSON, J.

I. **Fire Insurance—Conditions in Policy.***—One condition of a policy of insurance on a building is, "if the building insured stands upon leased ground it must be so represented to the company, and so expressed in the written part of the policy; otherwise the policy shall be void"—HELD: The plaintiff may prove that the description of the property was inserted in the policy by the general agent of the company who issued this policy, and that he knew at the time that the building stood upon leased ground.

II. **Same—General Agent.**—The knowledge of the general agent issuing the policy, is the knowledge of the company, and they receiving the premiums on the policy with that knowledge, are bound by the policy.

III. Another condition of a policy of insurance on buildings is, "if the interest of the assured in the property be any other than the entire unconditional and sole ownership of the property for the use and benefit of the assured, it must be so represented to the company, and so expressed in the written part of this policy, otherwise the policy shall be void. The assured had given a deed of trust upon the building to secure a debt—HELD:

1. **Same—Condition in Policy—Ownership of Property.**—This condition does not refer to the legal title, but to the interest of the assured in the property: that he warranted to be no other than the entire unconditional ownership of the property.

2. **Same—Same—Same—Liens and Encumbrances.**—This was no warranty against

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***Fire Insurance—Waiver and Estoppel.**—In Georgia Home In. Co. v. Goode, 95 Va. 756, the court said: "It was contended by the insured that the existence of the lien having been fully made known to the soliciting agent, and his knowledge being imputable to the company, it was estopped to interpose the fact of the incumbrance as a defense against its liability upon the policy. Authorities to sustain the proposition are abundant," citing the principal case and Mutual Fire Ins. Co. v. Ward, 95 Va. 231; Farmers' Fire Ass'n v. Williams, 95 Va. 248; Georgia Home Ins. Co. v. Kinnier, 28 Gratt. 88; Carpenter v. Germania Ins. Co., 135 N. Y. 298; Forward v. C. Ins. Co., 142 N. Y. 382; Planters' Ins. Co. v. Myers, 55 Miss. 479; 1 Wood on Ins. sec. 90, and Ostrander on Fire Ins. (2d Ed.) sec. 350, and 356. See also, Lynchburg Fire Ins. Co. v. West, 76 Va. 575; Wytheville Ins. Co. v. Stultz, 87 Va. 629; Goode v. Georgia Home Ins. Co., 92 Va. 399; Wytheville Ins. Co. v. Teiger, 90 Va. 283; Southern Mutual Ins. Co. v. Yates, 28 Gratt. 585, citing the principal case. See Wooddy v. Old Dominion Ins. Co., 31 Gratt. 362, and *note*. See especially, monographic *note* on insurance appended to Assurance Society v. Holt, 29 Gratt. 612.

liens and incumbrances. The assured's interest was the sole ownership. The fact that he had given a deed of trust to secure a debt upon the property does not make the *cestui que trust* a joint owner.

3. **Same—When Policy Obligatory.**—There being no pretence of fraudulent concealment or misrepresentation, by the assured, of the deed of trust upon the building, the policy is obligatory upon the insurance company.

This was an action on the case in 390 the corporation *court of the city of Norfolk, brought by Weill & Ullman, against the Manhattan Fire Insurance Company, to recover the amount of the insurance on a house in said city which had been consumed by fire. On the trial several exceptions were taken by the defendants to rulings of the court, there having been a verdict and judgment in favor of the plaintiff for the sum of $1,385, with interest from the 1st of November 1873, the defendants applied to a judge of this court for a writ of error and *supersedeas;* which was allowed. The questions involved in the case and the facts, are stated by JUDGE CHRISTIAN in his opinion.

Scarburgh & Duffield, for the appellants.

White & Garnett, for the appellees.

CHRISTIAN, J. The plaintiff in error (the Manhattan Fire Insurance Company) seeks to avoid the obligation of its policy issued to the defendant in error upon two grounds:

First, that the building insured stood upon leased ground, but was not so represented to the company, and not so expressed in the policy.

Second, that at the time of the insurance, the house was encumbered by a deed of trust, which fact was not represented to the company, and not expressed in the policy.

The condition of the policy upon which this defence is based is as follows:

"IV. If the interest of the assured in the property be any other than the entire unconditional and sole ownership of the property for the use and benefit of the assured, or if the buildings insured stand on leased ground, it must be so represented to 391 the company, and *so expressed in the written part of this policy, otherwise the policy shall be void."

Evidence was offered to prove that the general agent of the company, who issued this policy to defendants in error, knew that the building insured stood on leased ground at the time he issued the policy. There was a motion to exclude this evidence from the jury, which was overruled by the court, and was the subject of a bill of exceptions, which set forth the evidence offered and admitted by the court as follows:

Be it remembered, that after the jury were sworn to try the issue joined in this cause, the plaintiffs to maintain the said issue on their part, after having offered in evidence to the jury (1) the policy, (2) the authenticated copy of the deed of lease, (3) the admissions of the parties, and (4) the proof of loss, as these several matters are set forth in the defendant's bill of exceptions No. 1, introduced (5) R. F. Vaughan as a witness in their behalf, who testified as follows:

"Previous to the first day of January, A. D. 1873, the firm of which I was a member, had been agents for the Maryland Fire Insurance Company, and that company had insured the same building described in the policy of the Manhattan Fire Insurance Company of New York City, mentioned in the plaintiff's declaration, and it was then owned by the plaintiffs, and described in the policy of the Maryland Fire Insurance Company as it is described in the said policy of the said Manhattan Fire Insurance Company. The agency for the said Maryland Fire Insurance Company, before the said first day of January, A. D. 1873, had been transferred from our firm to A. M. Vaughan, and the plaintiffs applied to our firm for a renewal of their policy in the Maryland Fire Insurance Company, but our agency for 392 that company having ceased, and *we having no company in which we could place it, I applied to A. M. Vaughan to take the risk, giving him in writing a description of the said building as it was described in the policy of the Maryland Fire Insurance Company. I did not then know that the said building stood on leased land. I have ascertained that since. Our firm was then composed of J. C. Deming, R. C. M. Wingfield and myself. A. M. Vaughan then issued the policy sued on, and delivered it to me, and then I delivered it to the plaintiffs, and received from them the premium, and gave A. M. Vaughan credit for it on our books. We retained one-half of the commissions on the premium, and paid the rest of the premium to A. M. Vaughan."

And then the plaintiffs introduced (6) A. M. Vaughan as a witness in their behalf, who testified as follows:

"I was, and still am, the agent of the defendant, the Manhattan Fire Insurance Company. R. F. Vaughan, of the firm of Deming, Wingfield & Co., applied to me in behalf of the plaintiffs, for an insurance on the building mentioned in the policy sued on, furnishing me with a written description of the property as it is stated in that policy. In behalf of the defendant I accepted the risk, and issued the policy. At that time I knew that the building stood on leased ground, and if the application had been made to me by the plaintiffs I might have so described it. But supposing that the description in writing furnished me by R. F. Vaughan was the form by which the other companies—those represented by Deming, Wingfield & Co. had written—and the form adopted in their policies, I followed the written description furnished me in making out the policy sued on. I did this, although I knew at the time that the building stood on leased ground; but I do not recollect that this occurred to me at that time."

393 *And then the plaintiffs introduced (7) J. C. Deming as a witness in their behalf, who testified as follows:

"I have for several years—ten years—been engaged in insurance agencies, and have done an extensive business in that line in this city. I am not now so engaged. Wingfield and

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Vaughan were my partners for several years. Both of them were my partners on the first day of January, A. D. 1873. I can't say I know any thing about the getting out of the particular policy sued on by the plaintiffs. I can only speak in general terms of what I have done for the plaintiffs. I would state that those gentlemen have for several years confided their insurance business to our firm with special reference to myself. I know the particular property on which the building in suit stood. I have known for some time that it stood on leased ground. I would state that a large number of the companies by common consent have waived a written application for a policy on ordinary risks. I can't say that at the time the plaintiffs stated to me that the building stood on leasehold ground, but I have known that fact for a long while. The reason that I cannot state whether the plaintiffs told me that the building stood on leased ground is, that I rarely made that a question in my practice. I represented two companies, which had given policies on that building, and was a special agent, and adjusted for one of them. They have both paid their *pro rata* shares of the loss occasioned by its destruction by fire, with a full knowledge of the fact that it stood on leased ground. Each of those policies contained the same general provision as in article IV of the terms and provisions of the policy sued on, and all the modern policies are alike in this respect. I state the fact, that the companies I represented had full knowledge of the fact that the building stood on
394 leased *ground when they paid their *pro rata* shares of the loss aforesaid, from the fact that their representatives, who supervised the ascertainment of that loss, had full access to, and availed themselves of the records of the clerk's office of the corporation court of this city in regard to the title."

The first question we have to determine is whether the court below erred, in admitting this testimony. The rule of evidence invoked to exclude it is, that which does not permit the written contract to be contradicted and varied by parol testimony. The great value of this rule of evidence cannot be easily overestimated, and merits the eulogies it has received.

In a proper case its application always promotes the ends of justice, by protecting parties against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability to misconstruction. But experience has shown that it is not a rule of universal application. And if there did not exist some authority to correct the universality of its application, then a rule of evidence adopted by the courts as a protection against fraud and false swearing, would, as was said in regard to the analagous rule known as the statute of frauds, become the instrument of the very fraud it was intended to prevent.

In the case before us the general agent of the plaintiff in error filled up the policy and took the description of the property from a policy on the same house, which had been issued by the Maryland Fire Insurance company. This agent says he knew at the time that the building stood upon leased premises. This knowledge of the general agent must be imputed to the principal. Regarding the fourth clause of the policy
395 *as a warranty, then there was a breach of warranty *eo instanti* of the making of the contract. This the company knew when it issued the policy. It knew when it accepted the premium the policy was void: that when it took the premium they took no risk, and that the insured had paid his money for a policy of insurance which the company knew was void at the moment when it was issued. To allow this would be to permit the company to receive a premium when they incurred no risk, and would encourage and promote the grossest fraud.

It is precisely in such cases as this, that the courts of law in modern times have introduced the doctrine of equitable estoppels, or as it is sometimes called estoppels *en pais*.

The principle is that where one party has by his representation *or his conduct*, induced the other party to a transaction to give him an advantage which it would be against equity and good conscience to assert, he would not in a court of justice be permitted to avail himself of that advantage.

See *Insurance Company* v. *Wilkinson*, 13 Wall U. S. R. 222; *Plumb* v. *Cattaraugus Insurance Company*, 18 New York R. 392; *Rowley* v. *Empire Ins. Co.*, 36 New York R. 550; 31 Conn. R. 526; 42 Missouri R. 148; *Bidwell* v. *North Western Ins. Co.*, 24 New York R. 302.

In the last named case the court says: "Indeed it is not easy to perceive why an insurance company by reason of the formal words or clauses (of a general and comprehensive nature), inserted in a policy, intended to meet broad classes of contingencies, should ever be allowed to avoid liabilities on the ground that facts, of which the company had full knowledge, at the time of issuing the policy were then not in accordance
396 *with the formal words of the contract, or some of its multifarious conditions. If such facts are to be held a breach of such a clause, they are a breach *eo instanti* of the making of the contract, and are so known to be by the company as well as the insured. And to allow the company to take the premium without taking the risk, would be to encourage a fraud. It would, as a legal principle, be equivalent to holding that the warranty of the soundness of a horse is a warranty that he has four legs, when one has been cut off." In the case before us the knowledge of the agent must be taken as the knowledge of the company, and to avoid the policy upon the ground the building insured was upon leased ground, would be to permit the company to say, "it is true, we *knew* that the building was upon leased ground; we knew that our agent, and not the insured, had filled up the description of the property, and had omitted to state the fact; but we hold it to be

void because one of the conditions of the policy makes it void, if the fact that the property stands on leased ground is not so represented or expressed in the policy; and while we have received your money, we issued to you a policy which we knew to be void, *eo instanti* of its delivery. We took the premium, but took no risk." Where good faith and fair dealing are of the very essence of a' contract of insurance, insurance companies will be estopped from asserting a defence which not only tends to a breach of good faith, but to actual and positive fraud.

I am, therefore, of opinion that the evidence admitted by the court below was properly admitted because it proved such a state of facts as constituted an *estoppel*, and that the court did not err in overruling the motion to exclude the same. In addition to the authorities above cited, see JUDGE
397 BURKS' opinion in *the case of *Georgia Home Insurance Co.* v. *Kinnier's adm'x*, and cases cited by him, *supra*, 88.

The second ground upon which the company seek to relieve itself against liability for loss is, that at the time the insurance was affected, there was an incumbrance in the form of a deed of trust. Now it is not pretended that there was any misrepresentation or fraudulent concealment, as to the fact of the existence of such incumbrance. On the contrary it does not appear that any question was asked the assured on that subject: but as has already been seen, *the agent of the company* filled up the description of the property, copying it from a policy in another company. But it is insisted that this incumbrance, existing at the time, of itself avoided the policy, under that condition which declared: "If the *interest* of the assured in the property be other than the entire unconditional and sole ownership of the property for the use and benefit of the assured, * * * it must be so represented to the company, and so expressed in the written part of the policy. Otherwise the policy shall be void."

It was held by this court, in *West Rock. Mutual Fire Ins. Co.* v. *Sheets*, 26 Gratt. 871, that unless there be a warranty, or a representation that amounts to a warranty, a policy cannot be avoided for incumbrances unless upon the applicants false and fraudulent answers to interrogatories. Of course if there be a warranty, or a representation amounting to a warranty, that there are no incumbrances on the property, whether such answer be given in answer to a question or not; if it be untrue, the policy would be void, even though the insured might not be guilty of actual fraud.

The question then in this case turns upon the construction to be given to the condition in the policy above quoted. Can that
398 be construed to be a warranty *on the part of the assured that there was no incumbrance on the property insured? This condition does not refer to the *legal title*, but to the *interest* of the assured in the property; *that* he warranted to be no "other than the entire unconditional and sole ownership of the property." This was no warranty against liens and incumbrances. His interest was the *sole ownership*. The fact that he had mortgaged the property did not make the mortgagee a joint owner with him. The fact that he may have incumbered it with a deed of trust does not make the *cestui que trust* a joint owner. The fact that there may have been liens for taxes, or liens by judgment did not effect his ownership. He is still the sole owner, though he may have incumbered it, or liens may exist against it, and the existence of such is no breach of a condition declaring sole ownership. This is the doctrine of the courts, settled by repeated decisions. *Strong* v. *Manufacturers Ins. Co.* 10 Pick. R. 40; *Ætna Fire Ins. Co.* v. *Tyler* 16 Wend. R. 385; 12 Wend. R. 507; *Smith* v. *Columbia Ins. Co.*, 17 Penn. State R. 253; *Hough* v. *City Fire Ins. Co.*, 29 Cow. R. 10. In the last named case, it was a condition of the policy, that "if the *interest* in the property insured is not *absolute*, it must be so represented to the company and expressed in the policy in writing, otherwise the insurance shall be void. The applicant represented the property as his house, and it was so represented in the policy. In fact he had only agreed to purchase the property, but under his agreement had paid part of the purchase money, had taken possession, and made valuable improvements. It was held that the statement made by the assured, that the property was *his* was true, and his interest was an absolute one. The court said, "the subject of insurance was an interest,
399 not a title. It is *an *interest, not a title*, of which the conditions of insurance speak. The terms interest and title are not synonymous.

A mortgagor in possession, and a purchaser holding under a deed defectively executed, have both of them *absolute* as well as insurable interests in the property, though neither of them has the legal title. The condition in question speaks only of the character of the interest to be insured, not of its quality."

In *Aurys* v. *Hartford Fire Ins. Co.*, 17 Iowa 176, the court holds the following language, speaking upon this point, and which very aptly applies to the case before us: The object of the insurance company by this clause (*i. e.*, a claim providing against change of interest, &c.) is, that the interest shall not change, so that the assured shall have a greater temptation or motive to burn the property, or less interest or watchfulness in guarding and preserving it from destruction by fire. Any change in, or transfer of the assured in the property, of a nature calculated to have this effect, is in violation of the policy. But if the real ownership remains the same, if there is no change in the fact of title, but only in the evidence of it, and if the latter change is only nominal, and not of a nature calculated to increase the motive to burn, or diminish the motive to guard the property from loss by fire, the policy is not violated." See also *Shepard* v. *Union Fire Ins. Co.*, 38 New H. 232.

I am of opinion, both upon principle and authority, that the condition referred to is not a warranty against incumbrance, and that the fact that the assured had incum-

bered the property was no breach of that condition.

As was said by the president in *W. R. F. C.* v. *Sheets* (*supra*): "There is nothing in this policy (when *fairly construed) which required a disclosure by the insured of the liens upon the insured property. There was no question proposed by the insurer to the insured in regard to the existence of such liens. The insurers might have examined the records for such liens, and made inquiries about them of the insured, or others, but they failed to do so. Can they now avoid the obligation of the policy on the ground that the insured, without being inquired of, and without any fraud, omitted to give notice of the lien at the time of obtaining the policy? I think they cannot." Page 870.

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I am therefore of opinion that in the absence of all fraud, in the absence of all proof of pretence of any misrepresentation or fraudulent concealment, on the part of the assured, the defense set up by the insurance company, is purely technical, and ought not to shield them against their just liability to the assured for the loss he has sustained.

I am for affirming the judgment of the corporation court of the city of Norfolk.

MONCURE, P., and STAPLES and BURKS, Js., concurred in the opinion of CHRISTIAN, J.

JUDGMENT AFFIRMED.

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401 *Floyd, Trustee v. Harding & als.

March Term, 1877, Richmond.

Absent, ANDERSON and BURKS, J's.*

In 1856 L sells land to T by parol contract, receives all the purchase money and puts T into possession. In January 1867 L executes a deed to T, by which he releases all his claims to the land to T, and warrants the title. T then sells the land to W, and W conveys to F. In March 1866 B recovers a judgment against L, which is docketed within the year. In a suit against F to subject the land to satisfy the judgment against L—HELD:

1. **Registry Acts—Parol Contract for Land.**†—That the registry acts do not apply to a parol contract for land, and T having paid all the purchase money, and having been put into possession, so that he had a valid equitable title to the land, it is not subject to the lien of the judgment against L.
2. **Equitable Title—Merger.**—The valid equitable title of T is not so merged in the legal title acquired by the deed of L to him, as to subject the land to the lien of the judgment against L.
3. **Withers v. Carter Approved.**—The principles of the case of *Withers* v. *Carter*, 4 Gratt. 407, approved.

This was a bill filed in the circuit court of Bedford county, by John B. Harding, to subject a certain tract of land in the possession of N. B. Floyd, as trustee of his wife Ellen S. Floyd, to a judgment which had been recovered by Green B. Board against J. M. W. Leftwich, the plaintiff, and two others, on a negotiable note, in which said Leftwich was maker, and the plaintiff and the others were endorsers; and which the plaintiff had satisfied. This judgment was recovered *on the 30th March 1866, and was docketed March 16th, 1867.

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Floyd answered the bill. And it was proved that as early as 1856 J. M. W. Leftwich, by an unwritten parol contract, sold this land to Lewis H. Turnbull, who paid the whole purchase money, and was put into possession. By deed of the 23d of January 1867, which was admitted to record on March 13th 1867, Leftwich and wife released to Turnbull all their claim upon the land, and warranted the title. Turnbull in June of the same year, sold to John W. Howard; and subsequently under a decree of the court in the case *Howard* v. *Howard*, the land was sold and conveyed to N. B. Floyd in trust for his wife Ellen S. Floyd.

The cause came on to be heard on the 7th of October 1872, when the court held that the judgment was a valid lien upon the tract of land conveyed by Leftwich and wife to Turnbull, by their deed of the 23d of January 1867, and now in the possession of Floyd; and decreed that unless the defendants, &c.,

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*JUDGE BURKS had been counsel in the cause in the circuit court.

†**Registry Acts—Parol Contracts of Land.**—The decision of the principal case, that the registry acts do not apply to a parol contract of land so that one who under a parol contract has paid the purchase money and been put in possession of land has a valid equitable title not subject to the lien of a subsequent judgment creditor of the vendor, is followed in Burkholder v. Ludlam, 30 Gratt. 255, and *note*; March, Price & Co. v. Chambers, 30 Gratt. 299, and *note*; Long v. Mfg. Co., 30 Gratt. 665; Trout v. Warwick, 77 Va. 731; Halsey v. Peters, 79 Va. 60; Bowman v. Hicks, 80 Va. 806; Powell v. Bell, 81 Va. 222; Brown v. Butler, 87 Va. 621; Reynolds v. Necessary, 88 Va. 125; Frame v. Frame, 32 W. Va. 478. See 2 Minors (4th Ed.) 851 *et seq.* The principal case is distinguished in Campbell v. Nonpareil Co., 75 Va. 297 and Eidson v. Huff, 29 Gratt. 338. See also, Hicks v. Riddick, 28 Gratt. 418. Subsequent to these decisions it was provided by statute Code, sec. 2463 that "every contract, not in writing, made in respect to real estate or goods and chattels, in consideration of marriage, or made for the conveyance or sale of real estate on a term therein of more than five years, shall be void, both at law and in equity, as to purchasers for valuable consideration without notice and creditors." See also, Barton's Ch. Pr. 396, 552, 636, 932, 950, 990, 1030, 1032, 1063.

Implied Trusts.—In Smith v. Proffit, 82 Va. 832, the principal case is cited to sustain the proposition that when property is brought by one for another and is conveyed to the former and is partly paid for by the latter an implied trust arises in favor of the payer to the extent of his payment.

What Rights Acquired by Judgment Creditor.—The general rule laid down in the principal case that the judgment creditor can acquire no better right to the estate than the debtor himself has when the judgment is recovered, is followed in the subsequent Virginia cases. The principal case is cited on this point in Shipe, Cloud & Co. v. Repass, 28 Gratt. 723; Coldiron v. Asheville Shoe Co., 93 Va. 373; Sinclair v. Sinclair, 79 Va. 42; Nutt v. Summers, 78 Va. 173; Cowardin v. Anderson, 78 Va. 90; Hughes v. Harvey, 75 Va. 210.

did within ninety days, pay to the plaintiff the amount of his judgment and the costs of this suit, commissioners named should sell, &c.

From this decree Floyd applied to this court for an appeal; which was allowed.

John W. Daniel, and *Haymond,* for the appellant.

R. G. H. Kean, for the appellees.

STAPLES, J. There is no controversy in this case in regard to the facts. They are few and simple, and may be briefly stated. In the year 1856 James W. Leftwich sold to Lewis H. Turnbull a tract of land in Bedford county. The contract was not re-
403 duced to *writing; but Turnbull was placed in immediate possession, and the whole of the purchase money was paid by him. In January 1867 Leftwich executed to Turnbull a deed of release for the land, with warranty of title. Turnbull shortly afterwards sold and conveyed to Howard, and Howard subsequently in 1868, conveyed to Floyd the appellant. In 1866 a judgment was recovered by Board against Leftwich, the original vendor, in the circuit court of Roanoke, which was duly docketed in the county court of Bedford. The claim here is to subject this land in the hands of Floyd, to the lien of this judgment. The question presented is, whether a parol contract for the sale of land so far executed as to vest in the purchaser a valid equitable title, is good against creditors of the vendor, under the statutes of registration. This question is now exciting no ordinary interest throughout the state. It is understood that numerous cases are pending in the circuit courts, involving a large amount of property, awaiting the decision here. The court has given the subject that consideration its gravity and importance demand.

In the outset it may be well to advert briefly to the case of *Withers* v. *Carter & als.,* 4 Gratt. 407. No sound conclusion can be arrived at in this case without a proper understanding of the facts and principles of law involved in that case. There the parties had reduced their contract to *writing,* and the purchaser was put in possession of the property. Subsequently a deed was executed by the grantor; but it was never recorded, having been lost by the person to whom it was committed to be delivered to the clerk.

At that time the statute required the recordation of deeds, but not of written executory contracts for the sale of land. The court of appeals held that while the
404 *effect of the statute was to render the unrecorded deed *quoad* the creditors of the grantor, a mere nullity, it left the subject precisely in the same situation as if no deed had been made or attempted. JUDGE BALDWIN, in delivering the opinion of the court, said, "It could not be doubted, a fair purchaser of the equitable estate has a right to hold it against creditors of the vendor who have not previously recovered judgments." This decision was rendered at the January term 1848. At the revisal of 1849 an amendment was incorporated in the statute. It is contained in sections 4 and 5, chap. 118, Code of 1849, and is as follows:

"4. Any contract in writing made in respect to real estate, or goods and chattels, in consideration of marriage, or made for the conveyance or sale of real estate, or a term therein of more than five years, shall, from the time it is duly admitted to record, be as against creditors and purchasers as valid as if the contract was a deed conveying the estate or interest embraced in the contract."

"5. Every such contract, every deed conveying any such estate or term, and every deed of gift, or deed of trust or mortgage, conveying real estate or goods and chattels, shall be void as to creditors and subsequent purchasers for valuable consideration without notice, until and except from the time it is duly admitted to record in the county or corporation wherein the property embraced in such contract or deed may be."

These provisions, as will be seen, do not expressly, or even by any fair implication, include all contracts for the sale of land. They apply only to contracts in writing. Having provided for the recordation of written contracts in the fourth section, the framers of the statute by the use of the words. "such contracts" in the fifth, evinced a
405 deliberate purpose to confine the *operation of that section to contracts in writing. It is obvious that the language was carefully chosen, and the omission to require the recordation of EVERY contract was not accidental. In order to give the statute the construction now contended for, we must strike out, or wholly disregard the words "in writing," in the one section, or the word "such" in the other. Are we authorized by any rule of interpretation to take such a liberty with a legislative enactment plain and explicit in its terms.

While in the construction of statutes the constant endeavor of the courts is, to ascertain and give effect to the intention of the legislature, that intention must be gathered from the words used, unless a literal construction would involve a manifest absurdity. Where the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed. The authorities in support of this principle are almost innumerable. It is unnecessary to cite them, as they may be found in Dwarris on Statutes, 181-4. 209; 2, 204-5, 208.

In this connection I cannot forbear quoting briefly a portion of the opinion of the supreme court of the United States in the case of *Denn* v. *Reid,* 10 Peters R. 524. The case turned upon the proper construction to be given to certain recording acts of North Carolina and Tennessee. MR. JUSTICE MCLEAN, after giving his construction of the statute said: "This, it must be admitted, when we consider the mischief the law was probably intended to remedy, is a somewhat technical construction of the act; and cases may be found where courts have construed a statute most liberally to effectuate the remedy: but where the language of the act

is explicit, there is great danger in de-
406 parting from the *words used, to give an effect to the law which may be supposed to have been designed by the legislature. * * * It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace all cases, because no good reason can be assigned why they were excluded from its provisions."

If the rule of construction here laid down be correct, there would seem to be an end of the question. But if we are permitted to go outside of the express language of the statute in pursuit of the supposed intention of the legislature, have we such satisfactory and conclusive evidence of that intention here, as to justify the courts in giving to the statute an interpretation so palpably in conflict with its language.

In answering this question it is important to bear in mind the rules of law in respect to parol contracts for the sale of land. Courts of equity treat such contracts, where there is part performance, as valid and effectual as those evidenced by the most solemn instruments of writing. In order to prevent the possibility of fraud in engrafting his exception upon the statute of frauds, it is settled, that the parol agreement relied on must be certain and definite in its terms: the acts proved in part performance must refer to, result from or be done in pursuance of the agreement: and the agreement must have been so far executed that a refusal of full execution will operate as a fraud upon the party, and place him in a situation which does not lie in compensation. *Wright* v. *Pucket*, 22 Gratt. 370; Lead. Cases in Equity, 2 vol. 1052.

When these circumstances concur it is as much a matter of course for the equity courts to decree a specific execution as for the common law courts to award damages for the breach of a written contract.
407 The purchaser *is regarded as the real beneficial owner of the estate, and the vendor a mere trustee of the legal title for his benefit. Whatever loss may fall on the estate is the loss of the purchaser. Whatever advantage may accrue to it is his gain. This doctrine is now too firmly settled ever to be changed by anything short of an express legislative enactment. It is to every intent a law of property, as much so as if the exception had been incorporated in the statute of frauds. Upon the faith of its existence, purchases of valuable estate have been made and held throughout this commonwealth. There can be no ground of controversy upon these points. It may be further affirmed that the title thus vesting in the purchaser under a valid parol contract, is good against all the world, except subsequent purchasers of the legal title for valuable consideration without notice. I speak now without reference to the recording acts. That the equitable estate of the purchaser is good against creditors of the vendor is incontrovertible. It has been over and over again decided that the judgment creditor can acquire no better right to the estate than the debtor himself has when the judgment is recovered. He takes it subject to every liability under which the debtor held it, and subject to all the equities which exist at the time in favor of third persons; and a court of chancery will limit the lien of the judgment to the actual interest which the debtor has in the estate. The creditor is in no sense a purchaser; he has no equity whatsoever beyond what justly belongs to his debtor; his claim is to subject to his lien such estate as the former owns, and no more.

These principles have been time and time again announced by the courts of England, by this court, and by the supreme court
408 of the United States, and by the *courts of many other states of the Union. See the cases cited by JUDGE BALDWIN in *Withers* and *Carter*.

Brown v. *Pierce*, 7 Wall U. S. R. 205; *Rogers* v. *Bonner*, 45 New York R. 379; *Money* v. *Dorsey*, 7 Smedes & Marsh. 15; *Morton* v. *Robards*, 4 Dana R. 258. Numerous other cases might be mentioned, but it is unnecessary.

The revisors of 1849 were men learned in the law; they were perfectly familiar with these principles. They could not but be aware that the question of the rights of purchasers under parol contracts would constantly arise in the courts. If they intended to make this fundamental revolution in the laws of property, and utterly to annihilate, for the benefit of creditors, a large class of contracts universally recognized as valid, they certainly would have expressed their intention in plain and unmistakable language. It is not reasonable to suppose they would have left a matter of so much importance to all the hazards of judicial interpretation—an interpretation only to be reached by disregarding the plain words of the statute, and having no other foundation than a supposed public policy.

But we are told that every consideration, prompting the revisors to require the recordation of deeds and title bonds, applies more strongly to mere verbal agreements for the sale of lands. A little reflection will, I think, show that this is not true, certainly not to the extent asserted in the argument.

When the vendee has a deed or other written evidence of his purchase, there is no hardship in requiring him to place it upon the record. It is gross laches not to do so, which the legislature might well declare good ground of forfeiture. But in many cases the vendee has neither deed nor title bond. He is often deprived of one or
409 both by the fraud of the vendor, *or by his death or sickness, or by some controversy in regard to the precise terms of the contract; and at last not unfrequently he is compelled to resort to a court of equity for redress. Such cases are constantly occurring in every community. The books abound with them. To require that such contracts shall be recorded is simply to require an impossibility. It is to provide that one man's property may be taken for another man's debts, without the fault of the owner, and without the possibility of guarding against it by the exercise of the greatest diligence. It seems to

be forgotten that one of the reasons influencing the courts to engraft an exception upon the statute of frauds in cases of parol contracts partly performed was, that oftentimes the purchaser is kept out of his deed or other writing by the fraud of the vendor, or other circumstance beyond the control of the purchaser. Who can say that the considerations which influenced the courts to engraft this exception upon the statute of frauds did not influence the legislature also to respect the same principle in the recording acts?

But in ascertaining the meaning of a statute it is sometimes important to find out the mischief to be corrected as well as the class to be protected. Who are the men to be most benefited by this enlarged interpretation of the statute? Not purchasers, certainly. They are fully protected by the provision requiring the recordation of deeds and title bonds. When the contract is evidenced by a writing it is not necessary the purchaser shall take possession under his contract. Unless, therefore, the writing is recorded, in very many cases it is impossible that a subsequent purchaser can have any knowledge of the alienation. There is nothing to give him notice, or even to put him upon inquiry. It was very proper **410** under such *circumstances to require the registration of the deeds and of the written executory agreement, not necessarily accompanied with possession. But when the contract is merely in parol, possession of the property under the agreement is indispensable. It must be a visible, notorious possession. Whether, under our recording acts, mere possession is sufficient to charge all persons dealing with the property with knowledge of all the equities of the tenant in possession, it is unnecessary now to decide, as no such question arises here. All agree that the notice must be such as to affect the conscience of the subsequent purchaser. *Siter, Price & Co.* v. *McClanachan et als.*, 2 Gratt. 280. If the first purchaser is not in possession, he must have his deed or title bond, and the registry of them will give notice. If he is in the actual possession under a parol agreement as owner of the estate, that possession will generally be so notorious, so well understood, that persons disposed to act in good faith will be rarely misled by the absence of registration. It seems to me, therefore, that, so far as subsequent purchasers are concerned, no such inconvenience will result as is apprehended from holding that the statute does not extend to parol contracts; certainly none comparable to the mischiefs likely to arise from a contrary construction.

The same observation may be made in respect to creditors. If acting in good faith, if not willfully closing their eyes to the true state of the title, they will rarely be misled in regard to the real ownership of the property. As to them, certainly the old rule should prevail, that possession is notice of the equity of the party having such possession.

But our recording acts make no distinction between creditors with notice and cred- **411** itors without notice. *The former, in this respect, stand upon higher grounds than subsequent purchasers. With us, the creditor, at the time he gives the credit, may know his debtor has sold the land, has received every dollar of the purchase money; he may see the purchaser in possession, claiming title, making costly and expensive improvements; he may know that the purchaser has been forced into a court of chancery to obtain the title withheld by the fraud or obstinacy of the vendor; he may know, as in this case, that the property is passing through successive alienations into the hands of innocent purchasers; all this he may know, and yet, if the construction now contended for be given to the statute, he may by means of a judgment against the vendor appropriate every acre of the property, every dollar expended upon it, to the payment of his debt. He cannot take a deed of trust or a mortgage, because he thereby becomes a purchaser, and as such he is infected with notice. But he can accomplish his object by a judgment, which confessedly gives a lien only upon that which belongs to the debtor. This is the class, and the only class, so far as I can see, that is to be benefited by this enlarged and liberal interpretation of the statute. The recording acts, I admit, are founded in wisdom and justice; but it by no means follows that every interest is to be made subservient to the policy of a registration system. It was said in the argument, that Virginia is the only state besides Mississippi, in which the right is conferred upon a creditor with notice of subjecting to his judgment the property in the hands of a *boia fide* purchaser. As the law is written, he must obey it. But, for one, I am not disposed to extend it one step beyond what is so written. If the rights of a large class of purchasers recognized by the law as valid are to be sacrificed **412** *because of a failure to do an act so often impossible to be done, it must be by the declared will of the legislature, in clear and unmistakeable language. It is not to be done by any mere rules of interpretation, or by inferences or conjectures as to the intention of the legislature, founded upon a supposed public policy. Under all the difficulties surrounding this question, who is authorized to speak for the legislature outside of its expressed will? Who can say that the framers of the statute did not carefully consider all these matters, and after full consideration determine to leave parol contracts just ts they were—unaffected by the recording acts?

It may be indeed, that they did not think of the matter at all; that the subject was not brought to their attention. If such be the case, who can say what view they would have taken, had the question been before them. If the conflict of opinion was as great then as it is now, it is a matter of impossibility to say what action they would have taken, or whether they would not have left the subject precisely where it is. To whatever cause the omission, if such it be, is owing, the defect cannot be remedied by the

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courts. In the language of MR. JUSTICE MCLEAN, already quoted, "It is not for the courts, where the language of the statute is clear, to say that it shall be construed so as to embrace all cases, because no good reason can be assigned why they were excluded from its provisions."

We are told, however, that although the statute may not in express terms apply to all contracts for the sale of land, it necessarily leads to that result. For, as is argued, whenever the parol contract is reduced to writing it becomes merged in the latter, and ceases to operate as a parol contract; and when a deed is executed it satisfies and discharges the contract to convey.

413 *In the first place, cases are constantly occurring which rest alone upon the parol agreement partly performed, and no deed or other writing is or has been executed when the creditor brings his suit. In these cases the doctrine of merger can of course have no application; and the whole structure of the argument upon this point falls to the ground. In the next place there are other cases, and the present is one of them, where no deed is given until after the judgment is recovered; but the contract is made—the purchase money paid—the purchaser in possession and so remaining years anterior thereto. Now if the title of the purchaser is good against the creditor when the judgment is recovered, can it be the title becomes invalid by reason of the subsequent execution of a deed by *the vendor*. The bare statement of the proposition is its own refutation. But let us take the strongest case, that of a valid parol contract so far executed as to pass the equitable title, and subsequently a deed of conveyance, which is, however, not recorded, or if recorded at all, not until after a judgment recovered. This is the case as presented in *Withers* v. *Carter*, except that there the contract was in writing, while here in the case supposed it is in parol. But the principle is the same. "No deed of conveyance (said JUDGE BALDWIN) is necessary to confirm its validity (the executory agreement), and how an abortive attempt to obtain a valid conveyance can destroy the pre-existing title is beyond by comprehension. Nor can I conceive what merger there can be in regard to creditors, of the equitable estate in the legal title, by force of a deed which as to creditors is a blank piece of paper." Long before this opinion of JUDGE BALDWIN was written, the supreme court of Kentucky had announced the same view in the con-

414 struction of their *acts taken from the Virginia statutes. In *Morton* v. *Robards*, 4 Dana R. 258, that court said, "It would be strange to contend that the equity of a holder of a bond is good, yet if he attempted to consummate his legal title, but failed, that he forfeits that equity which he unquestionably could have held under his bond in case no attempt had been made."

It will not be denied that these principles apply with equal force to a pre-existing equitable estate acquired under a valid parol contract, as to one held under a written executory agreement. It may be conceded that when the parol agreement is connected with the deed and is contemporaneous with it, it must be regarded as *forming* part of the same transaction. In such case possession would perhaps be considered as taken under the deed and as referrible to it. But where there is a parol agreement under which the purchaser takes possession, and which, of course, is valid without deed, no good reason is perceived why the subsequent execution of a deed should either invalidate the title thus acquired, or preclude proof of it in a proper case.

The principle of the law of estoppel is, that when parties make an agreement which is afterwards reduced to writing, the former is so far merged in the latter that parol evidence is inadmissible to establish a variance between them, or to contradict the legal import of the writing. But this rule can have no just application, where the verbal and written agreement correspond in every particular, and the parol proof is offered, not to contradict but to sustain the written agreement. *Mills* v. *Matthews*, 7 Mary R. 315. Whatever might be the difficulties in a court of law, a court of equity, which regards not the mere form, but the substance of things,

415 will inquire into the real nature *of the transaction, and limit the lien of the judgment to the actual interest of the debtor.

Before closing this opinion it is proper to add a few words in reference to the case of *Withers* v. *Carter*. It is impossible to deny much of what is said in that case is equally applicable to the one before us. The reasoning which tends to show that under the laws in force prior to 1849, the unrecorded deed being a nullity, a written executory agreement was, nevertheless valid, because not affected by those laws, will equally show that a valid parol contract is now good against creditors, although never recorded, because it is not affected by the amendment incorporated in the statute. See 2 Minor Ins. 1027. The counsel for the judgment creditors have felt this difficulty throughout. Accordingly they have not hesitated to assail the decision in *Withers* v. *Carter* and the reasoning upon which it was based. It is no part of my duty to vindicate that decision. True it was made by a court of three only; but no abler judges ever sat on this bench; JUDGES CABELL, ALLEN and BALDWIN. It was made nearly thirty years ago, and during all the time that has since elapsed, it does not appear to have been seriously controverted. The legislature very soon after changed the law; but the change applied only to future contracts, and left untouched many cases which were necessarily controlled by that decision. If any effort was ever made by the profession to have it reversed there is nothing to show it. The doctrines announced by JUDGE BALDWIN have been repeatedly sanctioned by the highest tribunals in Kentucky and Mississippi in similar cases, and disputed by none that I have seen. We may safely, I think, adopt them as our guide in the present case. If the conclusion to which this court has

416 arrived is erroneous, it is an *error in the interests of justice. The chief loss

will be felt by creditors, nine-tenths of whom were well aware the property they seek to appropriate did not belong to their debtors, and they never gave credit upon the faith of any title in the latter. On the other hand it is impossible to estimate the mischief, the utter ruin which would follow a contrary decision. In nearly every city and town, and in every county, there are, no doubt, houses and lands held by no other title than that arising under parol contracts, held for years without question, until the disasters of the war opened the floodgates of litigation. If there was ever an occasion in which the letter of a statute should be adhered to, it is in these cases. There is one other consideration which ought to have its influence. If we are to hold "that every contract in respect to real estate" must be recorded, what is to be the effect upon those titles depending upon implied or resulting trusts, which, though not in writing, are recognized and sanctioned by our laws. There is no need to discuss this question here, but it may well deserve the attention of those who are so urgent for the policy of a "universal registration."

In whatever light we may consider the question, it seems to me it is safest to construe the statute according to its words, and to leave its defects to be remedied by the legislature. My opinion is, therefore, to reverse the decree of the circuit court of Bedford, and to dismiss the bill as to the appellant Floyd.

MONCURE, P., and CHRISTIAN, J., concurred in the opinion of STAPLES, J.

The decree was as follows:

417 *The court is of opinion, for reasons stated in writing and filed with the record, that the circuit court erred in holding that the judgment set out in the plaintiff's original bill constitutes a valid lien upon the tract of land conveyed by J. M. W. Leftwich and wife to C. H. Turnbull by deed dated January 23d, 1867, and now in the possession of the appellants; and in directing that, unless the said judgment be paid by the appellants, the real estate in the amended bill mentioned, or so much thereof as was necessary, should be sold to pay the same. Therefore it is decreed and ordered, that the said decree be reversed and annulled, and that the appellee, John B. Harding, pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here. And this court proceeding to render such decree as the said circuit court ought to have rendered, it is further decreed and ordered, that the plaintiff in the circuit court take nothing by his amended bill as to the appellant, but that it be dismissed as to him; that he go thereof without day and recover against the said plaintiff his costs by him about his defense in that behalf expended in the said circuit court.

Which is ordered to be certified to the said circuit court of Bedford county.

DECREE REVERSED.

418 *Hicks v. Riddick & als.

March Term, 1877, Richmond.

Absent, ANDERSON and BURKS, J's.*

1. **Parol Contracts for Sale of Real Estate.**†—R, by a verbal contract, sells a house and lot to M, who pays all the purchase money and is put into possession. R has no interest in the property which may be subjected by attachment against him as an absent debtor to the payment of his debt.
2. **Same—Effect of Subsequent Deed.**—After the purchase money had been paid and M put into possession, R sent to M a deed executed by himself for the property; but M insisting that R's wife should join in the deed, returned it to R; and it was not again delivered. If the deed might be considered as having been accepted by M, that would not render the property liable to the attachment.

This was an attachment in equity in the circuit court of Mecklenberg county, brought in March 1873 by John R. Hicks against C. B. Riddick, J. A. Moss and others. The plaintiff charged in his bill, that Riddick, who lived in North Carolina, was indebted to him by bond in the sum of $4,000; that he owned a house and lot in Clarkesville, in the said county, which he prayed might be subjected to pay his debt, and that J. A. Moss was in possession of the property.

Moss answered, denying that Riddick had any interest in the property, and alleging that he had in 1863 purchased the property, and had paid in full for it in tobacco, and had been put into possession of it.

419 *The facts, as they are clearly established by the evidence, are: That in April 1863 Riddick, by a verbal contract, sold the house and lot to Moss & Brother, who were manufacturers of tobacco in the town of Clarkesville: That the price of the property was $4,500, to be paid in manufactured tobacco: That the tobacco was selected by the brother of Riddick, who sold the house as agent of Riddick, and the tobacco was delivered and received by Riddick, and Moss & Brother took possession of the house and lot: That Riddick sent to Moss & Brother a deed for the property executed by himself; but his wife not having joined in the deed, it was returned to him with a request that he and his wife would execute a deed. As late as March 1865 Riddick wrote to Moss, saying that he living in North Carolina, there was no necessity for his wife's joining in the deed. And he in fact never afterwards delivered to them a deed for the property.

Moss & Brother having gone into bankruptcy, surrendered this house and lot as a part of their property; and in 1871 it was sold by their assignee in bankruptcy, and purchased by the defendant J. A. Moss. The property has been in possession of

*JUDGE BURKS had been counsel in *Floyd v. Harding*, involving the same question.

†**Parol Contracts—Rights of Creditors.**—The principal case is cited with approval in Halsey v. Peters, 79 Va. 66; Reynolds v. Necessary, 88 Va. 128; Burkholder v. Ludlam, 30 Gratt. 259. For general discussion, see Floyd v. Harding, 28 Gratt. 401, and *note*.

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Moss & Brother, the assignee and the present owner, from the time of the purchase by the former to this time.

It appears that, subsequent to the sale of the property by the assignee in bankruptcy, Riddick filed his bill in the circuit court of Mecklenburg, to set aside his sale to Moss & Brother, on the ground that the tobacco received by him was rotten and unfit for use; but there is no evidence in this record that such was the fact.

The cause came on to be heard on 420 the 18th of September *1874; when the court held that Moss & Brother were the purchasers for value of the house and lot, and were in possession thereof under a good equitable title prior to the institution of this suit, and, having paid all the purchase price, were entitled to a conveyance therefor; and that Riddick, holding the legal title, was only a trustee for Moss & Brother; and it appearing that they and their assignee in bankruptcy had held undisturbed possession thereof for nine years prior to the institution of this suit, and that Riddick, having sold, received full payment for and delivered possession of said house and lot, would be estopped from asserting claim thereto against Moss and Brother, or their alienee, the plaintiff, his creditor, could stand in no better position in relation thereto than the said Riddick; therefore the said house and lot was not liable to the attachment levied thereon for the debts of Riddick; and the bill was dismissed with costs. From this decree Hicks applied to a judge of this court for an appeal; which was allowed.

W. W. Henry and *R. S. Lee*, for the appellant.

Jones & Bouldin and *John W. Daniel*, for the appellee.

STAPLES, J. The question presented in this case is substantially the same as that just decided. The only difference is, that here the lien asserted is under an attachment sued out against the debtor as a non-resident. It is claimed that this lien binds the property in the possession of a *bona fide* purchaser where title is derived from a parol contract with the debtor long before the lien of the attachment commenced. There is no conflict of testimony in respect to the 421 terms of *the contract, and the payment of the purchase money in manufactured tobacco, as agreed by the parties, and the delivery of the possession of the house and lot to Moss & Brother, the purchasers. If the deed made by Riddick, the vendor, can be considered as ever accepted by Moss & Brother, it did not affect the pre-existing equitable estate acquired under the parol contract, complete and fully executed before the delivery of the deed. But it may be fairly presumed that Moss & Brother did not intend to accept the deed until the wife of Riddick had relinquished her contingent right of dower. It was returned by them to Riddick for that purpose; but the relinquishment was never made or the deed restored to the purchasers, although demanded by them.

The pretence set up by Riddick, years after the contract was made and the deed signed by him, of a defect in the quality of the tobacco, is not sustained by a particle of evidence, and is disproved by the only witness of the appellees.

The case presented is, therefore, of a parol contract so far executed as to entitle the purchaser to a deed without any conditions imposed; the deed improperly withheld by the vendor, so that it could not be recorded; possession taken and held uninterruptedly for nearly ten years, until this attachment was sued out by the appellant in 1873. The case, as the preceding one just decided, illustrates very strongly the rigorous operation of the recording acts, according to the construction now sought to be given them. The attachment lien confessedly only binds such interest as the debtor has; and here he had notoriously, years before, parted with every vestige of interest he had except the naked legal title; and that title he withheld in vio- 422 lation *of his express promise. My opinion, therefore, is, that the decree of the circuit court is right, and that the same must be affirmed.

MONCURE, P., and CHRISTIAN, J., concurred in the opinion of STAPLES, J.

DECREE AFFIRMED.

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423 *Borst v. Nalle & als.

March Term, 1877, Richmond.
Absent, ANDERSON, J.

I. **Statute—Docketing Judgments.***—The docketing of a judgment is an act to be done to preserve or prevent the loss of a civil right or remedy, within the meaning of the acts of March 4, 1862, acts of 1861-2, ch. 81, and of March 2, 1866, Code of 1873, ch. 146, §§ 6 and 7, p. 998-99. And therefore in computing the time within which a judgment is required by § 8, ch. 186, of the Code of 1860, to be docketed, in order to preserve the lien of such judgment against purchasers, the period between the 17th of April 1861 and the 2d of March 1866 is not to be computed as a part of such time.

II. **Witnesses—Interest—Competency.**†—An executor who conveys land with special warranty, who is not a party to the suit, and has no interest in the result of it, or in the record as an instrument of evidence, is a competent witness to prove the facts in relation to his sale and conveyance of the land, in a contest between the creditor of his grantee and a purchaser from him.

III. T an executor, employs R, to sell a tract of land

***Judgment Liens—Enforcement in Equity—Docketing Judgments.**—See Gurnee v. Johnson, 77 Va. 713; Hutcheson v. Grubbs, 80 Va. 251; Gordon v. Rixey, 76 Va. 704; Rhea v. Preston, 75 Va. 768; Price v. Thrash, 30 Gratt. 515; Bartons' Ch. Pr. (2nd Ed.) 290, 915, 932, 1060, 1061, 1063; Renick v. Ludington, 14 W. Va. 367; Calwell v. Prindle, 19 W. Va. 657.

†**Witnesses—Interest in Result—Competency.**—The principal case is cited in Knick v. Knick, 75 Va. 17, for the proposition that to render a witness incompetent on the ground of interest he must be interested in the *result* of the suit. See also, Reynolds v. Callaway, 31 Gratt. 436, and *note;* Bartons' Law Practice (2nd Ed.) 608.

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for him, and to facilitate it, T executes a deed to R, but does not deliver it. R makes a sale to B, and B pays the money to T, and then T delivers the deed to R, and at the same time R executes a deed to B. In a suit by a judgment creditor of R against B, to subject the land to pay his debt—HELD:

1. **Same—Same—Same.**—T is a competent witness to prove the fact that R sold as his agent, that the conveyance to him was that he might convey to B, and that B paid the purchase money to him.
2. **Resulting Trusts—Parol Evidence.***—By the conveyance to R there was an implied or resulting trust in favor of B, who had paid the purchase money; and this trust may be proved by parol evidence.
3. **Same—Same.**—The trust having been fully executed by R conveying the land *to B, before this litigation was commenced, it seems, that on that ground parol evidence is admissible to establish the trust. 424
4. **Witnesses—Death of a Party.**—R being dead, B is not a competent witness in his own behalf, as to the sale and conveyance of the property.

This was a suit in equity in the circuit court of Culpeper county, brought in August 1869, by Thomas B. Nalle, to subject certain lands to satisfy a judgment recovered by him against William B. Ross and James A. Beckham, in November 1860. One of the tracts of land had been conveyed by said Beckham to Franklin Stearns and John M. Botts in 1862, and another tract was conveyed by Ross to Peter B. Borst in March 1865. In November 1871 the court made a decree in the cause by which it was held that the land conveyed to Borst was primarily liable to the payment of the plaintiffs' debt; and a commissioner was directed to take certain accounts. From this decree Borst applied to this court for an appeal; which was allowed. The case is stated by JUDGE BURKS, in his opinion.

Wm. Green, for the appellant.

Field & Gray and *James W. Green*, for the appellees.

BURKS, J., delivered the opinion of the court.

In November 1860, the appellee, Thomas B. Nalle, recovered a judgment in the county court of Culpeper against William B. Ross and James A. Beckham, his surety, and caused the same to be docketed in said county court on the 3rd day of November, 1865. At the date of the judgment, Beckham was seized of several tracts of land in the county of Culpeper, which he conveyed to John Minor Botts and Franklin *Stearns by deed dated the 10th day of December, 1862, and admitted to record in the clerk's office of said county court on the 11th day of December, 1862. 425

Between the date of the judgment and the date of docketing thereof, John C. Thom and William A. Thom, as the executors of Lucy Lewis Taylor, by deed conveyed to the said William B. Ross, a tract of land in said county called "Berry Hill," which by the will of their testatrix they were empowered to sell; and Ross and wife thereupon conveyed the same to the appellant Peter B. Borst; both of which deeds were afterwards admitted to record in the county court aforesaid.

Nalle filed his original bill in the circuit court of Culpeper against Ross, Sternes, and the heirs of John Minor Botts (the latter being dead), to subject to the *lien* of his judgment the lands conveyed as aforesaid by Beckham to Botts and Stearns, alleging in the bill, among other things, that Ross was insolvent. Some of the heirs of Botts answered the bill; and denying that the judgment of the complainant constituted any *lien* on the lands purchased of Beckham, and averring that the "Berry Hill" estate conveyed by Ross to Borst, if there was any *lien* at all, was first liable to the satisfaction of the judgment, prayed that the complainant might be required to proceed against that estate, "as the lands of the principal debtor, and as the lands last aliened."

Thereupon, Nalle filed his amended and supplemental bill against the parties defendant to the original bill (except Ross who had died), and against the personal representative and heirs of Ross, the heirs of Beckham and against Borst, seeking to subject to the satisfaction of his judgment the "Berry Hill" tract of land owned by Borst, and charging that it was primarily liable for the payment of said judgment.

*Borst answered the bill, denying that the judgment was any *lien* on the "Berry Hill" tract; first, because, as he averred, the judgment was not docketed within the time prescribed by law; and second, because, as he further averred, Ross was never so seized of said land as to make it subject to the *lien* of the judgment. As to this second ground of objection, he stated in substance, that the executors of Mrs. Taylor were empowered by the will of their testatrix to make sale of her real estate, of which "Berry Hill" was a part; that they employed the said William B. Ross as their agent to make sale of "Berry Hill" at a price of not less than $135,000 in Confederate currency; that Ross, as such agent, did make the sale to him (Borst); that he (Borst) paid the purchase money to one of the executors, and after 426

*__Resulting Trusts—Parol Evidence.__—See Warwick v. Warwick, 31 Gratt. 70, and *note*; Sinclair v. Sinclair, 79 Va. 40; Kane v. O'Conners, 78 Va. 76, citing the principal case. Bartons' Ch. Pr. 226 (2nd Ed.) 954; Currence v. Ward, 43 W. Va. 370 (27 S. E. Rep. 329).

Judgment Lien—Extent and Effect.—The words of JUDGE BURKS in the opinion of the principal case "that where statutory enactments do not interfere, the creditor can never get by his judgment more than his debtor really owns, and to this he will be confined, as he should be by courts of equity" are quoted in many subsequent decisions and the principle set forth therein is followed in many others. See Coldiron v. Asheville Shoe Co., 93 Va. 373; Burkholder v. Ludlam, 30 Gratt. 255, and *note*; National Bank v. Turnbull, 32 Gratt. 695; Hughes v. Harvey, 75 Va. 210; Cowardin v. Anderson, 78 Va. 90; Nutt v. Summers, 78 Va. 173; Powell v. Bell, 81 Va. 233; Braxton v. Bell, 92 Va. 237; Floyd v. Harding, 28 Gratt. 401, and *note*; Young v. Devries, 31 Gratt. 309; Summers v. Darne, 31 Gratt. 800.

Witnesses—Death of Party to Contract.—See Grigsby v. Simpson, 28 Gratt. 348, and *note*; Barton's L. Pr. (2nd Ed.) 614.

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the payment was completed, that a deed of conveyance of the land from the executors to Ross, which had been theretofore prepared, signed and acknowledged, was then delivered to Ross, and at the same time a deed of conveyance of the same land from Ross was delivered to him (Borst)—the delivery of the two deeds being contemporaneous acts—and both deeds were admitted to record at the same time; and that in the whole transaction, Ross asserted no claim to the land, acted merely as the agent of the executors, and never in fact at any time had any beneficial interest whatever in the land.

These statements of the answer were fully proved by the deposition of John C. Thom (one of the executors of Mrs. Taylor, and a grantor in the deed to Ross), and Borst gave his own deposition to the same effect. No other depositions were taken in the case. Exceptions were filed to the depositions on the ground of the alleged incompetency of the witnesses, and the illegality
427 *of parol evidence to establish the facts sought to be proved thereby.

At the hearing of the cause, the court sustained the exceptions taken to the incompetency of the witnesses, held the land of Borst to be primarily, and the land of Botts and Stearns to be secondarily liable to the *lien* of the complainant's judgment, and ordered an account to be taken of the fee simple and annual value of Borst's land and of the *liens* thereon, including the *lien* of the complainant's judgment. From this decree, an appeal was applied for by Borst, and allowed by one of the judges of this court.

It is objected, in the first place, by the appellant Borst, that even if Ross were the beneficial owner of the "Berry Hill" tract of land at the time he conveyed it to the appellant, still it was not bound by the judgment, because it was not docketed before the conveyance to him and within the time prescribed by law. The same objection is urged by the appellees owning the land purchased of Beckham.

This objection, we had supposed, was fully answered by the decision in *Hill* v. *Rixey & als.*, 26 Gratt. 72, made by this court since an appeal was allowed in this case.

Notwithstanding that decision, however, learned counsel still insist, that the docketing of a judgment under § 8, ch. 186, Code of 1860, is not within the operation of the act passed March 14, 1862, entitled "an act to extend the time for the exercise of certain civil rights and remedies:" (acts of 1861-62, ch. 81, p. 99) or of the act with the like title passed March 2, 1866, (acts of 1865-66, p. 191, Code of 1873, ch. 146, §§ 6, 7, pp. 998-99): that the docketing of a judgment as required by the Code is not "an act to be done to preserve or prevent the
428 loss of a civil right *or remedy" within the meaning of those terms as employed in the aforesaid acts of 1862 and 1866; and therefore that Nalle, having failed to docket his judgment within the time prescribed by the statute, and conveyances having been made to the purchasers of the lands and admitted to record long before the docketing, the judgment constituted no *lien* on the lands conveyed.

Let us inquire for a moment into the origin, nature, and extent of the judgment *lien*. At common law, lands of the debtor could not be taken to satisfy his debts, except judgments due to the king, and judgments therefore did not operate as *liens* on land. But by the statute of Westm. 2, 13 Edw. 1, ch. 18, substantially adopted in this state, (1 R. Code, ch. 134, § 1, pp. 524, 525, 526, 527), a new execution was provided, the writ of *elegit*, by which a moiety of the lands of the debtor could be subjected to the satisfaction of the judgment.

The statute, however, did not in *express* terms give a *lien* on the land. It provided for the writ, and prescribed the form of it. By its terms, the officer was required to deliver to the creditor all the goods and chattels of the debtor, saving the oxen and beasts of his plough, and also a moiety of all his lands and tenements whereof the debtor at the day of obtaining his judgment was seized, or at any time afterwards, by reasonable price and extent, to have and to hold the said goods and chattels to the creditor as his own proper goods and chattels, and the said moiety as his freehold, to him and his assigns, until thereof the judgment be satisfied, ("until he shall have levied thereof the debt and damages aforesaid)."

It was by the judicial construction given to this writ, that the judgment was
429 said to be a *lien* on the *land. The *lien* resulted from the mandate of the writ to *deliver* to the creditor, by reasonable price and extent, a moiety of all the lands and tenements of the debtor, whereof he was *seized at the date of the judgment* or *at any time afterwards*. The *lien* was an incident of the writ and depended for its existence and continuance upon the capacity to sue out the writ. As long as this capacity lasted, even although revived after being temporarily suspended, the *lien* continued, and whenever it finally ceased, the *lien* which was dependent upon it was extinguished.

As the mandate of the writ extended to all the lands and tenements of which the debtor was *seized at the date of the judgment*, or *at any time afterwards*, it was by force of this mandate also that the *lien* of the judgment over-reached all subsequent conveyances, although made to purchasers for valuable consideration without notice of the judgment, and extended to all the lands of the debtor within the jurisdiction of the state.

In the interest and for the protection of such purchasers, the act of March 3, 1843, was passed, which provided for the docketing of judgments; and further, that "no judgment, decree, bond or recognizance thereafter rendered, should bind the land of any party to the same against a *bona fide* purchaser for valuable consideration without notice, unless the same should be docketed in the county or corporation in which the land lay, within twelve months after the rendition or forfeiture of such judgment, decree, bond, or recognizance, or ninety days before such land shall

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have been conveyed to such purchaser."

Except as thus modified, in respect to purchasers, by the act of 1843, the *lien* of the judgment continued the same, in all respects, as to its nature, extent, and the mode of enforcing it, until the general revi-
430 sion of *the laws in 1849. Up to that time, as we have seen, it was a mere incident of the writ of *elegit*, resulting by construction from the mandate of the writ, and dependent for its existence and continuance on the capacity to sue out the writ.

It was now made for the first time, as to judgments thereafter to be rendered, an express, direct, positive, absolute *lien* on *all* the *real estate* of or to which the judgment debtor should be *possessed* or entitled, at or after the date of the judgment, or if it was rendered in court, at or after the commencement of the term at which it was so rendered, with the same qualification as to purchasers for valuable consideration without notice, as was made by the act of 1843. Code of 1860, ch. 186, §§ 6, 8.

The writ of *elegit* was preserved and made to conform to the statutory *lien* of the judgment, and an additional remedy in equity was given for the enforcement of the *lien*. Idem, § 9.

The *lien* of the judgment being now express, positive, and in no way dependent on the *elegit*, and the remedy in equity being preferred in practice, the *elegit* soon fell into disuse, and was finally abolished by the legislature. Code of 1873, ch. 183, § 26, p. 1175.

It can hardly be said of such a *lien* as we have described, that it is not a "civil right" and one of a high order; seeing that is is, under the law as it stands, and by force of the law, a plain, direct, positive *charge* upon real estate. Having once attached, it continues, unless it is in some way discharged, as long as the real estate on which it rests remains the property of the judgment debtor. It accompanies the land in its descent to the heirs, follows it into the possession of volunteers, and even into the hands of purchasers for value, if they have no-
431 tice, or even if they do not have *notice, *provided* the judgment is docketed in the manner, and within the time prescribed by law.

It is a mistake to suppose that the 8th section of ch. 186, of the Code of 1860, (amended in the Code of 1873, ch. 182, § 8,) was intended to *create* a *lien* against the purchaser by docketing the judgment. The *lien* is *created* by section 6, and attaches to all the real estate of the debtor, except so far as it is qualified by section 8. The qualification is, that it shall not extend to real estate aliened after judgment to purchasers for value who have no notice of the judgment, *unless* the judgment be docketed in the manner and within the time prescribed. The implication is irresistible, that if so docketed it shall be a lien: that is, that the *lien* which was created by section 6 shall *continue* as to such purchasers.

Section 8 is substantially the same as section 4, of the act of 1843 before referred to, as may be seen by comparing the two sections.

In the opinion of JUDGE STANARD, in *Taylor's adm'r* v. *Spindle*, 2 Gratt. 44, 69, in which CABELL and BALDWIN (Judges) concurred, discussing the nature and extent of the judgment *lien* under the law as it then stood, and referring to the act of 1843, he said: "The late act of March, 1843, respecting the docketing of judgments, clearly evinces that in the opinion of the legislature, the *lien* of the judgment creditor operated from the date of the judgment, and *continued thenceforward* without qualification or impediment, while the creditor had or could get the capacity to issue the *elegit* on it, irrespective of intervening abatements, suspensions or delays; and that the judgments *docketed according to that act*, would in like manner, *preserve the past*, and *continue the existing lien indefinitely*: that is, until from some supervening cause, it should be lost by the
432 loss *of the rightful capacity to sue execution on the judgment."

We have said enough, we think, to show that by a proper construction of the several statutes, the *lien* of a judgment attaches to and follows the lands of the debtor into the hands of a purchaser for value without notice, and *continues*, provided the judgment is docketed; and if so docketed, that it is a *lien* from the date of the judgment as against such a purchaser, in like manner and with like effect, as against the debtor: and while the docketing of a judgment does not *per se create* a *lien* as against a purchaser for value without notice, yet it is an act necessary under our statutes to be done in order to preserve or prevent the loss of the *lien* as against such purchaser.

It follows, therefore, that, in our opinion, in computing the time within which a judgment is required by section 8, ch. 186, of the Code of 1860, to be docketed in order to preserve the *lien* of such judgment against purchasers, the period which elapsed between the 17th day of April 1861 and the 2nd day of March 1866 is not to be computed as a part of such time, and therefore the judgment of Nalle, which appears to have been docketed on the 3rd day of November, 1865, has the same binding force against the alienees of Ross and Beckham in respect of the lands actually owned and aliened by the latter, as if no conveyances had been made by them.

We have dwelt longer on this branch of the case than we otherwise should have done, because the learned counsel for the appellant seemed to suppose, that in deciding the case of *Hill & als.* v. *Rixey & als.*, *supra*, the court was not in that case fully possessed of all the views presented in argument in this.

433 *We proceed to consider the other questions presented by the assignment of errors.

These relate altogether to the "Berry Hill" tract of land conveyed by the executors of Mrs. Taylor to William B. Ross, one of the judgment debtors, and by Ross conveyed to the appellant Borst.

If John C. Thom was a competent witness, and his testimony was admissible to

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establish the facts which were intended to be proved by it, then beyond all dispute it is clear, that William B. Ross never at any time had any estate in this tract of land beyond the naked legal title, and that title he had for an instant only. He never had, even for an instant, the least beneficial interest in it. He was a mere *conduit* to pass the legal title to Borst the real owner. This being so, and the recording acts having no application to the case, there was nothing substantial to which the *lien* of Nalle's judgment could attach. Authorities without number might be cited to show, that where statutory enactments do not interfere, the creditor can never get by his judgment more than his debtor really owns, and to this he will be confined, as he should be, by courts of equity. In support of this proposition the following apposite authorities are cited by the appellant's counsel. *White* v. *Carpenter*, 2 Paige R. 217, 238, 266-7; *Kiersted* v. *Avery*, 4 Paige R. 9; *Buchan* v. *Sumner*, 2 Barb. Ch. R. 165, 207; *Lownsbury* v. *Purdy*, 11 Barb. R. 490; *Towsley* v. *McDonald*, 32 Barb. R. 604; *Sieman* v. *Austin*, 33 Barb. R. 9; *Sieman* v. *Schenck*, 29 New York R. 598; *Smith* v. *Gage*, 41 Barb. R. 60, 71-75; *Schlæper* v. *Corson*, 52 Barb. R. 510; *Robinson* v. *Robinson*, 22 Iowa R. 427; *Thomas* v. *Kennedy*, 24 Iowa R. 397; *Brown* v. *Pierce*, 7 Wall. 205, 218; *Baker* v. *Morton*, 12 Wall. U. S. R. 150.

Was John C. Thom a competent wit-
434 ness? He was *one of the grantors in the deed to Ross; but he conveyed *as executor* and with covenant of *special* warranty. He was not a party to the suit, and had no interest in the result of it, nor in the record as an instrument of evidence. He was, therefore, clearly a competent witness at common law. He was not disqualified by the statute. Code of 1873, §§ 21, 22. The object of that statute was to remove disqualification from witnesses, not to impose it.

It only remains to consider, whether parol evidence was admissible for the purpose of showing, that notwithstanding the land was conveyed to Ross, Borst was the real or beneficial owner of it.

The proof is clear and satisfactory, that the executors of Mrs. Taylor employed Ross as their agent to make sale of the land; that Ross, as such agent, made the sale to Borst; that Borst treated with Ross as agent only, and paid the purchase money to the executors; and after the payment of the purchase money was completed, the executors delivered to Ross the deed which had been sometime before prepared and acknowledged, by which the land was conveyed to Ross, and at the same time Ross made and delivered a deed to Borst, conveying to him the same land. We are satisfied from the evidence, that the two deeds were delivered and admitted to record at the same time.

We are of opinion, that this proof establishes a trust, which by some text writers is denominated a resulting trust, and by others an implied trust. It matters not to which of these two classes of trusts it properly belongs, as both are founded on the presumed intention of the parties, both arise by operation of law upon the transactions of the parties, and the authorities generally concur, that both may be established by parol evidence.

435 *The evidence does not show any express agreement between Borst and Ross, that the latter should take the title to himself, but it does show conclusively that Borst paid the purchase money to Taylor's executors before the latter delivered the previously prepared deed to Ross. If one pays the purchase money of an estate and takes the title deed in the name of another, in the absence of all evidence of intention, the law presumes a trust, from the natural equity that he who pays the money for the property ought to enjoy the beneficial interest. 1 Perry on Trusts, § 124. This presumption is stronger or weaker according to circumstances, and may be wholly rebutted. In this case it is greatly strengthened by the circumstances proved. No unfavorable deduction is to be drawn from the fact that the amount of Confederate money paid by Borst was larger than the sum received by Taylor's executors: the difference in the sums expressed as the consideration in the two deeds was paid by Borst to Ross, and was doubtless composed of Ross's commission for making the sale and the price of the two small parcels of land owned by Ross in his own right, and conveyed along with the "Berry Hill" tract in the same deed to Borst. This latter circumstance may also account for Ross's wife uniting in the deed. This was done, no doubt, to secure the relinquishment of her contingent dower interest in the two small parcels.

By sections 7 and 8 of the English Statute of Frauds, 29 Car. 2, ch. 3, all declarations or creations of trusts or confidences of lands are required to be manifested and proved by writing, except such as arise or result by the implication or construction of law. This statute in varied forms has been adopted in most, if not in all of the states of the
436 union, and *in perhaps the greater number, sections 7 and 8 of the English statute are in force. In Virginia, however, these two sections form no part of our statute. This fact is noticed and commented upon by the judges in the case of *Bank of United States* v. *Carrington & others*, 7 Leigh 566, and the opinion is there strongly intimated, that direct or express trusts are not within the operation of the Virginia statute, and it was so expressly held by the special court of appeals in *Walraven* v. *Lock & others*, 2 Patt. & Heath. R. 547. Notwithstanding, however, the decision in the last-named case and what was said by the judges in the former, this court in the very recent case of *Sprinkle & als.* v. *Hayworth & als.*, 26 Gratt. 384, 392, considers the question as not settled. "We do not mean to admit, however," says the president, delivering the opinion of the court, "that there is any difference in effect between the English statute and ours arising from the omission in the latter of the seventh and eighth sections of the former. That is a question which is unnec-

essary and not intended to be discussed in this case." It is alike unnecessary to be determined in the case now before us, and we express no opinion upon it. This case is disposed of under the rules and principles governing resulting and implied trusts, which, it is clear, may be established by parol evidence. *Bank of United States* v. *Carrington & others, supra,* and authorities there cited; *Phelps* v. *Seely & als.,* 22 Gratt. 573.

Parol evidence was admissible in this case upon other grounds perhaps than those already stated, even if the case had been one of express trusts. The trusts here were fully executed by the parties long before this litigation was commenced. They are not controverting, but on the contrary admit
437 *them; and it would seem, that strangers, the creditors of one of the parties, and others who do not claim in privity with the latter, should not be heard to make an objection to the nature of the evidence, which the parties themselves do not make. The doctrine of estoppel, as a general rule, applies only between parties and their privies, and as strangers are not bound by an estoppel, neither can they take advantage of it. *Mauzy* v. *Sellers & als.,* 26 Gratt. 641.

The case of *Sieman v. Austin,* 33 Barb. R. 9, besides being otherwise interesting, is instructive on this point. A judgment creditor of Youngs, the apparent but not the real owner of lands, sought to subject the land to his judgment after Youngs had executed by deed of conveyances to the real owner, the trust with which he had been invested by parol at the time of taking the title to himself; and one of the questions before the court was, whether the trust, which seems to have been an express one, being executed, parol evidence was admissible as against the judgment creditor, to show the true nature of the transaction and of the title. EMOT, J., in his opinion, concurred in by one of the two remaining judges, said, "Now if the statute of frauds would have been in the way of the subjection of this property to the trust, if Youngs had never recognized or acted upon it, that was a defect in the evidence of the trust and not in the nature of the trust itself. The law refuses its aid to enforce agreements creating trusts or charges upon lands, when they rest altogether in parol, not because the trusts are therefore void, but because it will not permit them to be proved by such evidence. But when a person who has received the title to lands purchased for the benefit of another, although without having declared the fact in writing, *recognizes and fulfils the*
438 **trust*, it is not the duty of a court to deny its existence. * * * * * This is no fraud or injustice to the creditors of Youngs, for the property never belonged to the debtor, nor did he obtain credit, much less incur this particular debt upon its possession. A debtor will not be permitted to convey away his property, either real or personal, and relieve it from incumbrances occasioned by his debts; but there is nothing to prevent his restoring to others their property, if it has been placed in his hands. Nor is there any reason why the property of others should be subject to the payment of his debts, if he is honest enough to refuse to avail himself of an opportunity to use it for that purpose. If it should be established, or should be conceded, that the rules of law would have defeated the enforcement of the rights of the plaintiff, in case Youngs had resisted and denied them, that question could not arise *unless Youngs chose to avail himself of it.* When *he* has admitted and *acted upon the trust,* and conveyed the property to its true and equitable owner, it cannot be tolerated, that his *creditors* should question the title, or attempt to assert *their lien* upon what was really never his."

The conclusion we have reached in this case is not to any extent based on the deposition of the appellant. He was incompetent to testify in his own behalf. He was a party to the suit, directly interested in the result of it, and a party to the transaction, the subject of investigation, and William B. Ross, the other party to the transaction, was dead when the deposition was given. The circuit court of Culpeper did not err, therefore, in sustaining the exception to said deposition: but it did err in sustaining the exceptions to the deposition of John C. Thom, in disregarding said deposition as evidence in the cause, and in holding
439 *the "Berry Hill" tract of land conveyed to the appellant bound for the payment of the judgment of the appellee Nalle. The amended and supplemented bill of the appellee Nalle, so far as it seeks to subject to his judgment the "Berry Hill" tract of land should be dismissed, and the two small parcels of land, which was conveyed by Ross to the appellant being bound by said judgment, should be subjected to its payment before the lands conveyed to Botts and Stearns are resorted to for that purpose.

The appellant's costs in this court should be paid by the appellees, Stearns and the parties claiming under John Minor Botts. The decree of the said circuit court must be reversed and a proper decree entered in conformity with this opinion.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said decree is erroneous in sustaining the exceptions to the deposition of the witness John C. Thom, because of the alleged incompetency of said witness, and in not overruling said exceptions, and the other exceptions taken to the 3rd, 4th, 5th, and 6th questions and answers to the same in said deposition; and that said decree is further erroneous in holding the "Berry Hill" tract of land in the amended and supplemental bill of the complainant Thomas B. Nalle mentioned, liable to the *lien* of the judgment of the said Thomas B. Nalle in said bill mentioned, and consequently further erroneous in or-
440 dering the accounts *directed by said

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decree so far as they relate to the said "Berry Hill" tract of land: it is therefore decreed and ordered, that the said decree, so far as hereinbefore declared erroneous, be reversed and annulled, and that the appellees Beverly B. Botts, Lunceford L. Lewis and Rose his wife, Daniel S. Lewis and Isabella his wife, B. W. Hoxie and Mary M. his wife, Franklin Stearns, and John F. Lewis, administrator of John Minor Botts, deceased, the said administrator out of the estate of his intestate in his hands to be administered, and the other said appellees out of their own proper estates respectively, do pay to the appellant his costs by him expended in the prosecution of his said appeal here. And this court, pronouncing such decree as the said circuit court ought to have pronounced, it is further decreed and ordered, that all of the exceptions taken to the deposition of the witness, John C. Thom, be overruled; and that the amended and supplemental bill of the complainant, Thomas B. Nalle, so far as the same relates to the "Berry Hill" tract of land, conveyed by the executors of Lucy Lewis Taylor, deceased, to William B. Ross, and by the said Wm. B. Ross and wife conveyed to the appellant, and so far as said bill seeks to subject said "Berry Hill" tract to the judgment of the complainant in the bill mentioned, be dismissed; and that it be referred to one of the commissioners of the said circuit court to take an account of the two parcels of land said to contain 130 acres mentioned in the deed of conveyance from said Ross and wife to the appellant (a copy of which deed is filed as an exhibit in the cause,) and also of the lands in the complainant's original bill mentioned, the same conveyed by James A. Beckham to John Minor Botts and Franklin Stearns; and of the fee simple and annual value of said several tracts
441 *and parcels of land, and of the *liens* thereon and their priorities, if any, including the *lien* of the complainant's said judgment, and make report to the said circuit court; and upon the coming in of said report, that the said two parcels of land of 130 acres conveyed as aforesaid, to the appellant, be first subjected to the payment of the complainant's said judgment, and if they prove insufficient to satisfy said judgment, that the lands aforesaid conveyed to Botts and Stearns be subjected for the deficiency. And this cause is remanded to the said circuit court for further proceedings to be had therein in conformity with the opinion and principles herein expressed. Which is ordered to be certified to the said circuit court of the county of Culpeper.

DECREE REVERSED.

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442 *Mills & als. v. Mills' Ex'ors & als.

Same v. Lancaster & als.

March Term, 1877, Richmond.

1. **Executors—General Liability.***—Where executors acting during the late war, had full power under the will to do the acts which they performed, and in performing them acted in good faith in discharge of what they believed to be their duty as executors, they are not liable for the ultimate loss which has arisen out of their acts.

2. **Same—Investing in Confederate Bonds.**†—Executors who are empowered by the will under which they act, to sell real estate and collect debts, and invest the proceeds for the purposes of the trusts declared in the will, in December, 1862, sell real estate, and in January, March, and April, 1863, collect ante-war debts well secured on real estate, taking payment in Confederate money, which they immediately invest in Confederate eight *per cent.* bonds for the purposes of the trusts of the will—HELD: That having acted in good faith, and in the exercise of their best judgments, under the circumstances surrounding them, they are not liable for the losses which occurred from such sales, collections and investments.

3. **Same—Sale of Real Estate—When Valid.**—Two out of three nominated executors qualify, and sell and convey real estate to the purchasers, who pay up the purchase money in full. Afterwards the third qualifies, and consents to the sale by sharing the commissions—HELD: The title of the purchaser is valid at least in equity.

4. **Same—Receiving Payment.**—There is a perpetual rent secured on real estate which the lessee has the right to redeem by paying an amount which at six *per cent.* will produce an interest equal to the rent—HELD: One of these executors may receive the payment, though it may require all to execute the release.

This is the sequel of the cases of *Corbin & als.* v. *Mills' ex'ors*, and *Lancaster & als.* v. *Corbin & als.*, reported in 19 Gratt. 438; and that report will show the
443 *nature of the case and most of the facts. When the case went back the plaintiff in the first case filed an amended and supplemental bill, in which he set his objections to the action of the executors of Nicholas Mills. The first of these was to the sale of the Leigh street property by the two executors Mills and Howison, before the qualification of Thomas Verney Robinson, the other nominated executor, and it was insisted that the conveyance of the property to the purchasers by the two executors was invalid and did not pass the title. And these purchasers were made parties de-

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Personal Representatives—General Liability.—The principal case is cited with approval upon the general rule that if the personal representative honestly exercise the discretion conferred upon him by the will, he cannot be held liable for any loss which may be occasioned by an honest error of judgment. Cooper v. Cooper, 77 Va. 203; Jones v. Jones, 86 Va. 852; Brockenbrough v. Turner, 78 Va. 456.

†**Personal Representatives—Investing in Confederate Bonds.**—In Lingle v. Cook, 32 Gratt. 262, the same decision was reached as in the principal case in regard to exonerating personal representatives who in good faith invested trust funds in Confederate bonds. The court in its opinion in that case, besides citing the principal case, cites Staples v. Staples, 24 Gratt. 225; Jones v. Clark, 25 Gratt. 642, as sustaining this decision. See Carter v. Dulaney, 30 Gratt. 192, and *note*, for a case where an executor was held liable for investing funds of the estate in Confederate bonds. See 3 Minors Inst. (2nd Ed.) 645; Bartons' Ch. Pr. (2nd Ed.) 727, 729.

fendants. The second objection was to the receipt of payment in Confederate money at par of certain debts due to their testator and well secured: one of them was a debt of Thomas Bradford for $1,000 paid on the 3rd of January 1863, and another of Charles Y. Morris for $9,000 paid on the 12th of March, 1863, both well secured on real estate; another was a debt of the Midlothian Coal Mining company for $15,300 received on the 18th of November 1862; another, a debt of the Exchange Hotel company, for $10,000 paid the 3d of January 1863; and $19,000 received from the same company on account of one hundred and ninety shares of the stock of the company; and two notes of L. W. Glazebrook, Jr., for $1,360, one received on the 14th of April, 1863, and the other in April, 1864. The third objection to the action of these executors was to the investments made by them in Confederate bonds. The propriety of the action of the executors as to the ground rent on the Exchange Hotel property was the subject of enquiry in the case of *Corbin* v. *Lancaster*.

The executors, Mills and Howison, filed their answer in the first suit, substantially the same as the answer to the original
444 bill. The purchasers of the *Leigh street property also answered, insisting on the full price they had paid for it, having been more than enough to have bought the gold to pay the full value of the property before the war, and insisting that their title was valid.

In the second of these causes a commissioner was instructed to make the inquiries directed by the court of appeals, viz: to ascertain what was on the 30th day of April, 1863, the value, as compared with specie, of the treasury notes of the United States, and also of the treasury notes of the Confederate States, and to what extent, at that time, the treasury notes of the Confederate States were, according to the common usages of business in Richmond, available in payment of debts contracted before the war and payable in specie, or in current money of the United States, and well secured on real estate, or for the purchase of property or otherwise.

The commissioner examined a number of witnesses, and made his report to the court. This is sufficiently stated by JUDGE MONCURE. The judge also sufficiently states the facts in relation to the action of the executors in receiving the payment of the debts objected to by the plaintiff, and in making the investments, showing clearly the grounds on which the decision of the court was based.

The two cases came on to be heard together on the 4th of March, 1872, when the court made the following decree:

The court being of opinion, for reasons assigned in a written opinion filed among the papers in the cause, and made a part of this decree, that it was the intention of the testator that the provisions of his will should be promptly executed, and sales made of his property, and the debts
445 due him promptly collected, *and the proceeds invested in order to meet the semiannual and quarterly payments to the several annuitants and legatees—the scheme of the will being that the executors should convert the whole of his estate from what it was when the testator died, into a fund to raise annuities, pay debts and legacies, and afterwards for general distribution, as therein directed; and being further of opinion, that under the circumstances the executors were justified in receiving Confederate States treasury notes in payment of the real estate sold by them, and in discharge of the debts collected by them, because of the usage in the community, the recent example of the testator, and the necessities of the case arising from the whole scheme of the will, and that the scheme of the will could not be carried out without collecting all the debts due, including those secured on real estate, and when collected so invested as to meet promptly the quarterly and semiannual annuities and legacies, and being further of opinion that the said executors should not be held liable, because such investments have proved calamitous and unfortunate, unless it can be shown that such result arose from *mala fides* or some wrongful act, or the want of common skill, prudence or caution on the part of the executors; and the proof in the cause being insufficient to show the result was due to those causes, or any one of them, the court doth therefore adjudge, order and decree that the sale of the real estate in the bill mentioned, made by the two executors, Robert R. Howison and Charles S. Mills, was valid, and that their deeds conveyed a good title to the purchasers thereof; and that the third executor, after his qualification, in effect ratified the same; nor was the consent of the beneficiaries under the will necessary to authorize said executors to sell said real estate.

446 *And the court being of opinion that the executors were authorized under the will to invest the residuary estate given by the fourteenth clause thereof, doth adjudge, order and decree that the investments of such residuary estate, so made by them, were legal and valid, nor is there any proof that the executors ever changed these investments after they were made, as charged in said amended and supplemental bill. And the court doth further adjudge, order and decree that the said executors were authorized by the will to collect the debts due from Morriss, Bradford, Glazebrook, the Midlothian Coal Mining Company, and from all others who were debtors to their testator, and that their collection of the said debts were valid, and fully discharged the debtors. And the court doth further adjudge, order and decree that the sale of the Exchange hotel stock was made in consequence of the dissolution of the company by the action of the majority of the stockholders, and that the executors were right in receiving the share of the proceeds of such sale belonging to the estate of their testator in Confederate money. And the court being of opinion that the lien on the Exchange hotel property was in substance a mortgage, by which the sum of $26,666.60, with six *per cent.* interest, was secured, and

being so, stands upon the same footing as the other debts due to the testator, payable in specie or its equivalent, and well secured on real estate; and in the absence of any proof, or even charge of *mala fides* or fraud, the court doth adjudge, order and decree that the executors were authorized to collect said debts, and that collections of the same was valid, and discharged the debtors; and that their deed releasing the lien on said property was a valid and legal discharge of the same, and that the said executors are not liable for any loss that has
447 subsequently *occurred in consequence of such collections and release.

And the court being of opinion that the will contemplated investments as well as collections, and it appearing that said executors obtained from the circuit court of Richmond, under the act of March 1863 an order to invest in Confederate State bonds the sum of $215,000 of Confederate State treasury notes in their hands, or under their control as executors, and belonging to the estate of their testator, and that investments in said bonds were made in pursuance thereof, the court doth adjudge, order and decree that the investments made by said executors in Confederate State bonds were legal and valid, as well by reason of the authority conferred by said will as by virtue of the order aforesaid, and that said executors are not liable for any loss sustained by reason of such investments.

And the court doth further adjudge, order and decree that the executors are entitled to the credit for the Confederate States money received by them in the collection of the debts due to their testator, and for investments made by them in Confederate States bonds; and the court doth therefore overrule the three exceptions filed by Messrs. Patterson, Gilliam and Howard, to the report of the 4th day of December 1871, and all exceptions to either of said reports inconsistent with the principles hereinbefore declared and announced. And it appearing that the report of the 7th day of February 1872, and the accounts returned as part thereof, were made in pursuance of instructions given him by the court in conformity with these principles, the court doth approve and confirm said report, and doth overrule all exceptions to the same.

From this decree Georgiana Mills
448 and others, legatees *of Nicholas Mills, applied to this court for an appeal, which was allowed.

The case was argued by *Wm. W. Crump*, *Jno. W. Daniel*, *Guy & Gilliam*, and *Camm Patterson*, for the appellants; by *C. Robinson* and *J. Alfred Jones* for the purchasers of the Exchange Hotel property; by *Ould & Carrington* and *Wm. Green* for the purchasers of the Leigh street property, and Morris and Bradford; and by *The Attorney-General*, *Jno. A. Meredith* and *R. R. Howison* for the executors.

MONCURE, P. This case has been three times argued before this court, and each time at great length and with great ability. I was a member of the court, and heard the argument on each of the three occasions; and if I am not now able to decide the case correctly, it is certainly not because it has not been sufficiently argued before me. My opinion in it is as follows:

The controversy in the case is concerning the effect of certain acts done by Dr. Charles S. Mills and Mr. R. R. Howison, as executors of Nicholas Mills, deceased, of which some of the residuary legatees of said testator complain as breaches of trust; and they claim to hold the said executors and certain other persons charged to have been participants in the said breaches of trust liable for the losses thereby occasioned. Those acts consisted of the said executors' receiving, during the war and as late as 1863, Confederate money at par in payment of debts due to their testator in good money and well secured by liens on real estate, and in investing the amount so received in Confederate bonds on account of said testator; and the persons charged to have been participants as aforesaid were the debtors by whom the said payments
449 were made. The said *debts consisted of a debt of one thousand dollars, due by Thomas Bradford, payable January 1st, 1863, and paid by him to the said executors on the 3rd of that month; also of a debt of ten thousand dollars, due by the Exchange hotel company, and paid on the same day, out of the proceeds of the sale of the property of that company, sold at or about the same time; also of nineteen thousand dollars, par value of one hundred and ninety shares of the stock of said company owned by the testator, which said sum of money was paid to the said executors out of the proceeds of said sale; also of a debt of nine thousand two hundred and sixty-eight dollars and eighty-eight cents, paid by Charles Y. Morris to the said executor on the 12th day of March 1863, being the principal and interest of a bond due by him to the testator; also of a debt of one thousand three hundred and sixty dollars, due by note of L. W. Glazebrook, and paid to said executors on the 12th of March 1863; and of a debt of one thousand three hundred and thirty dollars, due by note of same debtor, and paid to said executors on the 19th of April 1864; also of twenty-six thousand six hundred and sixty-six dollars and sixty-seven cents, paid to the said executors on the 29th of April 1863 by Lancaster and other purchasers of the Exchange hotel property, to extinguish ground rent reserved on a lease from said testator to the said hotel company; also of one thousand five hundred dollars, paid to the said executors on the 1st of September 1863, on stock of the testator in the Midlothian coal mining company. Besides these matters, others were embraced in the controversy in its commencement and progress, which seems to have been since abandoned; and therefore little or nothing will be said of them in this opinion, except to name them. They are: 1st, the Leigh street
450 property, *which was sold by the said executors on the 28th of October 1862, just two and a half months after the death

of the testator, for the enormous sum of one hundred and twenty-eight thousand two hundred and thirty-six dollars and thirty cents—more than double the amount at which it had just before, in the same month, been appraised. Everybody who heard of the sale was no doubt astonished at the amount it produced, which was more than enough to buy as much gold, dear as it then was, as the property would have produced before the war. And everybody who was interested in the sale seemed to be well pleased with it, with the exception, perhaps, of Mrs. Robinson, a daughter of the testator, who lived on the property at his death, and had, therefore, to look out for another home after the sale. And complaint was made in the argument that the sale was made in such haste, that almost before the funeral bell of the testator ceased to be heard, the bell of the auctioneer was ringing to give notice of the sale. A plain answer to this (if any be necessary) is, that the testator made ample provision for his said daughter, which did not include her continued residence on his Leigh street property, which constitued the greater and by far the most valuable part of his real estate, but was producing little or no rent at his death, and was not capable of producing much, in comparison with the great value of the property. The testator, by his will, expressly desired that his executors should sell all his real estate not otherwise specially disposed of, in such manner and on such terms as they might deem most advantageous; and it was obviously their duty to sell the Leigh street property as soon as it could possibly be done consistently with giving of due notice of the sale. It could only be sold for
451 Confederate money; and the *whole purchase money, large as was the amount, was paid in cash, and the greater part of it was soon invested in eight *per cent.* Confederate bonds. After the war was over, and after this controversy was commenced, the objection seems for the first time to have been made, that the sale and conveyance of this property were invalid, because only two of the three executors nominated in the will joined in making them. But they were made by the only nominated executors who had then qualified, and who had endeavored in vain to procure a furlough for the other nominee, Thomas V. Robinson, who was in the army at the time of the testator's death, and continued there during the war, to enable him to return home for the purpose of qualifying also. It would not be difficult to show that this objection is not well founded in law. But it is now unnecessary to do so, for reasons before stated. Secondly, fifteen thousand three hundred dollars, the amount of the bonds of the Midlothian coal mining company to the testator, were paid by that company to the said executors on the 18th of November 1862. There is now no complaint as to any payment made to the executors before 1863; though there would seem to be no difficulty in showing the propriety of receiving this payment; but it is unnecessary to do so.

I will now proceed to consider the controversy still remaining in the case in regard to the liability of the said executors on account of Confederate money received by them after the 1st of January 1863, in payment of debts due their testator, and invested in Confederate bonds as aforesaid.

That liability depends upon two questions, viz: 1st. Whether the executors had power to perform the acts complained of; and 2ndly, Whether, in performing
452 *them, they acted in good faith, and in discharge of what they believed to be their duty as executors? If these questions can be answered in the affirmative, then no such liability exists, and of course, in that case, there is no liability, on account of those acts, on the part of any of those who paid the money to the executors.

First, Had the executors power to perform the acts complained of? To receive the Confederate money paid to them, and invest the same in Confederate bonds as aforesaid—supposing the acts to have been done in good faith on their part and in discharge of what they believed to be their duty as executors?

We have only to read the will of Nicholas Mills to be able to answer this question, with great confidence, in the affirmative. And our conviction to that effect will become still stronger, if possible, when we do what a court of construction must always do; that is, place ourselves precisely in the situation of the testator when he wrote his will, look at all the circumstances which then surrounded him, and read and construe his will in the light of those circumstances. He was an old citizen of Richmond, where he died and probably had always lived; was very wealthy, owning at the time of his death, besides real estate and slaves of great value, stocks and debts due him, of large amounts, and other property; his whole estate being valued at upwards of $400,000. He was an intelligent gentleman, of business capacity, and retained his faculties unimpaired to the time of his death. He seems to have had no immediate family living with him when he made his will, or afterwards, except, perhaps, his widowed daughter, Mrs. Robinson, and two of her children, who were both grown up. But he had a large number of children and
453 grandchildren, *who, or most of whom, needed his assistance at the time he made his will, and of his death; though he had provided largely for his children by advancements previously made to them. These children and grandchildren were the main, and almost the only, objects of his bounty in his will; and he was obviously anxious to dispose of his estate in such a way as to do them the most good, and afford them the speedy and regular relief which they needed; some of them being feme coverts, others unsuccessful managers apparently, and most of the grandchildren (all of them but three) infants. In this state of things, it was all important that he should select the most trustworthy persons to be his executors, especially if he devolved on them the many and various trusts made necessary by the state of his family and property, and

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of the extraordinary times which then existed. It was also important that he should invest these executors and trustees with the amplest power and discretion in the execution of his will. He made his will on the 17th of October, 1861, six months after the war had commenced, and when it had become flagrant. He lived nearly twelve months after the date of his will, and until the 12th of September, 1862, when he died. We were then in the midst of the war, and Confederate money had become the only currency; for which only could property be sold; and in which only could debts be collected. The testator continued to manage his own affairs after the date of his will, and until his death, and during that period he collected in Confederate money large amounts of debts due him in good money, including some which were well secured by liens on real estate, and he invested the money collected, or most of it, in eight *per cent.* Confederate bonds. Some of these collec-
454 tions were made a short *time before his death. After he made his will, he never added a word to it, or took a word from it, or made any change in it, but left it at his death exactly as it was when it was first written. A testator's will must be considered as speaking at the time of his death, unless a contrary intention be expressed or plainly implied therein. At the date of the will, and at the time of the testator's death, it was the general if not the universal belief in the Confederate States that their cause would be ultimately successful, and that in that event all Confederate bonds would be fully paid, and it was then generally believed that the war would terminate much sooner than it did. Such belief continued to prevail during the year 1863, and until the last payment complained of in this case was made, though it no doubt grew weaker and weaker in some degree as time progressed, and as Confederate money continued to depreciate. While such depreciation became comparatively great in regard to gold, which ceased to be currency, and was an article of merchandise of peculiar value, it was not near so great in regard to other articles, and it was hoped and expected that it would soon undergo a great change, and be as valuable, or nearly so, as it was when it was first issued. It is difficult for us now to recall the views we entertained of these matters during the early period of the war; but it is necessary to do so as far as possible, in order to estimate correctly the import of transactions occurring during that period. If we judge them by the present lights, we will universally condemn them, though we generally approved them when they occurred.

Let us now look at the will, and see what powers it conferred on the executors, and whether they are broad enough to cover the acts in question. It confers the
455 *most extraordinary powers and trusts upon the executors. It contains twenty-two clauses, almost every one of which confers such powers and trusts. The second clause creates a trust in favor of George Mills, a son of the testator, to whom is given an annuity of $800, payable quarterly in advance during his life, to be applied to and for his personal support, &c., and to "be free from any contract made by him, unless such contract be for his necessary and proper support. Of all which matters I constitute my executors the exclusive and absolute judges." The fourth clause creates a trust in favor of Mrs. Robinson, commencing thus: "I give, devise, and bequeath unto my executors, hereinafter named, in trust for the separate benefit of my daughter, Sarah Ann Robinson, and her children and grandchildren, born or to be born, subject to the purposes, limitations and conditions hereinafter declared, the sum of," &c.; and then proceeding to set forth the long details of the trust. The fifth clause creates a similar trust to the same trustees, in favor of the same beneficiaries, in regard to certain slaves. But without setting forth in detail the many trusts created by the will, in which the executors are made trustees for the benefit of different members of the testator's family and their descendants, it may be sufficient to say, in general terms, that besides the clause before enumerated, the sixth, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, eighteenth and twentieth clauses create important trusts in favor of different objects of the testator's bounty, in all of which the executors are named as the trustees, to carry the said trusts into effect. The fourteenth is the most important clause of the will, especially in regard to this controversy, and will be set forth in full. It is in these words:

456 *"14. All the real estate which I may leave at my death, not otherwise specially disposed of, I desire that my executors shall sell in such manner and on such terms as they may deem most advantageous. All money on hand, and stocks in companies, not specifically given or bequeathed in this will, all debts due me, and all other personal estate owned by me, I hereby direct my executors, as soon after their qualification as practicable, to dispose of as follows: My slaves shall be disposed of as provided in the next clause of my will. All other funds shall be applied first to the payment of my funeral expenses, medical bills, all just debts I may owe at my death, and then to the satisfaction of the two sums of one thousand dollars each given to my daughters, Sarah Ann Robinson and Jane R. Blair; then to provide for the punctual payment of the annuities hereby given; then for the pecuniary legacies hereby given to my children; then for the pecuniary legacies hereby given to my grandchildren. All the rest and residue of my estate (except slaves), not specifically devised or bequeathed herein, no matter of what it may consist, or where it may be, not effectually disposed of by this will, or which may turn out by lapse of devisees, legatees or legacies, not to be effectually disposed of by my will, I hereby bequeath as follows: first, out of such residuary fund shall be paid to my sons, Charles S. Mills

and Ronald Mills, each $3,000, and the remainder I give and bequeath equally, share and share alike, to all my grandchildren, and the lineal descendants of such as may die, such descendants taking the share of the parent; but my six grandchildren, to whom $2,000 each are bequeathed, are not to participate without bringing into the division the said legacies of $2,000 each so given to them."

457 *The twenty-first clause of the will is in these words: "I appoint my son, Charles S. Mills, my grandson, Thomas Verney Robinson, and Robert R. Howison, executors of this my will, and having confidence in their capacity and integrity, I direct that security shall not be required of them on their qualifying as such."

The intention of the testator obviously was, that his estate should be divided and disposed of by his executors, according to the directions of his will, with as little delay as the possible consistency with the apparent interest of his devisees and legatees; and for that purpose, that all his estate, real and personal, not specifically devised or bequeathed, except his slaves, and the debts due him and perhaps his stocks, should be sold; and that all the debts due him should be collected by his executors, and the proceeds of such sale and collection applied to the payment of the pecuniary legacies, and the surplus divided among the residuary legatees, and such investments made as are directed by the will. He probably did not expect that any of the stocks on hand, which were susceptible of easy division among the residuary legatees, would be sold by his executors, but rather that they would be divided in kind. Though "having confidence in their capacity and integrity," he no doubt intended that they should exercise their discretion in selling or not selling any of his stocks not specifically bequeathed by his will. He had no difficulty in regard to the currency, present or prospective; at least not enough to produce any change in his will. He knew, of course, that the currency had depreciated, and was depreciating; but he no doubt hoped and believed, as we then all did, that it would come out right in the end, and perhaps sooner than we expected. At all events he knew that nearly all, if not all of his devisees and

458 legatees were *in need of the means of subsistence, and were dependent for them entirely on what they were to derive from him under his will. It was absolutely necessary therefore that they should have money. The only money then current was Confederate money, and they could only obtain that in any sufficient quantity by the sale of property and collection of debts belonging to the testator's estate. He empowered them to make such sale and collection, and expressly desired them to sell all his real estate, not otherwise specially disposed of, in such manner and on such terms as they might deem most advantageous.

Assuming the executors to have acted *bona fide* in doing what they did (a question we will presently consider), I think I have said enough to show, and hope I have fully shown, that they had ample power to do so; unless there be something in one of the grounds taken to show that they had not power to receive the money paid to them by Lancaster and others in extinguishment of the ground rent on the Exchange hotel property. That ground is, that the deed to Lancaster and others for the reversion to which that ground rent was incident was executed only by the executors Mills and Howison, and not also by the executor Robinson; and therefore the deed was void, and the title to the reversion still remains in the heirs of Nicholas Mills, or as part of his estate, and would so remain even if the payment had been made in gold instead of Confederate money. I will, therefore, consider that question at this point, as it is a question of power in regard to this part of the transaction.

Beyond all question, the reversion to which the said rent was incident was, before the said rent was extinguished as aforesaid

459 (if it was so extinguished), real *estate of Nicholas Mills, and might have been sold by his executors under his will, just as his Leigh street property was sold; and the purchaser would thereby have acquired, with the reversion as incident thereto, the right to the annual rent from the time of the sale. It might, and no doubt would have been contended in that case, that the executor Robinson, having qualified before that sale, would have been a necessary party to the deed to the purchaser. A sufficient answer to such an objection no doubt would have been, that the deed having been executed, and the purchase money received by the two acting executors, and the other executor not having objected to such acts of his co-executors, but, on the contrary, received one-third of the executors' commission on the amount of the purchase money, he thus confirmed what had been done by his associates and gave it the same effect in a court of equity which it would have had at law if all the executors had joined in the original transaction.

But it is unnecessary in this case to consider that question, as there was no such sale of the reversion with the rent as incident thereto. Instead of that, Lancaster and others, purchasers and assignees of the leasehold estate in the Exchange hotel property, subject to the payment of the rent reserved in the lease, and with the right thereby secured to the lessees or their assigns to extinguish the rent by the payment of a sum of money in gross sufficient to produce an amount of annual interest equal to the annual rent under the lease, elected to extinguish the rent, and accordingly tendered to the executors, Mills and Howison, $26,666.66⅔ cents, in current money of the Confederate States, being a sum sufficient to produce, in interest thereon at the rate of six *per centum*, the sum of $1,600, the said annual rent;

460 and desired a deed *demising the property in fee simple and releasing the rent and rent charge aforesaid. And accordingly the said executors received the said amount so tendered, and executed such

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a deed. And the executors invested the money so received in Confederate eight *per cent.* bonds, for the benefit of the legatees of their testator. No objection was ever made to this transaction by the third executor, or any of the other parties concerned, until after the war; but, on the contrary, that executor in effect confirmed it by receiving one-third of the commission on the amount charged by the executors in their account, which was made out in the name of all three of the executors and returned, confirmed and recorded. So that the transaction stands on the same footing, in a court of equity, at least, as if all the executors had concurred in it from the beginning.

But there is another view of this branch of the subject which seems to be conclusive of it. The effect of the will was to break the descent and devolve the title to the land upon the executors, instead of the heirs of the testator. The executors had not a mere naked power of sale, but a power coupled with an interest, and most important trusts. The estate did not devolve on the heirs for an instant, either at law or in equity, but enured at once to the executors for the purposes of the will. *Mosby's adm'r* v. *Mosby's adm'r*, 9 Gratt. 584. When, therefore, Lancaster and others elected to extinguish the rent by the payment of a gross sum, according to the terms of the lease, that gross sum became the property of the estate of Mr. Mills, and payable to his executors like any other debt due to his estate, and might have been received by any one or more of them. If it be said that all of the executors must join in the deed of release of the reversion, without admitting the necessity for
461 any such joinder, it is *a sufficient answer to the objection to say that it would not follow from such admission that all of the executors must must join in receiving the money. It is like the case of an executory contract for the sale of real estate where the vendor dies before the money is paid or the estate conveyed. There the title to the purchase money is in the executors, while the title to the estate is in the heirs of the vendor. Either, any, or all of the executors may receive the money, but all the heirs must convey the title. When the money is paid, a court of equity will, of course, if necessary, enforce a proper conveyance of the legal title. In this case the legal title was in the executors, instead of the heirs, by reason of the descent being broken. But, if the same principle applies, and all the executors must join in conveying the title, that does not make it necessary that all should join in receiving the purchase money.

I think, therefore, that the payment of this sum of $26,666.66⅔ cents to the executors stands on the same footing with the payment of any other debt due to the estate in good money and about the same time paid to the executors in Confederate money; and that the executors had power under the will to receive such payment as well as payment of any other debt as aforesaid; provided that, in so doing, they acted in good faith. And now I proceed to consider the other question on which the alleged liability of the executors depends, viz:

Secondly, Did the executors, in performing the acts complained of in this case, act in good faith and in discharge of what they believed to be their duty as executors?

It was their sworn duty so to act, as well as the condition of their official bond;
462 and they say in their *answers and testify in their evidence that they did so act; and they so account for their conduct in regard to each of their executorial transactions complained of in this case, as plainly to show, if their account be true, that such conduct has been blameless, however unfortunate, or even unwise, it may in some respects have been. The presumption is always against the existence of fraud, and strong evidence is required to prove it; and testimony tending to show that no such fraud exists can be countervailed only by a decided preponderance of evidence on the other side. There is no charge of fraud contained in any of the bills against the executors. They were not speculators, and made no use, on their own account or for their own benefit, of any of the money received by them as executors, except the comparatively small portion of it to which they were entitled as their commission. They applied the money so received, as soon thereafter as could well be done, to the payment of legacies as far as that could be done, and invested the surplus in eight *per cent.* Confederate bonds, so as to make it as productive as possible, and as speedily as possible for the residuary legatees, most of whom were in great need. Neither of them had any motive, and certainly not anything like an adequate motive, to do wrong in the execution of his duties as executor. The only motive of that kind which seems to have been attributed to them in all these proceedings is, that they were interested in getting the largest possible amount of commission on their receipts, and were therefore interested in making their receipts as large as possible. A commission of five *per cent.*, in Confederate money, on the amount received by the executors, is a matter of small value, taken altogether; but, divided among three (as it was), or even two executors, is very
463 insignificant*—far too much so to warrant suspicion, much less to amount to proof of fraud on the part of the executors, who were gentlemen of high character for integrity as well as capacity, in whom the testator reposed the greatest confidence, as is plainly shown by his whole will. One of the executors is a son and legatee of the testator, as also are his children residuary legatees; and it is obvious that he and they would lose much more by the acts of the executors which are complained of, supposing them to result as they did, than he could possibly gain by his share of the commission. He was also an uncle of the other residuary legatees, and naturally desired to benefit them as well as his own children and himself. As to this executor, therefore,

the decided preponderance of motive was the other way.

But it is said that as Confederate money after the first of January 1863 was greatly depreciated in value as compared with gold, and continued more and more to depreciate until it came to be of no value, the executors committed a *devastavit* in receiving in that currency after that day payment of debts due to their testator in good money, and are therefore liable without regard to their motive.

Though Confederate money at the date aforesaid had depreciated in value as compared with gold, it had depreciated very little, if at all, in regard to most other subjects. Gold had ceased to be currency, and for peculiar reasons had become an article of merchandise of extraordinary value during the war. It is necessary therefore in ascertaining its real value at any time during that period to compare it with other articles than gold, and especially with articles of prime necessity. Accordingly this court, in January 1869, when the controversy involved in this case was first **464** before *it, declined making a decree upon the merits of the controversy in the existing state of the record, but remanded the cause to the court below, with directions for "an enquiry by a commissioner to ascertain what was, on the 30th day of April 1863, the value as compared with specie of the treasury notes of the United States, and also of the treasury notes of the Confederate States, and to what extent at that time the treasury notes of the Confederate States were, according to the common usages of business in Richmond, available for the payment of debts contracted before the war, and payable in specie or in current money of the United States, and well secured on real estate, or for the purchase of property or otherwise, with leave to any of the parties to file additional evidence as they might be advised upon any matter involved in the cause." Accordingly after the case went back to the court below, such an inquiry was made by commissioner Hudnall, and such additional evidence was taken before him, and he made his report thereon, from which it appeared that, on the 30th of April 1863, the value of the treasury notes of the United States, as compared with specie, was as one-and-a-half to one, and the value of Confederate States treasury notes, measured by the same standard, was as five-and-a-half to one. In answer to the next enquiry, as "to what extent at that time the treasury notes of the Confederate States were, according to the common usage of business in Richmond, available in payment of debts contracted before the war, and payable in specie or in current money of the United States, and well secured on real estate, or for the purchase of property or otherwise," the commissioner reported a considerable conflict of evidence, all of the witnesses perhaps agreeing that to some extent, and by some persons, **465** such *notes were received at par at that time in payment of such debts, but differing as to such extent, and the comparative number of such persons—some of the witnesses testifying that the practice was general, and others testifying that it was only exceptional. Among the former were Wellington Goddin and Lawson Nunnally. Wellington Goddin was a real estate auctioneer for many years in Richmond, and during a portion of the war a banker and broker in Richmond. He "testified that Confederate treasury notes were generally accepted in payments of debts due, whether contracted before the war or not; that many citizens who had debts due them, secured by trust deeds, were willing to accept payment at par in Confederate notes. A few persons in this city at that time refused to accept Confederate notes in payment of debts contracted before the war, but that the number of such persons was so small as to form only an exception to the general number. That the general usage of business was to receive Confederate notes in payment of old debts. United States notes were not in circulation. They were worth two to three for one over Confederate notes." Lawson Nunnally testified that he "resided in Richmond since 1840; before and during the war was president of the Bank of the Commonwealth in this city; as soon as the Confederate government could prepare a sufficient amount of treasury notes they became almost exclusively the circulation of the state; as early as 22d March 1862 the Virginia legislature passed an act making these notes receivable for all public dues to this state; after this they were used in all current transactions, and as bankable currency in this city, none other being in use except Virginia treasury notes, and they only to a limited extent. His recollection is, that debts **466** contracted before the *war were generally settled in Confederate notes," &c. The commissioner, after stating a summary of the testimony on both sides of the question, makes this report upon it: "I think therefore that I am justified in reporting that on the 30th April 1863 Confederate notes were available to the extent of their face value in payment of debts contracted before the war, and payable in specie or in current money of the United States, and well secured on real estate among merchants and banks and those persons whose necessities prompted them to receive such payments, but outside of these classes of persons, although it might have been occasional, it was not common usage for these notes to be available for the payment of such debts." The executors excepted to the conclusions of the commissioner in his report as unwarranted by the evidence.

Now, if we are to judge of the conduct of the executors on the testimony of Goddin and Nunnally, there can be no doubt that they are not liable; for they did not more than conform to the general usage in receiving the debts in question in Confederate money. And why are we not to judge of that conduct by that testimony? Who in Richmond would have been more likely or reasonably enquired of on the subject than these two witnesses? Who had better opportunity of knowing the facts than they? Who could have been more safely relied on? Suppose

the executors had enquired of those gentlemen on the subject, and concurring in their view, had acted accordingly, and in good faith, and in discharge of what they believed to be their duty as executors, could they have been made liable for the unexpected result of their act, even though others may have differed with them as to the wisdom of the act? Certainly not.

467 *But suppose we judge of their conduct on all the testimony set forth in the commissioner's report, and on his own conclusion upon it, can we hold them liable, supposing them to have acted in good faith, as we are bound to presume they did, in the absence of any evidence to the contrary, and as no doubt they did—I again say, certainly not. For in that view, they only did what all merchants and banks and some other persons in Richmond would have done.

In all these cases in which Confederate money was received in payment of ante war debts, whether by merchants, banks, or those executors, I take it for granted that the receivers confidently believed that Confederate money, or the Confederate bonds in which it might be invested, would ultimately be fully redeemed and satisfied. They had confidence, as all true Confederates then had, in the ultimate triumph of our cause, and payment of our debt.

To be sure, if a person to whom a well secured debt was due had no occasion for the use of the money, he would not be apt to receive it voluntarily in a depreciated currency at par, but would prefer to let it stand until he could obtain payment in money that was not depreciated. If, however, he had occasion for money, and there was no other in circulation but depreciated money, he would have to receive that or none.

I have thus far been considering this case without reference to the peculiar circumstances in it tending to increase the propriety, if not necessity, of receiving payment of the debts in question in Confederate money. These circumstances are as follows:

1st. The executors were acting in execution of the will of a testator, who died on the 12th of September, 1862, in the midst of the war, when Confederate money was the only currency, had greatly depreciated

468 *in comparison with the value of gold, and was still depreciating, who, by his will, gave his large estate to a large number of children and grandchildren, most of whom appear at the time of his death to have been in need of the means of subsistence, and dependent therefor on their interests in his estate. He therefore plainly intended, and expressly or by plain implication directed by his will, that his estate should be distributed and disposed of in pursuance of the same as soon as possible; and for that purpose, that the whole estate not specifically devised and bequeathed, except his slaves, should be converted into money by sale of property, real and personal, and collection of debts, so far as might be necessary. His real estate, not specifically devised, consisting mainly of his valuable Leigh street property, not being susceptible of division among his devisees, he expressly directed to be sold; and therefore that property was sold by his executors, Mills and Howison, as soon as could properly be done, and in less than two months after his death. His stocks and railroad bonds, not specifically disposed of by his will, were, or seemed to be, susceptible of division in kind among his legatees, and therefore none of them were sold by his executors. The debts paid to the executors, the receipt of which by them in Confederate money is complained of in this case, could not it seems be divided in kind among the legatees; and therefore their collection by the executor was necessary, and was required by the will. The executors therefore acted in obedience to the will of their testator in making the collections complained of. It was necessary to make them for the purposes of the will, and they could only be made in Confederate money, which was then the only currency. The testator well knew that fact, and that the currency was depreciated,

469 *and continuing to depreciate; and yet he directed his property to be sold, and the debts due him to be collected immediately, instead of being postponed until a change might take place in the value of the currency, which he could and would have directed in his will if he had so desired. To further show, if possible, that he really intended what he expressly said in his will, he proceeded after the date of his will, and before his death, to execute it in part by receiving Confederate money in payment of well secured good money debts, and in effect telling his executors, or one of them, his son, that such was his will. The executors collected no debt of which payment was not tendered to them by the debtor. How could they have declined to receive such payment under the circumstances? If there had been any very material depreciation of the currency between the death of the testator and the time of such payment, it might have been questionable whether it was not the duty of the executors, notwithstanding the direction of the will, not to receive such payment, upon the presumption that the testator in making his will did not anticipate or contemplate so great an increase of depreciation. But the executors might well have considered that there was no such increase of depreciation when such payments were made as to warrant them in refusing to receive such payment; and if they erred in their judgment in that respect without any *mala fides*, it was a mere error of judgment, which certainly would not make them liable. Another of the peculiar circumstances aforesaid is,

2nd. The legislation, present and prospective, of the state and of the Confederate States, before, at and about the time of said payment, was such as to make it probable that the refusal of the executors to receive such payments would subject the estate of

470 their testator *to heavy loss by increased taxation, and his legatees, or some of them, to great inconvenience by a material reduction of their income. These acts of legislation are referred to in the record and in the briefs of counsel, and need not

be noticed in detail here, as they may be seen by reference to the acts themselves. In regard to the Morris bonds, Dr. Mills in his deposition says: "Sometime during the year 1862, the period I cannot exactly recall, but not long before my father's death, Mr. Charles Y. Morris met me and informed me that he was prepared to pay $9,000, the amount of the first bond alluded to. I at that time was acting as the agent for my father for the collection of his rents and interest, and Mr. Morris supposing that I was authorized to receive the money, proposed to pay it to me in Confederate notes. I refused to receive it, and remonstrated with him as to paying it in that currency. He claimed his right to pay it, and I then told him I had no right to receive it, but referred him to my father who had the bond and could alone give him a receipt for the payment. That evening I saw my father, who told me that Mr. Morris had mentioned to him the conversation that had passed between Mr. Morris and myself, and that he (my father) had allowed him to discharge the bond in Confederate money; and he expressed surprise at my unwillingness to receive Confederate notes, and said that he would not only receive them, but that it was the duty of every good citizen to do the same. With regard to the second bond, sometime during the year 1863, March 12th, Mr. Morris called on me, and stated his wish to pay it, as he had the money then ready. I expressed my astonishment at the proposition, and positively refused to receive it. He then declared his right to do so, and stated
471 that if I declined *receiving it, it would be reported to the commissioners, and the debt taxed as if of gold value. I still refused. He afterwards saw Mr. Howison, with whom I afterwards conferred, when, in view of all the circumstances under the laws then existing, and then in course of enactment, we considered it safest for the estate to receive the money." Another of the peculiar circumstances aforesaid is,

3d. Every debt paid to the executors after the 1st day of January 1863, as aforesaid, was secured by a lien on real estate in the city of Richmond, the destruction of which real estate would have endangered the loss of such debt in whole or in part; and all buildings in the city were, during almost the whole war, in danger of being destroyed by fire, in the event that the armies of the enemy, which were around the city, trying to force an entrance therein, should succeed in capturing it—an event which was often apprehended. It was feared that on the happening of such an event the whole city, or the greater part of it, might be reduced to ashes. When at last the city did fall into the hands of the enemy, after its evacuation by our army, many buildings were burned down and much valuable property was destroyed in the city. The property on which the liens aforesaid existed happened to escape destruction on that occasion, but it was a mere accident. Some of the said property was peculiarly exposed to such destruction, as, for example, the Exchange hotel, which, it is said, was near being burned down, and the wonder is that it was not. The state court-house, I believe a fire proof building, standing by itself on the capitol square, was burned down on that occasion, and with it were destroyed many valuable records and much valuable property which had been deposited there-
472 in as a place of the greatest *safety in the city. All the bonds, notes, stocks and other valuable papers belonging to the estate of Nicholas Mills, deceased, which were by his executors put in a tin box and deposited in a bank in the city, were burned up with the bank on that occasion, notwithstanding all the efforts which were then used to save them. Certainly it was a most material circumstance to be weighed in determining whether it would be proper to receive payment in Confederate money of a debt due in good money, the security of which was dependent only or chiefly on a lien on a building in the city of Richmond, that it was exposed to the danger aforesaid, against which no insurance could be obtained. The Confederate money so received might have been invested in a Confederate bond, which would no doubt have been good in the event of the success of our cause, which might well have been gained, though the building subject to the lien, and even the whole city, had been destroyed by the enemy.

I will now take some further notice of the different instances in which the executors, Mills and Howison, are charged with having, since the first of January 1863, improperly received in Confederate money payment of debts due to their testator's estate in good money; and in so doing I will pursue the order in which those instances are before stated in this opinion. They are,

1st. Thomas Bradford's bond for one thousand dollars, payable first of January 1863, and paid to the said executors on the 3d of the month.

This payment was made very recently after the testator's death. Had it been made but four days before it was made, that is, in 1862, it would not have been embraced within the period to which the objection has been limited.

473 *2nd. A bond of the Exchange hotel company for ten thousand dollars, paid on the same day out of the proceeds of the sale of the Exchange hotel, made on the 24th of November 1862; so that the payment may be considered as having been made on the latter day, exactly two months after the qualification of the executors, and is therefore not within the limit of the objection aforesaid. But the testator was himself a very large stockholder in the company which owed this bond, and had received in Confederate money after the date of his will, and before his death, a large payment on account of the debt due him by the company.

3d. The sum of $19,000, par value of one hundred and ninety shares of the stock of said company, owned by the testator, which said sum of money was paid to the said executors out of the proceeds of said sale. The propriety of the act of the executors,

in receiving this payment, is too manifest to require further commentary.

4th. A debt of $9,268.88, paid by Charles Y. Morris to the said executors on the 12th of March 1863, being the principal and interest of a bond due by him to the testator. Enough has already been said in regard to this payment.

5th. A debt of $1,360, due by note of L. W. Glazebrook, paid to said executors on the 12th of March 1863, and a debt of $1,330, due by note of same debtor, and paid to said executor on the 19th of April 1864. The latter is the only debt of which payment was received by the executors in Confederate money after April 1863. Glazebrook, it seems, owed a large debt to the testator, payable in annual instalments. Two of them became payable during the war, and were paid about the time of their ma-
474 tuity to the executors. *Another probably became payable just before the end of the war, but payment of that was not received by the executors. There remained due by Glazebrook to the testator at the end of the war a balance of $13,030.

6th. A debt of $26,666.67, paid to the said executors on the 29th of April 1863, by Lancaster and others, purchasers of the Exchange hotel property, to extinguish ground rent reserved on a lease from testator to said hotel company. I think I have already shown that any one or more of the executors had the same power to receive payment of this debt as of any other debt due to their testator's estate, and therefore there was at least as much propriety in receiving such payment in Confederate money as in receiving payment in such currency of any other debt which was paid to them about the same time. There are other circumstances, however, connected with this debt, which seem to increase the propriety of so receiving payment of it. The testator must have expected that this ground-rent would soon be redeemed by the payment of the gross sum aforesaid, and must have intended that such payment might be made in Confederate money, for it could be made during the war in no other currency. If he had supposed that the rent charge of $1,600 *per annum*, payable quarterly, would remain a perpetual rent charge, he would certainly have named it in his will, and expressly directed therein in what manner and for whose benefit such an important subject should be disposed of. But believing that the lessees or their assigns would soon avail themselves of the privilege of redeeming it, by paying the stipulated sum in gross to his executors, he saw no reason for naming it in his will any more than the other debts which were due to him. His estate was deeply interested in the Ex-
475 change hotel property. *Besides the perpetual rent charge redeemable as aforesaid, the company owed him at his death a debt of $10,000; and he owned 190 shares of stock, being, it seems, the largest stockholder in the company. There was great difficulty in renting out the property, and great danger of its destruction in the event of the city's being captured by the public enemy. It was therefore unanimously resolved by the company to sell the property at public auction, provided it could be sold without too great a sacrifice. Accordingly it was sold at public auction in November 1862. It was all important to Mr. Mills's estate that the sale should be made to the best possible advantage; and it was proclaimed at the sale by the auctioneer who made it, and in the presence of the executors, Mills and Howison, who were there, that the purchaser would have a right, under the lease, to redeem the rent charge by payment of the gross sum aforesaid, whenever he chose to do so. Accordingly Lancaster and others became the purchasers at the said sale, at a price which was much higher than was expected to be obtained for the property. And the consequence was that the executors received out of the proceeds of sale, not only the amount of the debt of $10,000 due to their testator's estate by the company, but also $19,000, being the par amount of his one hundred and ninety shares of stock in said company, though stock therein had been sold as low as twenty-five dollars per share before the war. In April following the sale, the purchasers redeemed the rent charge, by tendering and paying to the executors the gross sum aforesaid in Confederate money. It was payable under the lease, bearing date the 31st of July 1839, "in current money of the United States," which, at the time of payment,
476 was an unlawful currency in the *Confederate States, and was a depreciated currency in the United States. It appears, I think, from what I have already said, that if the debt had been payable in constitutional currency, the executors would have been warranted under the circumstances in receiving payment of it in Confederate money? *A fortiori*, were they so warranted, payable as it was "in current money of the United States."

The executors did not conceal their action in this matter nor any other connected with their administration of the testator's estate, but acted openly, and no doubt with the knowledge of all the legatees who were old enough to have such knowledge. At least, those legatees might easily have become informed on the subject if they so desired. They very promptly returned an inventory of the estate and had it recorded; and they yearly settled their accounts during the war before a commissioner in chancery, which accounts were duly returned and filed for exceptions, and, being unexcepted to, were duly recorded. In these accounts all payments made by them were duly entered.

In regard to the investments made by the executors of Confederate money in eight *per cent.* Confederate bonds, if the money was properly received by them, it was certainly properly invested. We all yet well remember that during the earlier period of the war, and as late perhaps as the end of the year 1863, it was generally, if not universally, considered in the Confederate States that the best possible investment of Confederate money was in Confederate eight *per cent.* bonds, unless the

money was employed in the purchase of cotton and tobacco or used otherwise for purposes of speculation, which could not properly be done with trust funds. By so investing the money in this case as soon as it could be done after it was received (except
477 so *much as could be paid in discharge of legacies, which was accordingly paid), the largest possible revenue, payable semiannually and punctually, was obtained for the legatees. They received Confederate money from the executors without objection; for they knew the executors could get no other for them. And they made no complaint of any act of the executors, in receiving such money or otherwise, until after the end of the war, when the suits were brought which are the origin of this controversy.

I am therefore of opinion that the executors, in performing the acts complained of in this case, acted in good faith and in discharge of what they believed to be their duty as executors.

I have cited but one authority in the foregoing opinion, and that was upon a particular question arising in the case. I will cite but one other, which, I thing, is conclusive in favor of the executors—I mean the case of *Myers' ex'or* v. *Zetelle*, 21 Gratt. 733. This court was unanimous in the decision of that case, and the principles on which the decision was founded directly apply to this case. The features of the two cases are very much alike, and most of what was said by JUDGE CHRISTIAN, in his able opinion in that case, is as appropriate to this case as it was to that, if not more so. I am strongly tempted to repeat here a good deal of what was said there; but my opinion is already so long, that I must content myself with merely referring to the report, and especially to pages 750, 752, 754, 755, 756, 758, 761. A good deal has been said about the unlimited powers of the agents in that case. But certainly the executors had the amplest powers to do what they did in this case, and there can therefore be no difference between the two cases in that respect.

When powers are ample to do a cer-
478 tain act, there can *be no increase of such powers to do that act. The only difference between the two cases in that respect seems to be that in this the executors were in effect expressly directed to do the acts complained of, whereas in that the agents had a discretion to do or not to do them. The agents and executors both were invested with trusts which they had no right to break; and they were both liable, and equally so, for any losses arising to others from such breaches of trust.

Being of opinion that the executors were not guilty of any breach of trust in this case, it follows, as a matter of course, that none of those who dealt with them, whether as purchasers or debtors, can be liable for participating in any such breach of trust.

At the suggestion of my brother BURKS, made since the foregoing was written, I will cite one other authority, which I also think is conclusive in favor of the executors—I mean the case of *Staples & als.*, v. *Staples & als.*, 24 Gratt. 225, decided in 1874, after the case of *Myers' ex'or* v. *Zetelle*, which was decided in 1872. The court was unanimous in that case also, at least so far as it is applicable to this—JUDGE STAPLES, who was related to some of the parties, not sitting in the case. The features of that case and this are very much alike, and the principles on which the decision in that case was founded directly apply to this. Much of what was said by the court in that case, is at least as applicable to this case as to that, and would be repeated here but for the reason before stated. I therefore content myself with referring to the report of the case, and especially to pages 232, 236, 248 and 249.

It may be proper also to notice briefly some recent decisions of this court, which were referred to in the argument of this case, as modifying, to some extent, the doctrine of the two cases just referred to,
479 and *tending to show that it is inapplicable to this case. They are *Campbell's ex'ors* v. *Campbell's ex'or*, 22 Gratt. 649; *Moss &c.* v. *Moorman's adm'r &c.*, 24 Id. 97; *Williams' adm'rs* v. *Shinker & wife*, 25 Id. 507; and *Hannah's adm'r* v. *Boyd, &c.*, Id. 692, decided in 1872, 1873, 1874 and 1875, all of them having been decided after the case of *Myers' ex'or* v. *Zetelle*, and two of them after the case of *Staples & als.* v. *Staples & als.*; but all six of these cases having been decided by this court within a period of less than three years. In neither of them is any question raised as to the authority of any of the rest; and it cannot be supposed that the court intended in any one of them to change or modify the doctrine of any of those which preceded it, and still less the doctrine of either of the two cases of *Myers' ex'or* v. *Zetelle*, and *Staples & als.* v. *Staples & als.*, which had so recently been fully and ably argued by counsel, and maturely considered by the court, and concurred in by all the judges present at the decision of those two cases respectively. These cases are, I think, all consistent with each other, although there may be in some of them expressions which, taken from the context, may appear to be inconsistent with other expressions to be found in other cases.

In *Campbell's ex'ors* v. *Campbell's ex'or*, the executors of J. B. Campbell called in a debt due in good money to their testator's estate and perfectly secure, for the purpose of investing the amount in Confederate bonds, Confederate money being then at a great depreciation. And their motive for making the change of investment was the gain which they and their brothers, who owed the debt, would thereby realize. This court held that "it was a *devastavit* to call in that debt or any part of it for the purpose of making an investment in Confederate bonds. The investment act contained an
480 express *proviso that nothing therein contained should authorize a fiduciary to change the character of an existing investment."

In *Moss & wife* v. *Moorman's adm'r &c.*, it was held that "a personal representative is not warranted in receiving a specie debt due

to the decedents' estate in a greatly depreciated currency—depreciated to the extent to which it was depreciated when the money was received by the representative in this case—unless there be something in the condition of the debt, or in the state of the demands of creditors or legatees of the estate, or otherwise, which makes it to the interest of the estate that the debt should be so received." "In this case," said judge who delivered the opinion in the case, in which two of his brethren concurred, and in the results of which all the judges concurred. "it is not pretended that the debtor was not perfectly solvent and likely to continue so at the time his debt was received by the administrator of the creditor; nor that the collection of the debt was required for the purpose of being paid to creditors or legatees of the deceased. The money was not in fact paid to creditors or legatees after it was received by the administrator, but was either used by him for his own purposes or remained in his hands until after the war; on which subject there seems to be no evidence in the record. Where, then, was the necessity or propriety of receiving it in a depreciated currency—depreciated, it is said, to the extent of eight and a half to one as compared with gold? How was the estate benefited thereby?" Surely it cannot be necessary to say anything more than what is said in the context before stated, to show that it is not at all inconsistent with either of the two cases referred to and relied on as governing the case under consideration. A pru-
481 dent *man, in the management of his own affairs, would not, with a view to his own wordly interest, have received payment of a debt due to himself in good money, and well secured in a currency depreciated to the extent of eight-and-a-half to one as compared with gold, unless he had some very good reason for doing so, such as the payment of a specie debt, the supply of his necessary wants, the purposes of speculation, &c. A personal representative, therefore, ought not to receive payment of a well secured debt, due to a decedent's estate in such a depreciated currency, in the absence of some good reason making it his duty to do so. In the absence of such a reason, the debt, being perfectly secure, ought to be permitted by the personal representative to remain as it is, and not be collected in a depreciated currency merely for the purpose of changing the investment, however secure the new investment may be considered ultimately to be. If he should make such a collection and reinvestment, and the new investment should turn out to be worthless, it would be reasonable to hold him liable as for a *devastavit*. In the case of *Moss &c.* v. *Moorman's adm'r &c.*, there was not even a reinvestment in a Confederate bond or otherwise.

In *Williams' adm'rs* v. *Skinker & wife*, Williams, the executor of Hite, received payment in depreciated Confederate money of a well-secured specie debt, well knowing at the time that he had no authority to receive such payment, except with the consent of the legatees, to whom it belonged, one of whom did not consent, and against whose claim the executor received from another party such indemnity in Confederate money as was deemed to be sufficient. The executor was held to be liable to the non-consenting legatee after the war for her portion of the debt in good money. Surely it cannot be necessary to say anything
482 *more to show the consistency of that case with the other cases before referred to. But I will quote here a remark contained in the opinion of JUDGE CHRISTIAN in that case, in which a majority of the judges concurred, which remark is certainly very just, and is stated by the reporter in his *syllabus* of the case as one of the points therein decided; that "it is difficult to lay down any general rules applicable to all cases which arise out of dealings by executors during the war. Each case must depend upon its facts and the circumstances at the time surrounding the executor."

In *Hannah's adm'r* v. *Boyd & wife &c.*, the same remarks apply as were made in reference to *Moss &c.* v. *Moorman's adm'r &c.*

And if there be any other decision of this court which may seem at first glance to be inconsistent with the cases of *Myers' ex'or* v. *Zetelle*, and *Staples &c.* v. *Staples &c.*, the apparent inconsistency will doubtless disappear on looking to the context.

I base my opinion in this case "upon its facts and the circumstances at the time surrounding the executors." according to the rule laid down in *Williams' adm'rs* v. *Skinker & wife*. Those facts and circumstances have already been fully detailed. The executors acted under a will, made in the midst of the war, when Confederate money was almost the only currency. It conferred on them the greatest powers, and clothed them with very many important trusts. It empowered and directed them expressly, or by plain implication, to sell all his estate, real and personal, except slaves, and specific devises, and bequests, and to collect all his debts, so as to have all his estate, except as aforesaid, in their hands, in the form of money or "funds," to be applied as soon as possible to the payment of his debts, and the many legacies given
483 by the *will to his large family of children and grandchildren, most or many of whom seem to have been dependent on their interest in his estate for their means of subsistence. He lived nearly a year after the date of his will, and made no alteration in it. On the contrary, he continued until his death to receive payment of specie debts due him, and well secured by liens on real estate, in Confederate money, though greatly depreciated as compared with gold, and to invest the money so received in Confederate bonds, plainly signifying to his executors that he wished them to pursue the same course in the administration of his estate after his death. He thus received in 1862 the whole amount of the debt due him from Lewis Hyman, $7,500; one-half of the debt due him from Charles Y. Morris, $9,000; $1,000 of

the debt due him from Thomas Bradford, all mentioned in the fourth clause of his will, which provides for the payment of the legacy thereby given to his daughter, Mrs. Robinson. Thus showing that he intended that his executors should collect the debts mentioned in that clause, or such of them as might remain uncollected by him at his death. Under these circumstances the testator died, and his executors qualified as such, and proceeded diligently to execute his will according to its plain directions, making sales of his property and collections of his debts in the only currency in which they could possibly be made, and making them under the peculiar circumstances which have already been fully recounted. But I have said enough in the case, and therefore will say no more than to conclude that, upon the whole, I am for affirming the decree appealed from; and I entirely concur in the able opinion of the learned chancellor who pronounced that decree.

484 *CHRISTIAN, J. The magnitude of the interests involved, and the interesting and difficult legal questions growing out of it, render this one of the most important cases that has yet been submitted to the decision of this court.

The oral argument occupied two weeks, while the *printed* notes of counsel cover nearly five hundred pages. The record is proportionately voluminous. The case has been argued by a number af able and distinguished counsel, who have exhibited their accustomed zeal, ability and learning in maintaining the interests of their respective clients.

These considerations have united to induce the court to give to this important case the most deliberate and careful investigation, and constitute my apology for the unusual length of this opinion.

This case is for the second time before this court. It is the sequel of the cases of *Corbin & als.* v. *Mills' ex'ors & als.*, *Robinson* v. *Mills' ex'ors & als.*, and *Lancaster & als.* v. *Corbin & als.*, reported in 19 Gratt. 438.

In the third named cause this court made the following decree: "The court is further of opinion, that, while the court will take judicial notice of the fact that on the 13th day of April 1863, the date of the transaction which is the subject of controversy in this cause, the treasury notes of the United States, and also the treasury notes of the Confederate States, were greatly depreciated in value as compared with specie, it is not competent for the court to take judicial notice of the rate of depreciation of either currency at any particular time, nor of the extent to which at any particular time the treasury notes of the Confederate States were available, according to the common usages of business, for the payment of debts contracted before the war and payable in specie or in

485 current money of *the United States, or for the purchase of property, or otherwise. The court is further of opinion, that inasmuch as the record in this cause contains no evidence upon these points or either of them, it does not contain sufficient materials to enable the court to make a proper decision upon the questions in controversy. The court is therefore of opinion, that the said circuit court, instead of proceeding to make a decree upon the merits of the controversy in the existing state of the record, should have directed an enquiry by a commissioner to ascertain what was, on the 13th day of April 1863, the value, as compared with specie, of the treasury notes of the United States and also the treasury notes of the Confederate States, and to what extent, at that time, the treasury notes of the Confederate States were, according to the common usages of business in Richmond, available for the payment of debts contracted before the war and payable in specie or current money of the United States and well secured on real estate, or for the purchase of property, or otherwise, with leave to any of the parties to file additional evidence as they may be advised upon any matter involved in the cause." And the cause was remanded to the circuit court for further proceeding to be had therein in accordance with this decree.

After the causes were remanded to the circuit court, the plaintiff in the suit of *Corbin* v. *Mills' ex'ors & als.* filed an amended and supplemental bill, alleging his objections to the settled accounts of the executors.

The bill charges the executors with an improper and illegal administration of the estate of their testator and a violation of their duties as executors and trustees under the will. The particular specifications may be best stated as follows:

1. That the two executors had no

486 authority to sell *the Leigh street property for Confederate States treasury notes, without the consent of the beneficiaries under the will and the concurrence of the third executor; and that the deed of the two executors transferred no title to the grantees; and that the same were and are illegal and void.

2. That the will of Nicholas Mills did not confer upon his executors authority to invest residuary estate given by the fourteenth clause to the grandchildren of the testator, nor to make any investment whatever, except under the fourth, tenth, eleventh, twelfth and thirteenth clauses of the will; and that the legacies bequeathed by the thirteenth clause should have been paid to each of the grandchildren named therein as were of age.

3. That the executors had no authority to collect in Confederate States treasury notes, especially at their nominal value, well secured debts due in specie or its equivalent and in this connection the debt of Bradford, Morriss, the Midlothian coal mining company, the Exchange hotel company, Glazebrook, and the stock of the Exchange hotel company, are enumerated; and the bill charges that these payments, made in this currency so greatly depreciated, did not discharge the debtors.

4. That the authority given to the executors by the eighteenth clause of the will to change investments, did not apply to the re-

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siduary legatees, and is not binding upon them, but was only applicable to investments made under the fourth, tenth, eleventh, twelfth and thirteenth clauses of the will.

5. That the executors had no authority to invest in Confederate States bonds, because they were hazardous and unsafe, and the will required the investments it did authorize to be safe investments.

487 *6. Reference is made in said supplemental bill to the pending suit of *Corbin* v. *Lancaster*, as exhibiting the grounds of objection to the sale of the Exchange hotel ground rent.

This bill was answered by the executors Howison and Mills, who controverted and put in issue all the material allegations of the bill.

Much evidence was taken upon the points of enquiry directed by this court by its decree of the 13th day of March 1869; voluminous reports and accounts were returned by the commissioner of the court; and on the 4th day of March 1872 the chancery court of the city of Richmond pronounced its decree, by which it declared, and so adjudged, ordered and decreed: First, "that the sale of the real estate in the bill mentioned, made by the two executors, Robert R. Howison and Charles S. Mills, was valid, and that their deeds conveyed a good title to the purchasers thereof; and that the third executor after his qualification in effect ratified the same; nor was the consent of the beneficiaries under the will necessary to authorize said executors to sell said real estate."

Second. That the executors were authorized under the will to invest the residuary estate given by the fourteenth clause thereof, and that the investments so made by them were legal and valid.

Third. That the said executors were authorized by the will to collect the debts due from Messrs. Morriss, Bradford, Glazebrook, and the Midlothian mining company, and from all others who were debtors to their testator, and that their collection of said debts in Confederate money was valid, and fully discharged the debtors.

Fourth. That the sale of the Exchange hotel stock was made in consequence

488 of the dissolution of the *company by the action of a majority of the stockholders, and that the executors were right in receiving the share of the proceeds of such sale belonging to the estate of their testator in Confederate money.

Fifth. That the rent charge on the Exchange hotel property was, in substance, a mortgage, by which the sum of $26,666.60, with six *per cent.* interest, was secured, and being so, stands upon the same footing as the other debts due to the testator, and the executors were authorized to collect it, and the collection of the same in Confederate money was valid, and discharged the debtor; and that the deed of the executors, releasing the lien on said property, was a valid and legal discharge of the same, and that they are not liable for any loss that has subsequently occurred in consequence of such collection and release.

Sixth. That investments made by said executors, in Confederate States bonds, were legal and valid, and that said executors are not liable for any loss sustained by reason of such investments.

From this decree an appeal was allowed by one of the judges of this court.

The first question we have to determine is as to the validity of the sale made by the executors, of what is known in the record as the Leigh street property. This sale is objected to, and its validity assailed upon two grounds—*first*, that *three* executors having been appointed by the testator to execute the trusts of his will, the sale and deed made and executed *by two*, in the absence of the third, was a void act, and conferred no title on the purchaser. *Second*, that if the two acting executors had the authority to sell and convey this valuable real estate in the absence of the third (who had not then qualified, and who did not unite in the deed), still they had no authority to

489 sell the same *for *Confederate currency*, and consequently both the acting executors and the purchasers are liable to the legatees for the full value of the said real estate in a sound currency.

These propositions will now be considered in the order in which they are stated above.

Nicholas Mills, the testator, died on the 13th September 1862. He left a will, which had been duly executed on the 17th day of October 1861. He appointed as his executors his son, Charles S. Mills, his grandson, Thomas Verney Robinson, and Robert R. Howison, an attorney of the city of Richmond, who had been for many years the counsel of the testator. On the 24th September 1862 the will was admitted to probate, and Charles S. Mills and Robert R. Howison, two of the executors named, qualified as such, and liberty was reserved to Thomas Verney Robinson, the other executor, to join in the probate if he thought fit. He qualified on the 15th December 1862. At the time the will was offered and admitted to probate, on the motion of Mills and Howison, Robinson was a soldier in the army of Northern Virginia. An effort was made to get a furlough for him, in order that he might be present when the will was offered for probate and qualified with the other two executors. This effort failed, and it was at least uncertain and the time indefinite *when* he could qualify as one of the executors.

The testator, by the fourteenth clause of his will, made the following direction: "All the real estate which I may leave at my death, not otherwise specially disposed of, I desire my executors shall sell in such manner and on such terms as they may deem most advantageous."

On the 28th October 1862, the two

490 executors *who *had qualified*, Mills and Howison, made sale of the Leigh street property for the sum of $128,236.30, in Confederate money, and executed deeds to the purchasers. The third named executor, Robinson, was not present at this sale, and did not unite in the deed, he not having *qualified* as executor when the sale was made. It

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is earnestly insisted by the counsel for the appellants, that the deeds of the *two* executors conferred no title on the purchasers, but that in order to make a complete title in the purchasers, all the executors named in the will should unite in the sale and join in the conveyance. This was undoubtedly the rule of the common law. That rule was modified by the statute of 21st Henry VIII, chapter 4, which provided, that "where lands are willed to be sold by executors and part of them *refuse* to be executors, and to accept the administration of the will, all sales by the executors, that accept such administration, shall be as valid as if all the executors joined."

The statute of Henry the VIII, which was in force in Virginia at the time of the revolution, required a *refusal* to act by the person nominated. In 1785 the law was so changed by act of assembly as to authorize such as should "undertake the execution of the will" to sell and convey. The statute was re-enacted in 1792, with this additional provision: "But if none of the executors named in the will shall qualify, or after they have qualified shall die before the sale and conveyance of such lands, then, in these cases, the sale and conveyance thereof shall be made by such person or persons to whom administration of the testator's estate, with the will annexed, shall be granted." 1 Rev. Code 1819, p. 388, § 52.

The object of these amendments was plainly to extend the policy of the 491 statute of Henry the VIII, which *required a *refusal* of one of the executors to qualify before the others could act, and to confer the power to sell *upon those who qualify*. See *Mosby's adm'r & als.* v. *Mosby's adm'r*. Opinion of JUDGE MONCURE, 9 Gratt. 584, 598.

The provisions of our Code, which constituted the statute law of this state, when the executors made the sale, the validity of which is impeached, is found in the first section of chapter 130, Code 1860, and section 1, chapter 131, and are as follows:

"A person appointed by a will executor thereof, shall not have the powers of executor until he qualifies as such by taking an oath, and giving bond in the court in which the will or an authenticated copy thereof is admitted to record, except that he may provide for the burial of the testator, pay reasonable funeral expenses, and preserve the estate from waste." Ch. 130, § 1, Code 1860.

"Real estate devised to be sold, shall, if no other person other than the executors be appointed for the purpose, be sold and conveyed * * * * by the executors *who qualify* and the survivors of them."

In this case the sale was made by the two executors *who had qualified*. Robinson did not qualify until *after* the sale was made and the deeds executed to the purchasers. *When* he qualified, he was invested with all the rights and powers of an executor in and upon the estate of Nicholas Mills. But at the time of his qualification, the real estate (the Leigh street property) had been sold by the executors who had qualified. Robinson's powers as executor *then* attached only to the estate of his testator *not then* disposed of, and his securities on his official bond could be held *only* responsible for the assets, real and personal, which came into the hands of the ex- 492 ecutors *after* his qualification. **When* he qualified as executor, the Leigh street property was no longer a part of his testator's estate. It had been sold by his co-executors who had qualified before him, and his only responsibility was for the application of the proceeds of the sale. The law in express terms, vested all authority and power to sell the real estate directed to be sold by the will, in *those who had qualified as executors*. They had executed that power before Robinson qualified, and there was neither power nor responsibility attaching to him as to that sale.

Of course, it is not intended in this view to assert that one executor may, because he happens to qualify first, in hot haste and in fraud of the rights of his co-executors, and of those interested in the estate, proceed to sell his testator's real estate authorized to be sold. No such case is made in the record. In this case an effort was made to get the presence of the third executor. He was then in the army and it was altogether uncertain when he could return. Under the circumstances the other two were justified in acting without him. But in point of fact there is nothing in the record to show that Robinson ever objected to the sale by his co-executors until after the close of the war. He saw the purchasers put in possession of the property without objection. He expressed himself gratified at the large price for which the property had been sold, and he received his part of the commissions of the sale, and stoutly contended for his part thereof against the other two executors. Not a word was said by him by way of objection to this sale, until after this suit was brought; but all his acts and conduct showed a full ratification of what had been done by his co-executors, and conclusively shows that if he had 493 been present he would have *united with his co-executors in making the sale and would have joined with them in a deed to the purchasers.

But however this may be, I am of opinion that the executors *who qualified* had the authority under the will of the testator to make sale of the "Leigh street property," and to convey to the purchasers a valid title to the same; and that that title is in no way affected by the fact that one of the executors named in the will did not unite in said deeds, he not having *then* qualified as such executor; and that the title in the purchasers is as complete and perfect *as if all* the executors had united in said deeds.

But the validity of this sale was impeached on another ground, as before stated, to wit: that if the two *acting* executors had the authority (in the absence of the third executor) to sell this valuable real estate, they had no authority to sell it for *Confederate money*; that in this they exceeded their authority, and that therefore the sale was void, and the deeds conveyed no title.

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This objection makes it necessary to recur again to the will, which is the source of power, and to note carefully the circumstances under which the sale was made. The 14th clause of the will, before recited, is as follows: "All the real estate which I may leave at my death, not otherwise specially disposed of, I desire my executors shall sell *in such manner* and *on such terms* as they may deem most advantageous."

Here the largest power is conferred on the executors. They are to sell *in such manner and on such terms as they may deem most advantageous.* Whether it was most *"advantageous"* to the estate they represented, to sell in October, 1862, they were to be the sole judges. Whether they should sell then, 494 or at a later period, or *postpone the sale until after the close of the war, was a matter left by the will entirely to their discretion. Nor was this discretion at all limited by the fact that at the time of the sale, the only currency in circulation was Confederate money. The testator did not direct a sale for specie or its equivalent, but simply directs his executors to sell "in such manner and on such terms as to them may seem most advantageous." It is a noteworthy fact, that at the time the will was executed, (October, 1861) the war was raging and Confederate money was then coming into general circulation, and at the time of his death, (September, 1862.) from which latter date his will speaks, Confederate money constituted the principal if not the whole currency of the country. The testator himself had received, for the sale of propery and in the payment of debts due him, about $19,000 in this currency. Thus knowing as he did, that there was no other currency in circulation but Confederate money, he did not limit the power or discretion of his executors, but without limitation or qualification conferred on them the power to sell his real estate "in such manner and on such terms as they may deem most advantageous." At the time of this sale the depreciation of Confederate money was comparatively small, being about two and a half for one, and was generally received in payment of debts, as well as for real estate sold. The Leigh street property was sold for $128,236.30. It was assessed in 1859 at $28,850. It therefore sold for a price which, if converted into gold, would have produced at least $50,000. The purchasers thus paid more than full value for it, and the sale at this large price might well have been considered by the executors, as it was by others, as "advantageous." But whether "advantageous" or not, having 495 full power to sell, neither the *executors nor the purchasers in the absence of fraud, can be held liable to the legatees for any loss incurred in consequence of such sale.

I am therefore of opinion that there is no error in the decree of the chancellor, which declared "that the sale of the real estate, in the bill mentioned, made by the two executors, Robert R. Howison and Charles S. Mills, was valid, and that their deeds conveyed a good title to the purchasers thereof," and that the said decree to this extent should be affirmed.

We come now to consider the second branch of this important case, which presents questions of great interest and difficulty, to wit: How far are these executors liable for a breach of trust in collecting debts due their testator in a sound currency, well secured upon real estate in the year 1863 in *Confederate money,* then depreciated to at least five to one; and if liable, how far the debtors and purchasers of the real estate, pledged as security for these debts, are to be regarded as participators with the executors in such breach of trust, so as to make them liable with the executors?

Among the assets of this large estate, which came into the hands of the executors, were certain debts of large amounts, amply secured upon valuable real estate. They are known in the record as the Exchange hotel rent charge, the Morris debt, the Midlothian coal mining company debt, and the Glazebrook debt, all of which were well secured upon real estate, of such value as to make them perfectly safe, and all of which were collected in Confederate money in 1863 by the executors, and release deeds executed by them of the real estate, which stood pledged for their payment.

As the Exchange hotel rent charge 496 stands upon *somewhat different grounds from the other above-named debts, that will be first considered.

On the first January 1839, Nicholas Mills and Sarah his wife "leased, demised, granted, and to farm let," unto Hugh W. Fry and others, for a hundred years, certain valuable real estate in the city of Richmond, formerly the site of the old Byrd warehouse, and now of the Exchange hotel, charging the same with an annual rent of $930, payable in equal annual instalments for one year, from January 1st, 1840, to January 1st, 1841; and thereafter for the ensuing ninety-nine years, with an annual rent of $1,600, payable likewise in equal quarterly portions.

In the contract of lease, it was stipulated that the property should be conveyed to the lessees absolutely in fee simple with general warranty at any time after January 1st, 1840, upon the following condition: "On receiving from the said parties of the second part, their heirs or assigns, the sum of $25,000, *current money of the United States,* and all rents that shall have accrued on the premises hereby demised, to the time of such payment of the $25,000 aforesaid; and at any time after the expiration of five years, from the first day of January, in the year 1840, during the term hereby granted, to convey the premises hereby demised, with all houses, buildings and improvements thereon, and appurtenances thereto belonging, or in any wise appertaining to the said parties of the second part, their heirs and assigns, in fee simple, with general warranty, on receiving from the said parties of the second part, their heirs or assigns, *in current money of the United States,* a sum which will be sufficient to produce in interest thereon at the rate of six *per centum per annum,* six-

teen hundred dollars, *like money*, in quarterly payments.

497 *There was thus secured upon this valuable property at the death of the testator an annual rent of $1,600, payable quarterly, in current money of the United States, with the privilege to the lessees to obtain from the lessors a fee simple title upon the payment of a sum sufficient to produce, in interest thereon at the rate of six *per centum per annum*, the sum of $1,600, like money, in quarterly payments. The sum required to produce this amount was $26,666.66⅔.

On the 30th April 1863 the two executors received this amount in Confederate money, and executed a deed releasing the rent and rent charge created by the deed of January 1st, 1839. At the time they received this large amount due in specie, Confederate money was depreciated to the extent of five and a half to one. Thus by this transaction, for a specie debt of $26,666.66⅔, secured upon ample and unquestionable security, and paying in quarterly payment $1,600 *per annum*, these executors received what was worth a little over $5,000. And, strange to say, it was thus collected, not to pay debts or legacies, but to be invested to produce a fund out of which annuities were to be paid under the will. This, at least, was the pretence. The will had directed the executors to invest in "productive stock, or in a safe loan on good real or personal security," any surplus funds remaining after payment of debts and legacies. But this sum was already invested; and what better investment or safer security could possibly have been made or desired? The bare ground had been assessed at upwards of $10,000, and the hotel built upon it had cost in good money $125,000. For a series of years it had rented for $10,000 *per annum* in gold. Thus the principal rent charge was secured on property worth at least $135,000; and the annual income of $1,600 had

498 a corresponding *income of $10,000 out of which to be punctually satisfied quarterly. It is difficult to conceive of a better investment or a safer one than this. To change such an investment, and to receive a specie debt, so well secured, in Confederate money, so greatly depreciated, cannot be excused or justified on any ground.

And the same may be said of the Morris debt, the Bradford debt, the Glazebrook debt, and the Midlothian company debt (and others, if there be any, of like character); all of which were amply secured upon real estate, and were collected by these executors in a currency depreciated at five or six to one; and this, too, at a time when they had on hand, from the sale of the Leigh street property and other sources collected by them, an enormous amount of Confederate money (after paying debts and legacies), and which they admit they could not loan out on either real or personal security, and were forced, for the want of better securities, to invest in Confederate bonds to the amount of $215,000. Such injudicious and reckless waste of the assets of this large estate cannot be justified or tolerated on any ground; and it is therefore needless to consider any of the grounds of excuse or justification offered by the executors or their able counsel. This court has in four successive decisions put the seal of its condemnation upon such conduct on the part of fiduciaries, and in cases of no such palpable recklessness and gross negligence as this discloses: and if there ever was a case where the rule *stare decisis* must prevail, it is the case before us.

In *Campbell's ex'ors* v. *Campbell's ex'or*, 22 Gratt. 649, 686, JUDGE MONCURE, speaking for the whole court, said: "The debt to the estate on account of these notes and bonds was, therefore, most amply secured;

499 *and it was a *devastavit* to call in that debt, or any part of it, for the purpose of making an investment in Confederate bonds. The investment act contained an express proviso that nothing therein contained should authorize the fiduciary to change the character of an existing investment. * * * As to the sums of $1,200 received of Pullins, and $2,500 received of Stephenson by the executors in the summer of 1863, in Confederate notes, which their counsel insist were received in due exercise of their trust, we think, for reasons already assigned, that they had no right to receive the said sums for said purpose, and therefore did not receive them in due exercise of their trust."

In *Williams' adm'rs* v. *Skinker & wife*, 25 Gratt. 507, it was said, "there may be cases in which an executor may be held justified in receiving Confederate money, greatly depreciated, for a debt payable in a sound currency, as where the necessities of the estate require it, where it could be used in payment of the debts of the testator, or where (there being no debts) legatees or the parties entitled to distribution consent to receive it, or where the security for the debt has become doubtful and the estate would be benefited by receiving even a depreciated currency." And it was held that the collection of an ante war debt, well secured on real estate (and not being necessary for the payment of debts), in Confederate money, in November 1862, without the consent of the legatees to whom it was secured and payable, was a *devastavit*, and, though no *mala fides* was attributed to the executor, he exceeded his powers as executor, in receiving Confederate money for a specie debt well secured, and, under the circumstances of that case, was held liable to the legatees.

500 *In *Moss & wife & als.* v. *Moorman's adm'r & als.*, 24 Gratt. 97, JUDGE MONCURE said (and all the judges concurred): "A personal representative is not warranted in receiving a specie debt due to the decedent's estate in a greatly depreciated currency—depreciated to the extent to which it was depreciated when the money was received in this case (1863)—unless there be something in the condition of the debt, or in the state of the demands of the creditors or legatees of the estate, or otherwise, which makes it to the interests of the estate that the debt should be so received."

In *Hannah's adm'r* v. *Boyd & wife & als.*, 25 Gratt. 692, JUDGE STAPLES, delivering the unanimous opinion of the court said: "The

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doctrine of this court as expressed in several cases, is that a fiduciary is not wararnted in receiving payment in a highly depreciated currency of a debt payable in gold or its equivalent, unless it can be made to appear (1) from the condition of the estate, or (2) the debtor, or (3) other circumstances, that the collection was expedient and proper. In the present case, nothing appears by the record, except the collection by the executor in Confederate currency in the year 1863 of a debt contracted long anterior to the commencement of the war."

Upon these repeated and successive decisions of this court, we are bound to conclude that the executors in this case, in receiving Confederate money as late as 1863 for debts payable in gold or its equivalent, and well secured upon real estate, have committed a *devastavit* for which they are personally liable.

And now the question recurs are the debtors who paid these debts in a depreciated currency, and the real estate pledged as security for these debts, and which has been released by the executors, still bound to make them good? This depends upon
501 the question *whether they have so participated with the executors in a breach of trust as to make them and the security pledged, still liable for the debt. The principle upon which a party dealing with a fiduciary is held responsible is that he has co-operated in the fraud of the fiduciary. *Hunter* v. *Lawrence's adm'r & al.*, 11 Gratt. 111. The fiduciary must commit a fraud and the third person must co-operate in that fraud in order to vitiate the transaction. In order to bind a party dealing with a fiduciary, there must be shown *direct collusion* between such party and the fiduciary to defraud the estate. Such collusion cannot be predicated upon the mere fact that a debtor pays his debt to one authorized to receive it in a depreciated currency, when the person to whom the debt is due is willing so to receive it.

The cases above referred to show that there may be many cases in which the executor would be justified in receiving such currency in payment of an ante-war debt; as where the emergencies of the estate or the condition of the debt requires it, where it can be used in the payment of debts and legacies, or where the security for the debt is doubtful (in the opinion of the executor) and where the estate would be benefited by receiving even a depreciated currency. Of all these things the debtor cannot be presumed to have any knowledge. He is not in any way responsible for the right administration of the estate. It is for the executor and not the debtor, to judge of the exigencies of the estate which may require him to collect a debt in a depreciated currency. When the debtor pays his debt to one who had a right to demand it, and is authorized to receive it, and is willing to receive it in a depreciated currency, the debtor is forever absolved of his obligation, unless there can be shown fraud and
502 *collusion between the debtor and the executor. The case is altogether different from the case of *Pinckard* v. *Woods*, 8 Gratt. 140, and the cases of *Cocke* v. *Minor*, and *Jones' ex'ors* v. *Clarke*, 25 Gratt. 246, 642.

In these cases there was a *dealing between the executor and third parties with the assets of the estate*—under such circumstances as imputed fraud to the executor, and brought home to the party dealing with him, notice of the fraud. Here was a dealing not between the executor and third parties in the assets of the estate, but between debtor and creditor who stood at arms length toward each other—between the debtor who had a right to pay his debt and the executor who had the right to receive it. It is true the debtor could not compel the executor to receive a depreciated currency in payment of his specie debt, and the executor ought to refuse to receive it. But if the executor chooses to receive it, the debtor may pay it; for the latter cannot be presumed to know the condition of the estate or the exigencies, which may be of such a character as imperatively to require the executor to collect the debts even in a depreciated currency. So that *the mere payment* of a well secured specie debt by a debtor to a fiduciary to whom it is due, and who is willing to receive it, does not constitute the debtor a participator in the breach of trust committed by such fiduciary in receiving a depreciated currency in payment of a specie debt. In such a case the debtor does not get possession of any of the assets of the estate. He is not, as in *Pinckard* and *Woods*, or *Jones* and *Clarke* (*supra*) a purchaser of a debt due the estate, and after the transaction, holds nothing belonging to the estate. He has simply extinguished a debt due the estate by payment of the debt to a party entitled to collect it in such currency (and at the
503 time of payment the only *currency in circulation) as the creditor is willing to receive. In such a case, in order to hold the debtor liable, there must be shown such facts and circumstances as amount to *fraud and collusion.*

In the case before us there is nothing to show fraud or collusion on the part of the debtors from whom the executors chose to receive in Confederate money specie debts due to their testator. And while we are bound to hold, upon the principles repeatedly declared by this court, that the executors in this case have committed a *devastavit* in collecting, as late as 1863, debts amply secured upon real estate, in Confederate money, depreciated to the extent of five to one, yet, for the reasons above stated, neither the debtors nor the real estate pledged for the payment of these debts can now be held liable to the legatees.

Much stress has been laid in the arguments by the several of the learned counsel upon the decision of this court in the case of *Myers* v. *Zetelle*, 21 Gratt. 733; and it is earnestly insisted that the principles therein announced must govern this case and relieve the executors from all liability. In *Williams' adm'rs* v. *Skinker & wife* (*supra*) I had occasion to distinguish that case from the case of an executor who received Confederate money for a specie debt well secured upon ample real estate, where there were no debts to pay, and where the money was received and invested in Confederate bonds, without the consent of the

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legatee to whom it was payable, and who at the time was within the lines of the Federal army. I refer to the discussion of the subject in the opinion in that case to show the manifest distinction between that case and the case of *an executor* collecting a specie debt well secured in a greatly depreciated currency.

It is sufficient here to remark that
504 the great point in *that case, the *pivot*, indeed, upon which the whole case turned, was the large and unlimited power and discretion conferred upon the agents, Myers & Cridland, by the most sweeping and unrestricted power of attorney that it was possible by the use of words to confer. This court, speaking of the power of attorney under which the agents in that case acted, said (p. 740): "The powers conferred by this instrument were of the most ample character. In addition to the enumeration of many particular powers, there are general clauses giving the widest scope to the powers conferred. For example, "to do, transact, execute and perform all proper, legal, equitable, needful and requisite acts, matters and things relative to any affairs, business and concerns of all and every kind whatever, none excepted or reserved; * * * it being meant and intended by me to authorize and empower my said attorneys, or either of them, to do every matter and thing for me in any right and capacity whatever which can possibly be devised or lawfully done, although the same may be omitted to be herein particularly set forth." And again: "and moreover, in and about the premises to do, transact, execute and perform such other acts, matters and things as shall be deemed needful and most beneficial, as fully and effectually to all intents and purposes *as I myself might or could do by being personally present.*" It is difficult to conceive how any form of words or use of language could confer more ample powers or larger discretion than are conferred by this power of attorney.

In *Myers* and *Zetelle* the whole case hinged and turned upon this power of attorney. It gave to Myers & Cridland the authority to do everything that Zetelle "*might or could do* if he had been personally present." So that in point of fact the only question
505 *was whether the agents had *fraudulently* exercised their extraordinary powers. No matter what they did, if it was done without a fraudulent purpose, without any *mala fides* imputed or proved, they must be absolved from all liability for loss resulting from their conduct, for their power and their discretion were unlimited and without restriction.

But an executor or administrator has no such power as this. Their powers (unless in the case of an executor specially conferred by the will of the testator) are limited and restricted by well settled rules of law. They of course have not the same power and the same discretion over the debts due to the estate as their testator or intestate. If they had they would be within the rule of *Zetelle* v. *Myers*. The testator or intestate may do what they please with their own. They may take in discharge of their debts a worthless currency, or may forgive every debt and surrender every obligation, but their personal representative cannot do this, or anything like it. The law requires them to collect the debts due to the estate, and they have no authority to release a solvent debt by taking one-fifth of what is due, as in this case. They have no authority to receive in payment of a specie debt a currency so greatly depreciated, unless it be shown that the emergencies of the estate require it, or the condition of the debtor makes it necessary, or that the estate will be benefited by receiving a depreciated currency which may be used in the payment of debts or legacies.

As was said in *Williams' ex'ors* v. *Skinker*: "While of course the executor has the general power to collect the debts due his testator, he certainly has no right to release a debt or to discharge a debtor of undoubted solvency of his whole obligation by receiving *a part*
506 *of *it*. He has no authority to receive in a depreciated currency a debt payable in specie, and well secured upon real estate ample in value to make it perfectly safe, unless the exigencies of the estate require it for the payment of debts (or where there are no debts) those entitled to legacies or to distribution consent to receive it."

I am, therefore, of opinion that the executors of Nicholas Mills (Charles S. Mills and Robert R. Howison) in collecting, in the year 1863, specie debts, secured upon real estate, in Confederate money, have committed a *devastavit* for which they are personally responsible to the legatees, and that so much of the decree of the chancery court as relieves them (the executors) from liability should be reversed.

I am further of opinion that neither the debtors who paid their debts in Confederate money to the executors, nor the real estate pledged for the security of their debts, can be held liable to the legatees; there being nothing in the record to show that the debtors fraudulently participated with the executors in the *devastavit* committed by them.

I am further of opinion that so much of the decree of the said chancery court as declares that the sale of the real estate known as the "Leigh street property," "made by the two executors, Robert R. Howison and Charles S. Mills, was valid, and that their deed conveyed a good title to the purchasers thereof," should be affirmed.

The cause should be remanded to the said chancery court to be further proceeded in, in conformity with the foregoing opinion.

The above is the opinion of CHRIS-
507 TIAN, J., delivered *when the cases were first considered by this court. To this he apppends the following—

NOTE.—Upon the re-argument of this case, at November term 1876, CHRISTIAN, J., was inclined to change his opinion, to the extent of holding the purchasers of the Exchange hotel property liable as well as the executors.

ANDERSON and BURKS, J's., concurred in the opinion of MONCURE, P.

STAPLES, J., concurred in the opinion of CHRISTIAN, J.

DECREE AFFIRMED.

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508 *Moore v. Fire & Marine Ins. Co.

[26 Am. Rep. 373.]

March Term, 1877, Richmond.

Absent, ANDERSON, J.

1. **Fire Insurance—Fraud—Forfeiture.**—A policy of insurance is for $5,000— to wit, $2,000 on buildings, describing them, $1,000 on machinery and fixtures, $2,000 on stock of grain, flour, meal, &c. And after prescribing what the insured shall do in case of loss, says: All fraud or attempt at fraud, or false swearing, on the part of the assured, or on the part of any person on his behalf, shall cause a forfeiture of all claim under this policy. And it concludes,—and this policy is made and accepted on the above express conditions. In an action by the insured on this policy it is proved that the claim of the plaintiff for his alleged loss on his stock of grain, &c., was fraudulent and false, and that the amount of loss designated in said proof sworn to by him was fraudulent and false so far as the said stock of grain, &c., was concerned. But it was not shown that his claim or his proof of loss as to the said buildings or machinery and fixtures was fraudulent and false—HELD: The forfeiture for fraud and false-swearing is incurred by the fraud and false swearing as to the grain, &c., and the insured cannot recover for any part of his loss.

2. **Same—Same—Provision for Forfeiture.**—Fraud on the part of the insured in making the contract of insurance will render it void without any express provision to that effect in the policy, and even though there may be such a provision therein relating only to fraud or false-swearing in connection with the preliminary proof.

This is a writ of error to a judgment rendered on the 3d day of February, 1873, by the circuit court of the city of Richmond in an action of *assumpsit* brought in said court by David W. Moore against the Virginia Fire and Marine Insurance company of Richmond, on a policy of insurance. 509 Issue was joined on the *plea of *non assumpsit*, and leave was given to introduce any evidence under that plea that could be introduced under any special plea. The jury found a verdict for the defendants on the issue joined; and thereupon the plaintiff moved the court to set aside the verdict and grant a new trial, which motion was overruled, and judgment was rendered for the defendants.

The plaintiff excepted to an opinion of the court given against him on the trial of the cause. It is stated in the bill of exceptions, that on the trial of the cause, the plaintiff, to sustain the issue on his part, offered the policy of insurance, which is set out *in haec verba* in the bill—

"By this policy of insurance," it proceeds to state "the Virginia Fire and Marine Insurance company of Richmond, in consideration of the receipt of $125, do insure David W. Moore and his legal representatives, $5,000 to wit:

"$2,000 on his new wooden, flour and corn mill building moved by water power, and wooden and gravelled lumber house connected and communicating, situate near the mouth of Shockoe Creek, Richmond, Virginia, and adjoined by his wooden plaster mill.

"$1,000 on machinery and fixtures of all kinds, including water wheel and millstones in said mill building; and

"$2,000 on his stock of grain, flour, meal, offal and empty barrels and bags in said mill building and lumber house; the same being on leased ground.

"Other insurance on mill, $2,000; m'ch'y $2,000; stock $1,000. Against all such immediate loss or damage as may accur by fire to the property specified, not exceeding the sum insured, nor the interest of 510 the *assured in the property, except as hereinafter provided, during one year to wit: from the 26th day of August, 1870, at 12 o'clock noon, to the 26th day of August, 1871, at 12 o'clock noon, to be paid in sixty days after the proofs required by this company shall have been received at the office of the company in Richmond, and the loss shall have been satisfactorily ascertained and proved, as required by the provisions of this policy."

Then follow various other provisions of the policy, which it is unnecessary here to repeat, until we get to that which directs what is to be done in the matter in case of loss, which is in these words:

"In case of loss the assured shall give immediate notice thereof, and shall render to the company a particular account in writing of said loss under oath, stating the time, origin and circumstances of the fire, the occupancy of the building insured, or containing the property insured, other insurance if any, and copies of all policies, the whole value and ownership of the property, and the amount of loss or damage, and shall also declare truly on oath that the fire and consequent loss and damage was occasioned without fraud or evil practice on his part, and that he has not done, or caused to be done, any act in violation of the provisions of this policy, whereby it would become void, and shall produce the certificate under seal of a magistrate, notary public, or commissioner of deeds, nearest the place of the fire, and not concerned in the loss, or related to the assured, stating that he had examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has without fraud sustained loss on the property insured to such an amount as the said official shall 511 certify. In no case shall the *company be liable, or the claim be for a greater sum than the actual damage to or cash value of the property at the time of the fire, or beyond such sum as will enable the assumed to replace or restore the property lost or damaged; a suitable allowonce will be required in settlement of any loss for depreciation from use or otherwise," &c. "If required the assured shall produce books of accounts and other proper vouchers, and all property saved and hereby insured, whether damaged or not damaged, and be examined under oath by any person

See monographic *note* on insurance appended to Mutual Assur. Society of Va. v. Holt & als., 29 Gratt. 612.

appointed by the company touching all persons relating to the loss, or, if deemed necessary by the company, shall produce said vouchers and property, and submit to a second examination, and subscribe such examination when reduced to writing," &c.; "and until such proofs and certificates are produced, and examination and appraisal permitted, the loss shall not be deemed proved or payable. All fraud, or attempt at fraud, or false swearing on the part of the assured, or on the part of any person in his behalf, shall cause a forfeiture of all claim under this policy." Then follow various other provisions, not necessary to be here repeated until we get down to the concluding one in these words: "And this policy is made and accepted on the above express conditions."

And the renewal thereof, which is in the words and figures following, to wit:

"RENEWAL.

"Premium $125.

VIRGINIA FIRE AND MARINE INSURANCE CO.,
Office Company's Building,
No. 1015, *Main St.,*
RICHMOND, August 26th, 1871.

"Received from David W. Moore
512 $125, being the *premium on $5,000 insured under the policy No. 19,526, which is hereby continued in force for one year, to-wit, from the 26th day of August, 1871, until the 26th day of August, 1872, at noon.

WILLIAM WILLIS, JR., Secretary.
No. 34,812. W. L. COWARDIN, President."

And proved the loss and destruction of the wooden flour and corn mill building and the machinery and fixtures and stock of grain, &c., named in said policy, on the night of the 24th December, 1871, by fire; also proved the value of the said building to be $2,791.89 at the time of the fire, and the value of machinery and fixtures to be $5,250 at the time of the fire; and also offered testimony tending to show that the value of the stock of grain, &c., at the time of the fire was $4,025, the plaintiff himself testifying on the trial to the truth and correctness of said valuations; also proved that he was the owner of the said property both at the time of the insurance and after its loss and destruction by fire; also proved that he had paid the premiums mentioned in said policy and renewal; and also that he had given notice of his said loss to the defendants on or about the 10th day of January 1872, rendering a particular account in writing of said loss as aforesaid, under oath, as required by said policy.

And thereupon the defendants, to sustain the issue on their part, proved that the claim of the plaintiff for his alleged loss on his said stock of grain, &c., was fraudulent and false; and that the amount of loss designated in said proof, sworn to by him as aforesaid, was fraudulent and false so far as the said stock of grain &c., was con-
513 cerned; but it was not shown that *the claim of the plaintiff, or his proof of loss as aforesaid, as to the said buildings or said machinery and fixtures, was fraudulent or false; and thereupon the defendants asked the following instruction:

INSTRUCTION REFUSED.

"If the jury shall believe from the evidence that the plaintiff attempted and intended a fraud upon the defendant by altering his books of accounts, or that he swore falsely and fraudulently to more or greater loss upon his stock than he had actually sustained in the account of loss rendered by him, then the said fraud or false swearing avoided and annulled his whole policy, and he can recover nothing in this action."

Which the court declined to give; but gave the following instructions:

INSTRUCTIONS GIVEN.

"If the jury believe from the evidence that the plaintiff, either in the making of his contract of insurance with the defendants or at any time thereafter prior to any default upon the part of the defendants in paying any loss incurred by fire upon the policy sued upon, attempted and intended a fraud, by false representations or false swearing, as to the amount and value of the property insured and destroyed, with a view to enhance his demand upon the defendants, they are instructed that such fraud destroyed all right upon his part to recover in this action.

"But if the jury shall believe that the plaintiff was guilty of no such fraud, prior to default by the defendants, but that subsequent thereto, with a view to
514 *strengthen his cause before the court, he has been guilty of attempting or intending a fraud, by altering his books of account, and by false swearing upon the trial of the cause, while such fraud or attempted fraud does not avoid and annul all claim upon his part under the policy, it is a material fact to be weighed by the jury in valuing the testimony and determining upon the validity of the whole claim and the amount of the loss alleged to have been incurred.

"The plaintiff, under the policy sued upon, had no right to demand of the defendants payment for any loss sustained by the destruction by fire of any of the property insured in the policy until after the termination of sixty days from the time of presentation of due notice and proofs of loss to the defendants, and until then the defendants could not be regarded as guilty of any default in compliance with their contract."

Judgment having been rendered against the plaintiff as aforesaid, he applied to a judge of this court for a writ of error thereto; which was accordingly awarded.

Ould & Carrington, for the appellant.

Crump, for the appellee.

MONCURE, P., delivered the opinion of the court. After stating the case, he proceeded:

The plaintiff in error, in his petition for a writ of error, assigns but two errors in the judgment, both of them being in the instruc-

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tions given by the court to the jury. The chief of these assignments of error in the instructions is,

515 *1st. In ruling that fraud and false swearing as to one independent subject of insurance avoided the whole policy.

There is a provision in the policy that "all fraud, or attempt at fraud, or false swearing on the part of the assured, or on the part of any person in his behalf, shall cause a forfeiture of all claim under this policy."

On the trial of this cause the defendants, to sustain the issue on their part, proved that the claim of the plaintiff for his alleged loss on his stock of grain, &c., named in said policy, was fraudulent, and false; and that the amount of loss designated in his proof of loss sworn to by him, was fraudulent and false, so far as the said stock of grain, &c., was concerned; but it was not shown that the claim of the plaintiff or his proof of loss as aforesaid, as to the buildings, or machinery and fixtures named in said policy was fraudulent or false.

The argument before this court of the counsel for the plaintiff proceeded upon the concession that there was such fraud and falsehood, so far as the said stock of grain, &c., was concerned—a fact which is certified in the record as having been proved on the trial, and was in effect found by the jury, and which, therefore, could not be denied by said counsel; and he admitted that, by reason of such fraud and falsehood, the plaintiff had forfeited all claim under the policy as to the said stock of grain, &c.; but he contended that as it was not shown that the claim of the plaintiff, or his proof of loss as aforesaid, as to the said buildings or said machinery and fixtures was fraudulent or false, the plaintiff had not forfeited his claim under the policy as to the said buildings or said machinery and fixtures. The said counsel also admitted that it was perfectly competent for the parties to argue that "all

516 *fraud or attempt at fraud or false swearing on the part of the assured, or on the part of any person in his behalf, shall cause a forfeiture of all claim under the policy," not only as to the particular subject named in the policy to which the said fraud or false swearing relates, but also as to all other subjects therein named.

The question to be now considered and decided therefore is one of construction merely; that is, whether, according to the true construction of the provision aforesaid, it was thereby intended that for a fraud, or attempt at fraud, or false swearing on the part of the assured, in relation to one only of several subjects embraced in one policy of insurance, as is this case, there should be a forfeiture of all claim under the policy, not only in regard to the particular subject aforesaid, but also in regard to all other subjects embraced in the policy, or only a forfeiture of all claim under the policy in regard to such particular subject.

The counsel for the plaintiff maintains the latter of these alternative constructions; while the counsel for the defendants maintains the former. Which of them is correct is the question which this court has now to solve.

We are all of opinion that the former is the correct construction, and that the forfeiture is total.

Supposing that to have been the true intention of the parties, we know not how it could well have been expressed in plainer language. "All fraud," &c., "shall cause a forfeiture of all claim under this policy." A more comprehensive word than "all" cannot be found in the English language; and it certainly has in this case the comprehensive meaning contended for by the counsel of the defendants, instead of the restricted meaning contended for by the coun-

517 sel for *the plaintiff, unless very strong reasons can be furnished for construing it in the latter sense.

So far from seeing any such reasons, we think there are strong reasons for believing that the real intention of the parties in making the provision aforesaid corresponded with the literal terms in which it is expressed, and that it was intended to create a general forefeiture as to all the subjects embraced in the policy, and not a forfeiture only as to the particular subject to which the fraud or false swearing might relate.

A policy of insurance is a contract, in the making of which, peculiar and great confidence must, of necessity, be reposed by the insurer in the insured. Good faith and fair dealing are especially required by the former of the latter. The former must mainly depend on the oath of the latter, and the account he may render to show the fact of the loss of the property insured, and the amount of the damage incurred by him, for which he claims indemnity under the policy. Where there is no good reason to suspect fraud or false swearing on the part of the insured, in making out his preliminary proof of loss, the insurer generally requires no further evidence to sustain the claim of the insured than his own oath and account, unless it be "the certificate under seal of a magistrate, notary public, or commissioner of deeds, nearest the place of the fire, and not concerned in the loss, or related to the assured, stating that he had examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has without fraud sustained loss on the property insured to such an amount as the said official shall certify." Such a certificate is generally provided for in a policy of insurance, and is provided for by the policy in this case.

518 *Now where, instead of there being no good reason to suspect fraud or false swearing on the part of insured in making out his preliminary proofs, it is proved that his claim for his alleged loss on one of the subjects insured was fraudulent and false, and that the amount of loss designated in his said proof of loss, sworn to by him as aforesaid, was fraudulent and false, so far as the said subject was concerned, is it unreasonable for the policy to provide that in such a case the insured shall forfeit all claim under the policy, not only as to the said

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subject, but also as to all other subjects included in the policy? Having been proved to be guilty of fraud and falsehood in regard to one of the subjects included in the policy, it is not unreasonable to suppose that he may be guilty of the like wrongs in regard to the other subjects included therein. He may be *so* guilty, and the insurer may have no means of providing such guilt. He may himself have been the author of the burning of which he complains, or he may have obtained the insurance for the very purpose of obtaining money by committing fraud and perjury in regard to one or more of the subjects insured. He was capable of either of these crimes, as he was capable of the crime which was proved upon him.

We therefore think the construction contended for by the counsel for the defendants is a reasonable one, and that it is the true one, especially as it accords with the literal terms of the provision in question.

The learned counsel for the plaintiff, in his argument in this case, referred to a great many decisions of other States and countries, for the purpose of sustaining his views of the case, and especially of the question we are now considering. He referred to no decision of this court, because there
519 is none on the question; *and he admitted that he could find no decision of any other court upon the very question in issue; which is certainly very strong negative evidence that no such decision exists. We have referred to all these decisions, or at least all of them, which, from the statement of the learned counsel in regard to them, seemed to be material to be referred to by us; and none of them seem to be in conflict with the views we have expressed. If any of them be so, we do not think they expound the law correctly, and we are therefore unwilling to be guided by them. The learned counsel argues, that though the policy in this case is a contract entire in form, being a contract by which "the Virginia Fire and Marine insurance company of Richmond, in consideration of the receipt of one hundred and twenty-five dollars, do insure (for one year) David W. Moore and his legal representatives five thousand dollars, to wit," &c. Yet he contends that it is a several contract in substance, because it proceeds to value severally the different parts of the subject insured as follows, to wit:

"2,000 on his new wooden flour and corn mill building, moved by water power, and wooden and graveled lumber house connected, &c.

"$1,000 on machinery and fixtures of all kinds, including water wheel and mill stones in said mill building; and $2,000 on his stock of grain, flour, meal, offal and empty barrels and bags in said mill building and lumber house," &c.

And he argues, that the provision of forfeiture in question must be construed precisely in the same way in this contract as a like provision would be construed in a several policy on each of the subjects insured. In other word, that this policy, though joint in form, is several in substance, and must
520 be construed accordingly, *as well in regard to the clause of forfeiture in question as to every other part of the policy. He applies to the case the rule of construction, *reddendo singula singulis*. That rule applies to many cases arising under policies of insurance, as some of the cases cited by the learned counsel show; but it does not apply to this case for reasons already stated, it being the manifest intention of the parties, as it is the express declaration of their contract, that "all fraud," &c., "shall cause a forfeiture of all claim under this policy." Where, in reason, is the difference between this case and a case in which the different parts of the same subject are included in one valuation, in regard to the clause in question? Suppose here the whole subject insured had been valued at $5,000, without any separate valuation of the different parts of the subject, and there had been fraud as to one of the parts only, would not all claim under the policy, as well to the other parts as to that part of the subject, have been forfeited? Certainly so, as all will admit. But where, in reason, is the difference between the two cases? What has the mode of valuation of the subject, whether it be joint or several, to do with the construction of the clause of forfeiture for fraud? Is not the evil of the fraud the same in either case? Is not the presumed intention of the parties in regard thereto the same in either case? And do not the literal terms of the clause apply alike to each case?

The policy in this case is an entire contract, notwithstanding the separate valuation of the different parts of the subject insured. That separate valuation was intended for the benefit of the insurers, and not the insured. The latter would have been benefited by letting the joint valuation of the whole subject insured remain at the sum of
521 $5,000 fixed in the policy, instead *of apportioning it among the different parts of the subject, as is afterwards done in the policy. By letting the joint valuation remain at the sum of $5,000, that would have been the only limit of the right to recover the actual value of any part of the subject insured which might be lost by any cause insured against. Whereas, by apportioning the amount of the joint valuation among the different parts of the subject, the valuation of each part is the limit of the right to recover for any loss sustained on account of such part. It cannot be supposed that either of the parties, much less the insurers for whose benefit alone the separate valuation was made, could have intended that it should have the effect of taking from them the benefit of the provision of the policy in regard to fraud or false swearing as to every part of the subject insured, except as to that part to which such fraud or false swearing might directly and specially relate. We have seen both reason and the literal terms of the policy confirm the view, that in every such case of fraud or false swearing, the forfeiture extends to all claim under the policy on account of the subject insured or any part thereof.

There are cases, it is true, in which it has been held, and no doubt properly, that a policy may be avoided as to a part of the subject insured, and valid as to the rest, even though the language of the policy declaring it to be void in such a case may seem to be general, and apply to the whole policy. As, for instance, in a case in which a policy declares that it shall be void for any subsequent alienation by the insured. There, if only a part of the subject be aliened, and the risk as to the rest cannot be increased by such partial alienation, the policy as to the rest would not be thereby avoided, but would re-
522 main in full force, in *pursuance of the presumed intention of the parties. But such a construction has never been applied, and can never be applied, to a case like this, of fraud and false swearing which pervades and avoids the whole policy. To such a case the maxim, *falsum in uno, falsum in omnibus,* applies. The insured, having been convicted of falsehood in regard to one of the subjects insured, will be considered as false in regard to all the rest. Suppose the parties had been asked when they entered into this contract, whether they intended that the forfeiture for fraud and falsehood of the assured as to one of the subjects insured, should be confined to that subject, or extend also to all the other subjects insured in the same policy, what would have been their answer? Can anybody doubt? Certainly the insurers would have answered, "the latter;" and surely the insured could not have answered otherwise; for that would have broken off the contract. The language of the policy, as already shown, literally accords with this obvious intention of the parties.

In regard to the first assignment of error, we are therefore of opinion, that the circuit court did not err "in ruling that fraud and false swearing as to one independent subject of insurance avoided the whole policy."

The other of the two assignments of error in the instruction is,—

2d. That the court extended the penalty of forfeiture to any false representation or false swearing as to the amount and value of the property insured and destroyed, made either in the contract of insurance, or at any time thereafter, prior to any default on the part of the defendant in paying any loss incurred.

The cases referred to in support of this assignment of error, to wit: *Ferris* v. *N.*
523 *American Ins. Co.*, 1 Hill *R. 71; and *Insurance Companies* v. *Weides*, 14 Wall. U. S. R. 375; seem to decide that the fraud or false swearing referred to in such a provision as the one now in question, standing in the same connection and location in the policy as does the provision here, is such fraud or false swearing only as relates to the preliminary proofs. Without deciding, but conceding (for the purposes of this case) that to be true, there can be no doubt but that fraud on the part of the insured in making the contract of insurance, would render it void without any express provision to that effect in the policy, and even though there might be such a provision therein relating only to fraud or false swearing in connection with the preliminary proofs. In delivering the opinion of the court in the case cited from 1 Hill 71, *supra*, COWEN, J., takes occasion to say, expressly, that a policy "is always avoided by the common law for the least want of good faith on the part of the assured."

We think there is no error in any of the instructions given by the court to the jury. The propositions of law therein announced are undoubtedly true. Nor were any of them mere abstractions. But if it can be said that any of them were such abstractions, the court would not on that ground reverse the judgment, there being no error in law in the instructions, and they could not have had the effect of misleading the jury.

Upon the whole, we think there is no error in the judgment, and are therefore for affirming it.

JUDGMENT AFFIRMED.

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524 *Moore v. The Fireman's Fund Ins. Co.

March Term, 1877, Richmond.

Fraud and false swearing by the insured as to one part of the subjects insured by the policy held to be a forfeiture of the whole policy, and that the insured cannot recover for any part of his loss.

This case was heard in this court, as well as tried in the court below, together with the preceding case. It is sufficiently stated in the opinion of the court.

Ould & Carrington, for the appellant.
Robert Howard, for the appellee.

MONCURE, P., delivered the opinion of the court.

This is a writ of error to a judgment of the circuit court of the city of Richmond rendered on the 3d day of February 1873 in an action of assumpsit brought in said court by David W. Moore against the Fireman's Fund insurance company, of San Francisco, on a policy of insurance. Issue was joined on the plea of non assumpsit, and leave was given to introduce any evidence under that plea which could be introduced under any special plea. The jury found a verdict for the defendants on the issue joined; and thereupon the plaintiff moved the court to set aside the verdict and grant a new trial, which motion was overruled, and judgment was rendered for the defendants.

The plaintiff excepted to an opinion of the court given against him on the trial of the cause. It is stated in the bill of excep-
525 tions that on the trial of the *cause the plaintiff, to sustain the issue on his part, offered the policy of insurance which is set out *in haec verba* in the bill. It is stated in the policy at its commencement that the said insurance company, "in consideration of $75, do insure David W. Moore to the amount of $2,500—"viz: $1,000 on his stock of grain, flour, meal, offal and empty bar-

rels, contained in his new wooden flour and corn mill building and wooden and gravel lumber houses connected and communicating, on leased ground, and adjoined by his wooden plaster mill; and $1,500 on his machinery and fixtures of every description, including water wheel and mill stones contained in said mill building, which is moved by water power, and is situate near the mouth of Shockoe creek, Richmond, Va." Then follow the other parts of the policy, in the ninth clause of which, being that which relates to the notice and preliminary proofs, is the following provision: "All fraud or attempt at fraud by false swearing, or otherwise, shall cause a forfeiture of all claim on this company under this policy."

This case was tried at the same time, in the same court, by the same jury, with the case just decided by this court of Moore *v.* Virginia Fire and Marine insurance company. The same proceedings were had in both cases in the circuit court; and this case, as well as that, was brought to this court by writ of error. The two cases involved the same questions, and were argued and heard in this court at the same time. The court is of opinion, for reasons stated in writing and filed with the record in that case and to be considered as filed with the record in this case also, that there is no error in the judgment in this case, and therefore affirm the same.

JUDGMENT AFFIRMED.

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526 *Dinwiddie County v. Stuart, Buchanan & Co.

March Term, 1877, Richmond.

1. **Appeal—Jurisdiction.***—An appeal from a decision of the board of supervisors of a county, rejecting a claim arising under an order of a county court, made in 1862, is properly taken to the county court of the county.
2. **Statutes—Special Authority.**—A county court acting under the statute authorizing county courts to purchase salt, is exercising a special authority, and it must appear from the record that the justices were summoned, or a majority were present, when a bond was executed for salt purchased, or the bond will be held to be null and void.
3. **Same—Statute of Limitation.**—Where a party presents his claim against a county to the board of supervisors, within the time limited by the statute, and they decline to take it up, and adjourn, and no entry is made of it until a subsequent meeting of the board, after the time of limitation, the statute will not be allowed to bar the claim.
4. **Same—Constitutionality.**†—Under the statute authorizing the counties and corporations to purchase salt to be sold to their people, the county court of Dinwiddie in 1862 makes a contract with S for the purchase of a certain quantity of salt, which is delivered by S. This is a valid contract, binding on the county of Dinwiddie as at present organized, and its payment is not prohibited either by the constitution of the state or of the United States.

This was a proceeding by Stuart, Buchanan & Co. to recover from the county of Dinwiddie the sum of $3,695.30, the price of salt delivered to the agent of said county in 1862. This salt was purchased under the authority of an act of the general assembly of Virginia, which is set out in the opinion of JUDGE CHRISTIAN. In May 1862, a majority of the justices being present, the county court made an order appointing
527 *Edward F. Williamson the agent of the county to purchase salt of Stuart, Buchanan & Co., who were the owners of the salt works in the county of Smyth. Williamson proceeded to act under this authority, and make a contract with said parties for the purchase of salt; which was fulfilled by them; and at the June term of the county court for 1863, the justices not having been summoned and a majority of them not being present, an order was made by the county court that the clerk of this court issue a bond for $3,695.30, payable to Stuart, Buchanan & Co., for salt to be delivered by contract, the said bond to be paid the 1st of January 1866, with interest at three *per cent.* thereon from the 1st of January 1863. By an order made on the 20th of July, the interest was increased to six *per cent.*

In pursuance of this order the clerk, on the 20th of July, executed a bond which is set out in the opinion of JUDGE CHRISTIAN.

On the first Monday in January 1873, Thomas G. Watkins, as counsel for Stuart, Buchanan & Co., presented their claim for the said debt to the board of supervisors of Dinwiddie; but they declined to act upon it, and no entry of the presentation of the claim was then made upon the books of the supervisors, nor was an entry of the claim made until the 3rd of January 1874. What occurred before the board of supervisors in January 1873, is stated by Mr. Watkins in his evidence, and is given by JUDGE CHRISTIAN in his opinion; and Watkins is sustained by the clerk and deputy clerk of the board.

***Appeal from Supervisor's Decision—Jurisdiction.**—See Bartons' Law Pr. (2d Ed.) 7.

†**Statutes—Constitutionality.**—The rule laid down in the second headnote of the principal case is discussed at length and reaffirmed in Pulaski County v. Stuart, Buchanan & Co., 28 Gratt. 872. In that case also the decision of the principal case in regard to the constitutionality of the act of May 9, 1862 and the validity of contracts made under it is reaffirmed. See also, Supervisors v. Catlett, 86 Va. 158; Chesterfield County v. Hall, 80 Va. 321; School Board v. Stuart and Palmer, 80 Va. 64; Stuart, Buchanan & Co. v. Greenbrier County, 16 W. Va. 95.

Sealed Instruments—Acknowledging Seal in Body of Instrument.—In Bradley Salt Co. v. Norfolk, &c., Co., 95 Va. 461 the discussion in the opinion of the principal case, pages 530, 531, concerning the validity of a paper exhibited in the record as a bond of the county of Dinwiddie is referred to as sustaining the proposition that by the Virginia statute in order to constitute a sealed instrument the seal (even if an actual seal and not a scroll) must be acknowledged in the body of the instrument.

On the 3d of January 1874 the claim of Stuart, Buchanan & Co. for the payment of the bond for $3,695.30, with interest at six *per cent. per annum* from the 1st of January 1863, was presented to the board of
528 supervisors *of the county of Dinwiddie, and was disallowed. And thereupon they gave notice of their intention to appeal to the county court. At the February term 1874 of the county court, the judge of that court being of opinion that it would be improper for him to try the cause, ordered it to be removed to the circuit court of the county. And the cause coming on to be tried in that court in April 1875, the parties waived their right to have a jury for the trial of the cause, and agreed that the whole matter of law and fact might be heard and decided, and judgment given by the court. And the court having considered the case, reversed the decision of the board of supervisors, and rendered a judgment in favor of Stuart, Buchanan & Co. for the sum of $3,695.30, with interest thereon from the 1st of December 1873 till paid, and their costs. And thereupon the defendants applied to this court for a *supersedeas;* which was awarded.

Jones, Bernard and *Epes,* for the appellants.
Ould & Carrington, S. D. Davies and *W. L. Watkins,* for the appellees.

CHRISTIAN, J. There are certain preliminary questions to be disposed of before we pass upon the merits of the controversy.

First, It is insisted in behalf of the appellants, that the appeal in this case was improperly taken to the county court, and that it ought to have been taken directly to the circuit court.

The decision of this question depends upon the true construction of the 10th and 12th sections of chapter 47, Code of 1873, page 442.

These two sections give the right of
529 appeal from a *decision of the board of supervisors, in general terms, both to the counties and to claimants against the county, *to the county court.* Appended to each section is a separate clause, following those clauses of the sections giving the right of appeal to the county court, which separate clauses are in these words: "Except that in case that where the decision complained of is upon an order made by the *county court or the judge thereof,* or in a case involving the constitutionality or validity of an ordinance or by-law of a corporation, the appeal *may* be taken to the circuit court having jurisdiction over said county or corporation."

I think it is plain that this clause was added in order to dispose of those claims which might arise upon orders made by the county courts as organized under the present constitution, and has no reference to claims arising upon orders of the county court made when composed of justices of the peace, which courts had been abolished by the new constitution when this act went into operation. The terms used in the proviso—"county court or judge thereof"—plainly indicate that this clause applies to the county courts as at present organized. Claims that arise under orders of the county courts which had been abolished might well be adjudicated by the county court as at present established, held by a judge learned in the law, as required by the present constitution. But it would be incongruous, and amount to a barren right of appeal, if the claim allowed or disallowed by the board of supervisors, which arose "upon an order made by a county court or a judge thereof," should be adjudicated by the same court or judge that made the order which is the foundation of the claim. In *such* a case it was proper to provide another tribunal to which the aggrieved party *may* appeal;
530 and in *such* *a case the legislature wisely provided another and independent tribunal, to-wit, the circuit court. This, however, is in terms an exceptional case, and applies only to cases where the claim arises upon an order made by the county court as at present organized, or the judge thereof. In these cases the right of appeal may be taken to the circuit court having jurisdiction of the county or corporation. In all other cases the right of appeal is to the county courts. In the case before us the claim *not* being founded upon an order of the county court as at present organized, or the judge thereof, but on an order of a county court composed of justices (which is no longer in existence), the right of appeal from the decision of the board of supervisors was properly taken to the county court, and comes within the general provisions of the statute, and not under the exception. I am therefore of opinion, that the appeal in this case was properly pending in the county court; and that the proceedings in that court, and afterwards in the circuit court, by appeal from the county court, were regular and proper, and that the case is properly now before this court for its final adjudication.

I am further of opinion, that the paper exhibited in the record as the bond of the county of Dinwiddie is invalid as a bond. Such invalidity, however, did not arise from any want of legal form. In form and legal effect it is a bond. It is an obligation, on the part of the county of Dinwiddie, to pay a sum certain to Stuart, Buchanan & Co. It is sealed with the seal of the court. The seal is acknowledged in the body of the instrument as follows: "being a bond created by order of the county court of Dinwiddie, made in pursuance of an act of the general assembly of Virginia," &c. This is equivalent
531 to saying, being *an instrument *under seal*; an is a sufficient recognition of the seal in the body of the instrument. But this paper is invalid, I think, as *a bond of the county,* because it does not appear from the record, that at the court at which it was executed the justices had all been summoned, or that a majority of them were present. Indeed, it appears that only three of these justices were present. It cannot be presumed, in a case like this, that the justices had been summoned. This ought to appear affirmatively, or the record should show that a majority was present. The court was acting upon a matter of special jurisdiction, conferred by a special statute, and upon a mat-

ter outside of its general jurisdiction.

The case does not, therefore, come within the doctrine declared by this court in *Ballard & als.* v. *Thomas & Ammon*, 19 Gratt. 14. Here the jurisdiction was special, fixed by a special statute, and must be exercised in accordance with the provision of the statute; that is, either when the justices had all been summoned, or when a majority was present. The proceedings in this case (the execution of a bond), not being a judicial proceeding within its ordinary jurisdiction, must be shown affirmatively to be strictly within the provisions of the statute under which the proceeding was had. I am, therefore, of opinion, that the bond referred to was invalid, *as a bond.* But I am further of opinion that, while the claim of Stuart, Buchanan & Co. cannot be asserted upon this bond, yet that is a valid claim, arising upon a contract made with the county court of Dinwiddie, for salt furnished said county, and the claim for which was recognized by said county in writing, and made a matter of record, as shown by the following order:

532 * VIRGINIA:

In Dinwiddie county court, June 16th, 1873:

Ordered, that the clerk of this court issued a bond for $3,695.30, payable to Stuart, Buchanan & Co., *for salt to be delivered by contract,* the said bond to be paid the 1st January, 1866, with interest at three per cent. thereon from the 1st January, 1863.

A copy. Teste:

A. C. WINSTON, C. C.

The record shows that when this order was entered a majority of the acting justices were present. This order is the foundation of a valid claim against the county of Dinwiddie, if the same was presented within the period of the statute of limitations. In a case arising upon a claim to be settled by the board of supervisors, it must be conceded that the time of the commencement of the action is the date of the presentation of the claim before the board. It is proved by incontrovertible evidence that the claim of Stuart, Buchanan & Co. was presented on the first Monday in December, 1873; which was at a period not barred by the statute of limitations. Mr. Thomas G. Watkins, one of the counsel of Stuart, Buchanan & Co., testified as follows:

On the first Monday in December, 1873, I, as one of the counsel for Stuart, Buchanan & Co., appeared before the board of supervisors of Dinwiddie county. As soon as the board met some member asked what business there was before the board. Some one then presented a long string of small claims against the county. I then got up and told them I had a claim of Stuart, Buchanan & Co., against the county. I unrolled a bundle of papers, 533 took the claim out, *and proceeded to read it aloud to the board. When I had finished, one member of the board (I did not know the name of any of them) asked me whether the amount of three thousand odd dollars was the principal or principal and interest both. I replied it was the principal. One of them asked me if I had the bond. I told him I did, and took it out; I also told him I had a copy which I intended to leave with the clerk, and then handed a copy to a member of the board, who I supposed was the president. I then told them I had the orders of the court appointing the agent, &c., and started to read one of them; but had hardly read a sentence of the order when some member of the board, got up, with a paper in his hand, and announced that a Mr. Carr, a member of the board, had died, read some resolutions, and moved that the board adjourn. I begged them not to adjourn, telling them I had come a long way and did not wish to return; when one of the board said that they had come a long way too, and their convenience ought to be consulted as well as mine. The commonwealth's attorney, Mr. Epes, then arose and told the board that they had a precedent for adjourning on account of the death of a member; and he hoped they would adjourn, so that he would have time to look into the claim of Stuart, Buchanan & Co. Mr. Epes advocated an adjournment, and I opposed it. After we had been talking for some time, the member of the board who had moved to adjourn renewed his motion. They wanted to adjourn indefinitely, without naming any day. Mr. Epes then proposed some day in February, 1874. I then asked to make it the 15th day of January, 1874; but Mr. Epes said he did not think it would give him time enough 534 to look into the case. *Finally, however, he agreed to 30th of January, 1874, saying he might be able to get ready by that time.

Before the board adjourned I asked that I might be allowed to spread the papers upon the record. Mr. Epes objected, saying he did not see what good it would do my case. The clerk then said, "I suppose I will be paid for it." I told him yes, to spread them on the record and send the bill to us, and we would pay for it. He then asked me to put them in the order I wanted them to come on the record. I took a pin and did so, handing them to him. I know that all the foregoing occurred on the first Monday in December, 1873. I most undoubtedly left with the belief that all the papers would be spread on the record on that day.

This testimony of the counsel prosecuting the claim is corroborated in every essential particular by the clerk of the board of supervisors. He says:

"On the first Monday in December 1873, Mr. Thos. G. Watkins, as counsel for Stuart, Buchanan & Co., appeared before the board of supervisors, and presented the claim of Stuart, Buchanan & Co., and orders of the court, and insisted upon their considering the claim and spreading it and the papers relating to the same, upon the record of said board. The board refused to consider the matter, and all other claims, but simply passed a resolution in relation to the death of one of its members, and then adjourned. Mr. Watkins left with me copies of the original papers relating to the claim of Stuart, Buchanan & Co., and which are set out in the

record of appeal. Mr. Watkins urged upon the board the consideration of the claim that day, and of spreading all the papers upon the record. All the papers were so left with me at that meeting on that day."

535 *He further says no entry of the application was made until the 3rd January 1874.

Now it is insisted by the learned counsel for the appellant, that it can be shown by the record alone that the claim was presented; and as the record shows that the date of its presentation was 3rd January 1874, it is therefore barred by the statute of limitations. I cannot concur in this view. If the board, by its own fault, prevented the recordation of the claim and the papers to sustain it, it cannot be permitted to take advantage of its own default, to defeat a claim presented in due time; and which ought to have been recorded, and would have been recorded but for its refusal. Under the circumstances the board will be estopped from pleading the act of limitations, and the court will regard the recordation of the claim to have been made when it ought to have been made—when the claim was presented, and the papers sustaining it were delivered to the clerk, to wit: on the first Monday in December 1873.

I am therefore of opinion that the claim of the appellees was not barred by the statute of limitations.

The decision of all the preliminary questions brings me to consider the case upon its merits.

This contract of Stuart, Buchanan & Co. with the county of Dinwiddie, for furnishing salt during the late war, like those cases known as the *Salt cases,* decided by a divided court at the last term, all have two features in common. They all arose out of contracts made by the several counties named, under an act of the legislature of what is called the Richmond government, in contradistinction of what is known as the restored government of Virginia, and which was passed during the war, to wit: on the 9th May 1862.

They all are denounced in common, as

536 contracts unlawful *and invalid, because made and entered into for the purpose of aiding (the so-called) rebellion against the United States, and therefore void under the constitution of the restored government of Virginia.

The authority under which the contracts now sought to be enforced were made, is an act of the legislature assembled at Richmond, passed May 9th, 1862, entitled "An act to authorize the county courts to purchase and distribute salt amongst the people and provided payment for the same;" and is in the following words:

§ 1. Be it enacted by the general assembly, that the courts of the several counties of this commonwealth, when a majority of the acting justices of the county is present, or when the justices have been summoned to attend to act upon the matter, are hereby authorized and empowered to order the purchase for the use of the people of said counties respectively, such quantities of salt as the said courts may deem necessary, and to provide for the payment of the same by county levies, or by loans negotiated upon the bonds of said counties, to be redeemed by county levies or otherwise.

§ 2. The said courts shall have power and authority to distribute the salt thus purchased amongst, or dispose of the same to, the people of their respective counties, in such quantities, upon such terms, and under such regulations as the said counties may prescribe.

§ 3. For the purpose of carrying out the provisions of this act, the said court may appoint or employ agents or commissioners, and take from them bonds with approved security, payable to their respective counties, in such penalties as such courts may pre-

537 scribe, *with condition for the faithful performance of their duties as such agents or commissioners. The bonds so taken shall be filed in the clerk's office of the court in which they are taken, and may be put in suit from time to time, by the said court in behalf of the said counties, or by any person injured by the breach of the said conditions.

§ —. This act shall be in force from its passage.

It was under this act that the contracts in the case before us, and those known as the Salt cases, are now sought to be enforced.

The learned counsel for the counties assail these contracts upon two grounds (common to all the cases). First, That the act of the legislature under which these contracts were made, was the act of a pretended legislature of an unlawful and usurped government; and that therefore all contracts made under this pretended authority of such legislation were illegal and void. Second, That all such contracts come within the prohibition of the present state constitution, which declares that "no county, city or corporation shall levy or collect any tax for the payment of any debt contracted for the purpose of aiding any rebellion against the state or the United States." Art. 10, sec. 10 Const.

These are the two grounds upon which these contracts are assailed by the counsel representing the different counties.

As to the first position upon which counsel claim that these contracts cannot be enforced, viz: that the contracts were made under the pretended authority of an unlawful and usurped government, it is sufficient to say that the Richmond government (so called), as well as the Confederate government, of which

538 it *formed a part, have been repeatedly recognized by this court, by the supreme court of the United States, and by the legislature of the restored government, as at least having all the attributes of a government *de facto. Walker* v. *Christian,* 21 Gratt. 291, 302; *Walker* v. *Pierce,* 21 Gratt. 722; *Newton* v. *Bushong,* 22 Gratt. 628; *Ruckman* v. *Lightner's ex'ors,* 24 Gratt. 19; *Texas* v. *White,* 7 Wall. U. S. R. 702, 733; *Thornington* v. *Smith,* 8 Wall. U. S. R. 1.

In *Walker* v. *Pierce,* JUDGE ANDERSON, speaking for the whole court, and referring to an act of the legislature passed in 1863, in reference to Confederate currency, says: "The plaintiff contends that this act has no force

or validity as a law. I do not concur in that opinion. It was the act of the legislature of the state, which had the power to enforce all its enactments. It had the force and effect of a law of the state, and was as obligatory on the citizens of the state as is any law passed by subsequent legislatures."

The opinion of CHIEF JUSTICE CHASE, in *Texas* v. *White*, is as applicable to that portion of this state now recognized as Virginia, as it was to the state of Texas. He says, page 733, "And yet it is an historical fact, that the government of Texas, then in full control of the state, was its only actual government; and certainly if Texas has been a separate state, and not one of the United States, the new government having displaced the regular authority, and having established itself in the customary seat of power, and in the exercise of the ordinary functions of administration, would have constituted, in the strictest sense of the words, a *de facto* government; and its acts, during the period of its existence as such, would be effectual, and in almost all respects valid. And to some extent this is true of the actual government of
539 *Texas, though unlawful and revolutionary as to the United States.

It is not necessary to attempt any exact definition within which the acts of such a state government must be treated as valid or invalid. It may be said, however, with sufficient accuracy, that acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person or estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual though unlawful government."

See also *Thornington* v. *Smith*, 8 Wall. U. S. R. 12; *Sprott* v. *United States*, 20 Wall. U. S. R. 459; *Huntington* v. *Texas*, 16 Wall. U. S. R. 402; *Evans* v. *City of Richmond*, Johns. Rep. Ch. J. *Chase's* Decisions 551; *Thomas* v. *City of Richmond*, 12 Wall. U. S. 349, 357.

Upon these authorities, as well as upon the general principals of international law, recognized by all writers upon the subject, from Grotius, its father, down to Wheaton and Phillimore, its latest expounders, the government, which had its seat at Richmond during the late civil war, was at least a government *de facto*, and all its acts in the ordinary administration of law, and in the interests of civil society, and for the protection of civil rights, were valid, and all contracts, arising out of the laws of such a government will be enforced, after the restoration of peace, to the extent of their just obligations unless it be shown that such laws were enacted, or contracts entered into, "for
540 the *purpose of aiding any rebellion against the state or against the United States."

Such laws and contracts are not only declared valid and binding by the decisions of this court and of the supreme court of the United States, but by the express statutes of the restored government of Virginia—whose constitutionality or validity have never been questioned in this court or elsewhere.

On the 28th February, 1866, an act was passed by the legislature of the restored government, the very object of which, as shown by its title and preamble, was "to give effect to certain acts, contracts and proceedings during the late war."

After reference to the existing and actual supremacy of the Confederate government and the state government as a part of it, it provides as follows: "And whereas doubts may arise whether any, and what acts, contracts and proceedings, done, made and had, and whether any, and what rights and titles acquired under the authority, or supposed authority, of the said governments, or either of them, are valid and effectual: Now, therefore, for the better protection of the people, and for preventing and settling such doubts,

"Be it enacted by the general assembly, that all contracts and agreements of every kind and nature whatsoever, whether executory or executed, all marriages, and all acts and proceedings whatsoever, made, done or had, and all rights and titles of every kind and nature whatsoever, accrued to or acquired by any person, under the authority of either of the governments aforesaid, or of any law established and recognized thereby, * * * and not inconsistent with the constitution and laws of the United States, or with the constitution of this state, and all such
541 contracts *and other acts and proceedings made, done or had, and rights and titles acquired, by any person under the authority of the said state government or the laws established or recognized thereby, * * * shall be held and taken to be, and to have been, at all times, of the same force, virtue and effect, in all respects, and none other, as if no question had ever been made as to the lawful authority of said governments, or either of them."

Thus it appeared that by an express enactment of the legislature of the recognized lawful and restored governments, all contracts made, and rights and titles acquired, under the authority of the Richmond government, or of laws established and recognized thereby, are expressly recognized as valid and binding, unless "inconsistent with the constitution and laws of the United States, or with the constitution of the state."

I come now to notice the second ground upon which the validity of the contracts under consideration is assailed by the learned counsel representing the counties in these suits, to wit: "and all these contracts come within the inhibition of the state constitution, which declares that 'no county, city or corporation shall levy or collect any tax for the payment of any debts created for the purpose of aiding any rebellion against the state or against the United States.'"

The question we have to determine is,

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were the debts contracted by these counties, in the purchase of salt for the use of its citizens, "created for the purpose of aiding any rebellion against the state or the United States?"

1st. Was there anything in the act itself which conferred the authority to make these purchases, which makes it liable to the 542 objection that it was passed for *the purpose of aiding any rebellion against the state or against the United States?

It has already been shown that it was a legislative act of a government *de facto*, and is as operative and valid as if it had been the legislative act of a government *de jure;* provided it is not subject to the objection that it was passed for an unlawful purpose. Certainly no such unlawful purpose is indicated upon the face of the act, either from its object or express terms. Its title indicates its purpose: "An act to authorize the county courts to purchase and distribute salt amongst the people, and provide payment for the same." Surely this is a lawful purpose. It cannot be held that the motive and object of the legislature in passing such act was unlawful and treasonable. The courts will not impute unlawful motives to the legislature where the terms of the act do not disclose the unlawful purpose. As was said by JUDGE DENIO, in *People* v. *Draper*, 15 N. Y. 533, 545: "If a given act of legislation is not forbidden by express words or by necessary implication, the judge cannot listen to a suggestion, that the professed motives for passing it are not the real ones. If the act can be upheld upon any views of expediency or public policy which the legislature may have entertained, the law cannot be challenged in the courts." See also *People* v. *Shepard*, 36 N. Y. 285, 289. The same doctrine is recognized by this court in *Dearing* v. *Rucker*, 18 Gratt. 427, 437, where it is said by JUDGE JOYNES, "Whatever we may speculate about the real purpose of the legislature, we must, if the language will allow it, impute to them a lawful purpose, and put such a construction upon the act as will make it consistent with the supreme law."

Adopting this rule of construction, it is plain that both the act itself, and the 543 contracts made under it, *were not unlawful. If these debts had been created under the authority of a lawful government (I mean lawful in the sense of the decisions of the courts), no question could have been raised as to their validity. And the true test of their validity is, were they enacted "for the purpose of aiding any rebellion against the state or against the United States."

The purpose of the act was "to furnish salt to the people of the commonwealth," not to soldiers in armed rebellion against the state or the United States, but to the people of the commonwealth—women, children, old men, non-combatants, slaves—all which make up the people of the commonwealth. This article of prime necessity, absolutely requisite for the preservation of human life and animal life, was to be furnished and distributed by the terms of the act through agencies of the civil government, and not the military. Neither military officers were called upon, nor military orders issued, to effect its distribution. It was distributed to the people through the civil courts, which had their existence and regular constitutional organization long before any "rebellion" was dreamed of; and it was the agents of those courts, and not of the military authorities, then at war with the United States, through whom these bounties of charity and humanity were dispensed to the people of the commonwealth. It is true that supplies of salt to the people preserved life and promoted health, and thus enabled them the better to resist invasion, and to carry on the war then waged between the north and south; and in this sense may be said to be remotely and indirectly in aid of the rebellion. The same may be said of every act of charity, of humanity and self-preservation done during a civil war. If I gave to a starving soldier a crust of bread or a cup of cold 544 *water—if a mother nursed and watched beside her sick or wounded son, seeking by her tenderness and care to restore him to health and strength—if amid the sickening horrors of the hospital and the prison angels of mercy were ministering to the suffering and the dying, and a single soldier be rescued from death—or a single wounded man is healed and sent back to the ranks—"aid" is given remotely and indirectly "to the rebellion." Are such acts as these—dictated by the instincts of nature and the appeals of our common humanity—to be denounced as unlawful and treasonable? Does the existence of a civil war loosen the bonds of society and destroy all natural and civil rights? Are the horrors of war to be increased and intensified by a total suspension of the administration of laws? Must anarchy rule supreme because a people are engaged in civil war? Does the maxim, *"inter arma leges silent,"* mean that all the laws of society and of self-preservation are to be silenced, and all natural rights and civil rights be destroyed, or yield to the laws of war?

Society has a right to protect itself. A state must provide for the health and the lives of its citizens. In doing this it but conforms to the law of nature and the law of God. "The law of nature," says Blackstone, "being coeval with mankind, is supreme in obligation to any other. No human laws are of any validity if contrary to this."

"The law of England (says Broom in his Commentaries on the Common Law), whether statutory or customary, professes to act in accordance with, and to be regulated by, certain great fundamental principles. It professes to act and adjudicate conformably to the law of nature, the law of God, to common sense, to legal reason, to justice and humanity."

545 *The enlightened jurisprudence of every civilized country recognize and enforce these doctrines. They have been repeatedly declared even by that tribunal (the supreme court of the United States) which would be very slow to legalize or validate any act intended to give aid to the rebellion.

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In *Texas* v. *White* (*supra*) JUDGE CHASE said: "Acts necessary to peace and good order, * * and other similar acts (and surely acts for the preservation of the health and life of the citizen come within the category), which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual though unlawful government."

In *Evans* v. *City of Richmond* (*supra*) the same judge said: "In *Texas* v. *White*, the supreme court held that the acts of a body exercising authority in an insurgent state as a legislature must be regarded by the United States as either valid or not according to the subject matter of legislation."

Again he says in the same case: "As to regulations concerning marriage, descents, conveyances of property—everything, in short, which belongs to ordinary business and the common transactions of life—its acts may be upheld as valid. But, on the other hand, those acts which were intended to give a sanction to proceedings of any body, corporate or otherwise, which would have a tendency to subvert the authority of the United States, cannot be so regarded."

In *Thomas* v. *The City of Richmond*, 12 Wall. U. S. R. 349, 357, MR. JUSTICE BRADLEY, declaring the unanimous opinion of the court, says: "Laws made for the preservation of public order (and *a fortiori* for the preservation of life and health), and for the regulation of business transactions between
546 man and man, and not *to aid or pro-
mote the rebellion, though made by a mere *de facto* government not recognized by the United States, would be so far recognized as to sustain the transactions which have taken place under them."

In *Thorington* v. *Smith* (*supra*) it was declared that "transactions in the ordinary course of civil society, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with the actual intent to further insurrection or rebellion."

The supreme court said in *Huntington* v. *Texas*, 16 Wall. U. S. R. 402, if the bonds in controversy "had been issued and applied to the support of schools, or the maintenance of asylums for the insane, for the deaf, mute or the blind, or to other purposes equally legitimate, the presumption would be in favor of the holders of the bonds, and not against them." * * * Whether the alienation of the bonds, by the usurping government, divests the title of the state, depends on other circumstances than the quality of the government. If the government was in actual control of the state, the validity of the alienation must depend on the object and purposes of it. If that was just in itself and laudable, the alienation was valid.

In conformity with these principles, so often and clearly defined by the decision of the supreme court of the United States, as well as by this court, it was perfectly competent for this *de facto* state government to pass the act of May 9th, 1862, under which those debts were created. The act itself makes no reference to war or state defence; its subject matter is in the interests of humanity and the preservation of society itself. Its professed object, as shown in its title, is to give relief to the needy, helpless, non-combatant people, and not to the maintenance of
547 a military *force. These professed motives being not only innocent, but commendable, we ought not to entertain a suggestion that these were not the real motives. Every presumption will be made in favor of a lawful purpose. It must be proved that the actual intent in the passage of the act was "to promote the rebellion," and that these debts were created for the purpose of aiding rebellion against the state or the United States. In these cases no such intent is proved; but, on the contrary, it is plain that the act was passed for the lawful and humane purpose of furnishing to the people that article of pure necessity, without which all human life and animal life must perish. It matters not that the scarcity of salt was produced by the war. Whether by war, or pestilence, or famine, or earthquake, or flood, or fire, or any other great calamity; if this great necessity for the preservation of health and of life existed, it was the duty of the state to supply it to its citizens; and every contract made for this lawful and humane purpose is as legal and valid, as sacred and binding, as any contract ever enforced in a court of justice.

I should say therefore, both upon principle and authority, that the obligations assumed by the counties for the purchase of salt, under the act of May 9th, 1862, are valid, and must be enforced.

Now at this point, before entering upon a discussion of further views enforced by the learned counsel for the appellant, with much ingenuity and ability, I desire to say, in justice to my brother ANDERSON, that in the opinion I wrote, after the adjournment of the court, carrying out my oral opinion, delivered from the bench in the cases known as the *salt cases*, decided by a divided court in 1876, I unintentionally gave to his language an interpretation not intended by him.
548 From *his explanation afterwards, I am satisfied I had misconceived his meaning, and I now take pleasure in repairing any injustice which may have been done him in the course of that opinion arising from such misconception; but I am constrained to say, most respectfully, that his views, as modified and explained, do not meet my concurrence, and admitting his premises to be correct, would lead my mind to a contrary conclusion.

But it is urged by the learned counsel for the appellant, in his petition of appeal, that "the present county of Dinwiddie *is a different county* organization from that whose agent contracted the debt, and is no wise bound therefor."

If I understand this position it is this—that the counties which made the contracts are not the same counties which are now called upon to meet them by payment. How have they lost their identity? When and where?

The *state* has certainly not lost its identity

by the events of the war. That it has not has been solemnly decided by this court. In *Higginbotham's ex'x* v. *Commonwealth*, 25 Gratt. 627, the lamented JUDGE BOULDIN, speaking for the whole court said, page 635, "Virginia has not lost her identity by the loss of forty-eight counties and the inhabitants thereof. Impoverished, crushed and dismembered, like a multitude of her faithful defenders, she is Virginia still, and so I trust she will long remain. I am wholly unwilling to admit that her identity has been lost."

Now if dissolution cannot be predicated of the state, how can it be of the counties? Can the state live and the counties perish? Can the state "remain the same" and the counties change—can the state retain its identity and the counties lose their identity?

549 *What is meant by the declaration that there is "a want of identity between the contracting party and the paying party?" The contracting party is the county of Dinwiddie in January 1862. Is not the county of Dinwiddie the same county in January 1862 as in January 1866 or in January 1876. Surely it will not be contended that its identity is destroyed because its citizens in 1862 are not the same in 1866 or 1876. If any change in the actual residents of a county could destroy its identity, it would lose its identity every day. The county of Dinwiddie continues to be the county of Dinwiddie, however its inhabitants may change either by increase or decrease. It is the identical county now that it was before any of its inhabitants were born. This court has more than once decided that not even an excision of a part of its territory and incorporation of a part of its inhabitants with another county or municipality destroys the identity of a county. *Harrison Justices* v. *Holland*, 3 Gratt. 247; *Wade and others* v. *City of Richmond*, 18 Gratt. 583. Within a few years past one-third of the population of the county of Henrico has been incorporated with the city of Richmond. Surely no one will contend that thereby the county of Henrico has lost its identity. It is still the same county that it was before. How can it be said, then, that the county of Dinwiddie as it stood in January 1862 is not the same as it stands at the present day. Its territory is the same, its population is but little changed, and substantially the same body of laws govern it now as in 1862.

The declaration that there is "want of identity" between the counties during the existence of the war and after its close is a declaration in another form that the counties perished or lost their identity during the war. It is admitted that the states did

550 not; and *a *fortiori* the counties did not. If the state retained its identity, the counties *a fortiori* remained the same. But if by the argument that there is a "want of identity between the contracting party and the paying party" it is meant to assert that a county within the territory of a state, while it was one of the Confederate States, is not the same county after that state has, by the destruction of the Confederacy, been restored to the Union, then all I have to say is, why is it that in the cases involving the same question, decided by this court and by the supreme court of the United States, no such ground has ever before been even hinted at either by court or counsel.

In *Jones* v. *City of Richmond*, 18 Gratt. 517, the city of Richmond made during the war, upon the eve of the evacuation, a contract to pay its citizens for all spirituous liquors which as a measure of peace and order, it was deemed necessary to destroy. This contract was enforced after the war. It was never hinted that the city of Richmond which made the contract was not the same city of Richmond which was required to pay the damages. There was the same "want of identity" between Richmond during the war and Richmond after the war as there was between the county of Dinwiddie during the war and the county of Dinwiddie after the war. So in the case of the *Town of Danville* v. Pace, 25 Gratt. 1, the bonds, the subject of controversy, were issued by the town of Danville during the war. Judgment was given upon these bonds after the war, which was affirmed by this court. It was never suggested by court or counsel that there was any "want of identity" between Danville during the war and Danville after the war, or that these contracts made by these towns during the war could not be enforced against them after the war. In both

551 *cases the court was unanimous. See also *Miller & Franklin* v. *City of Lynchburg*, 20 Gratt. 330, in which JUDGE ANDERSON delivered the opinion of the court. So in the cases of *Evans* v. *City of Richmond* and *Thomas* v. *same* (*supra*), it never was hinted by CHIEF JUSTICE CHASE or MR. JUSTICE MILLER, who delivered the opinion of the court in these two cases respectively, that the City of Richmond which issued the "small notes," the subject of controversy, was not the same city of Richmond against which payment was to be enforced; but the case turned upon the ground that the purpose for which they were issued was unlawful, because in aid of the rebellion.

The fact that these suits were brought against municipalities can make no difference. The counties must be governed by the same principles which control these cases.

The argument that these contracts must now be declared invalid, because the county of Dinwiddie is a different county from that which made the contract, is but another form of asserting the proposition, that the counties and county courts during the war had no power to bind the counties or their people after the war. What are the consequences which would flow from the establishment of such a doctrine? Have they been seriously considered? What becomes of the judgments of the county courts of that time? Are they binding now? Or was there such a want of identity between the county courts that pronounced the judgments and the county courts of 1866 that the latter could not enforce them? Are the roads which the county courts established in 1862 no public roads in 1866? Are the amounts awarded for condemnation

in 1862 collectable now? Are the roads which were discontinued by county courts in 552 1862 still public *roads, notwithstanding their alleged discontinuance? Are the probates which they allowed during the war valid now? Are the wills which they admitted to probate then valid instruments now? Are the deeds recorded in the clerks' offices of these courts legally recorded? Are the recognizances taken enforceable now? Are the administrations which they committed to the hands of sheriffs, administrators and executors lawfully in the hands of these parties now? Are the levies which they laid unlawful; and can the aggrieved citizen recover the unlawful tax he has paid? Are the bonds of public officers taken by these courts invalid and no longer binding? How can these questions, and a hundred others, be answered, if it be true that the counties of this state lost their identity during the war, and are not the same counties now that they were during the war? Are not these questions all solved in the confirming act of February 28th, 1866? And was it not the very purpose and object of that act to remedy the very evils which would arise from the doctrine asserted? The whole scope of the act is to carry out what its title asserts—"to give effect to certain acts, contracts and proceedings during the late war." So even if it be true that the counties now are not the same counties which made the contracts (to which I utterly dissent), yet, under the express terms of the confirming act, these contracts are still binding upon the counties and people thereof.

Public necessity, public morals, and the interest of good government require that this court shall carry out and firmly maintain the confirming act of 1866, passed by a legislature of our wisest and best men, at a period when anarchy would follow war, and when it required the voice of law to dispel chaos and reproduce order.

553 *It is impossible to estimate the disastrous consequences which would flow from a failure to carry out and enforce these wise enactments.

Titles would be destroyed; estates would be ruined; probate of wills would be invalid; the acts of administrators, executors, and guardians and other fiduciaries would be mere nullities. The bonds of matrimony would be dissolved, or marriage made adulterous and offspring illegitimate; the punishment of felons would be made false imprisonment or their execution murder: In a word, the bonds of society would be loosened and anarchy would reign supreme.

But it is further argued by the learned counsel for the appellant, that this and like debts were created in consequence of secession, and grew out of the war, and cannot therefore now be enforced; that the action of the county court to supply the people with salt was rendered necessary by the war, and was necessary to encourage and strengthen the people to maintain the war for the establishment of the Confederacy.

This is carrying the doctrine far beyond that declared by the Federal courts. If anything is settled by the decisions of the supreme court of the United States, it is that the validity of the legislation, or other acts during the war, depends upon the character of the act, and not upon the fact that the particular legislation was consequent upon the events of the war, or flowed from the actual condition of things. The Federal tribunals have always applied the test to the act which was done, or the legislation which was enacted, and have never stigmatized any act, or any legislation with illegality, merely because secession made it necessary, or because, if there had been no secession, the act would never have been done.

554 Will *our courts establish a more stringent or sweeping rule than the Federal courts?

The only case relied upon by the learned counsel to sustain this position, is that of *Leake* v. *Com'r of Richmond*, 64 North Car. R.; opinion of CHIEF JUSTICE PEARSON since overruled.

This is the only case referred to, to sustain the view suggested; and this case is opposed by the whole current of decisions in the Federal courts, in this court, and in the courts of Tennessee, Alabama, Mississippi and Texas.

I am the more confirmed in my opposition to these views of the learned counsel, because their logical conclusion and legitimate results would inevitably tend to a repudiation of all debts, public and private, contracted during the war. Why should not the same principle be applied to a debt contracted by an individual during the war, as to a debt created by a corporation?

If a contract, made by a corporation, which "was rendered necessary by reason of secession," cannot now be enforced, why should we enforce against individual contracts which also "were rendered necessary by reason of secession?" Was not the debt enforced in the case of *Mann* v. *Dozier*, 24 Gratt. 1, a contract which "was rendered necessary by reason of secession?" Are not all suits upon bonds given to substitutes which have been enforced since the war, suits upon contracts "rendered necessary by reason of secession?" Could it not be said, indeed must it not be said, of all contracts made for the payment of Confederate money, that they "were rendered necessary by reason of secession," and that "had there been no Confederacy, no such contract could have been made?" And yet we know that such contracts, by the thousand.

555 *have been enforced by this court and by every other court in the commonwealth. We hold that the contracts of individuals "which were rendered necessary by secession," and which would never have been made "had there been no Confederacy," are binding and valid. How can we say that when such contracts are made by corporations and counties (which are quasi corporations), that they are invalid and void. There is no difference in principle. And indeed this court, at its last term, held

that a corporation (the Eastern Lunatic Asylum) was bound for a claim which originated during the war, and which never could have arisen "if there had been no secession," and no "Confederacy." See *Eastern Lunatic Asylum* v. *Garrett*, 27 Gratt. 163. I can see no reason why a different rule is to apply to corporations than to individuals. I would excuse neither from the payment of their just obligations, if lawful in themselves.

The constitution itself makes a distinction between contracts made by the state while under the dominion of the Confederate government and those made by cities, counties and corporations. Payment of the former is expressly prohibited; but payment of the latter is only prohibited when they are debts created for the purpose of aiding any rebellion against the state or the United States.

The constitution makes no other inhibition. The very distinction which it makes between debts created by the state and those created by counties and corporations, shows that whenever such debts are lawful in themselves they may still be enforced. It does not prohibit payment of such as "were rendered necessary by secession," or such as would not have been contracted "if there had been no secession and no Confederacy;" but the inhibition is against the
556 payment *of all debts *"created for the purpose* of aiding any rebellion against the state or the United States." Unless it comes within this category it is a lawful contract and must be enforced. I cannot add another prohibition which the constitution does not recognize.

These considerations lead my mind to this conclusion: that whenever it appears from the facts clearly proved, or from fair and legal inferences from the facts, that the contract of the parties was made "for the purpose (that is, with the intent) of giving aid to any rebellion against the state or the United States," I should declare the contract invalid and void; but where this does not appear, I should uphold and enforce it; and, as I have already indicated, that a contract made by counties and corporations under act of May 9th, 1862, is not subject to the inhibition of the constitution, but is lawful and valid and must be enforced.

The counsel for the appellant relies strongly upon the cases of *Chalkley* v. *Commonwealth*, 20 Gratt. 404, and *De Rothschild* v. *The Auditor*, 22 Gratt. 44, as ruling this case.

The argument is based upon an entire misconception of the principles decided in those cases; and they have no application to the case before us. In those cases it was held that the present state government (the restored government, so-called) was not the successor of the Richmond government, and was not responsible for debts contracted by that government; and that the present state government was inhibited by express terms of the constitution, from paying any debt contracted by the Richmond government during the war. Art. 10, sec. 10.

This positive inhibition of the constitution must be observed: but the same sec-
557 tion only prohibited the *payment by counties and corporations of such debts as were created for the purpose of aiding the rebellion.

I am of opinion, for the reasons herein stated, that the contract of the county of Dinwiddie with Stuart, Buchanan & Co., for furnishing salt to the people of that county, during the late war, was a lawful contract, and must now be enforced.

But I am further of opinion, that said contract was one solvable in Confederate currency, and should be scaled to its value in gold at the date of the contract, to wit, on the 29th May, 1862.

ANDERSON, J. The contract in this case, it is claimed, was made by authority of an act of the Confederate state of Virginia, passed May 9th, 1862. Unless the power was vested in the county court by an act of the legislature, it could not bind the people of the county by contract.

The county court is invested with judicial power by the constitution; but not to make contracts for the county, or the people of the county. It is in no proper sense, the representative or agent of the people; was never constituted such by the voice or act of the people; and can only be authorized to bind the people by act and authority of the legislature of the state. It is a delegated power.

Was the contract in question made pursuant to the authority given by the Confederate legislature? The first section, under which the authority is claimed, is as follows: County courts are "authorized and empowered to order the purchase, for the use of the people of said counties respectively, such quantities of salt as the said courts may deem necessary, *and to provide for the payment of the same* by county levies, or by loans negotiated upon the bonds of said counties,
558 to *be redeemed by county levies or otherwise." Upon a fair construction of this act it was evidently intended by the legislature in vesting this power in the county courts to contract for the purchase of salt, to invest them also with power to provide for its payment; and it was evidently contemplated that when providing for the purchase, the county courts should at the same time provide for its payment by making a levy; or, if they determined to purchase for cash, and to raise the money by negotiating a loan on the bonds of the county, they were at the same time required to provide for the redemption of the bonds, by a levy, "or *otherwise*." The second section authorizes them to dispose of the salt to the people of their respective counties, under which clause they had authority to sell the salt to the people of the county for cash; as the county court of Dinwiddie county did. And in that case they might have met the requirement of the 1st section, in providing for the payment, by requiring the proceeds of the sales, to be applied to the redemption of the county bonds, or in paying directly for the salt, if no bonds had been issued; or if there was any better mode, in their opinion, by the terms "or otherwise," they were authorized to adopt it.

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But the provision for payment, whatever in their discretion they might adopt, was to be made when they ordered the purchase, and not to leave it to their successors to levy, and future generations to pay for it. And this, it seems to me, is a qualification of the power to *purchase,* with which they were invested by the act. I do not think it was intended or contemplated by that legislature, to invest the county courts that made the contract, with power to bind future county courts, and certainly not county courts which were subordinate to the government of the United States, to order *a levy for their payment, after the Confederate legislature, from whom the power emanated, had become extinct. That legislature itself had no power to invest them with such authority. 559

If this construction is correct, then to order the purchase of salt, upon the bond of the county, payable at a remote period, reaching beyond the probable continuance of the war, without providing in any way for its payment, as was done in this case, was a violation of the spirit, if not the letter, of the law. It was a speculation, in which it was not in the power of the county court, under this act, to involve the people of the county. And as the appellees co-operated with the county court in thus *abusing,* if not exceeding its authority, indeed it appears to have been done at their instance and request, they ought to bear the consequences; and the present population of Dinwiddie county ought not now be subject to a levy to pay for salt which the people of the county, at the time they received it from the agents of the county, paid for in cash. But if I am mistaken in this view, and the acts of the county court of Dinwiddie in relation to the contract in question were in conformity with and in pursuance of the act of the Confederate legislature relied on, the contract ought not to be enforced on other grounds which I will not consider.

I do not hold that the legislature which passed the act aforesaid was a pretended legislature of "an unlawful and usurped government." To the contrary, I am of opinion that it was the legislature not merely of a *de facto,* but of a *de jure* government; and that all its acts within the limits of its authority, under the constitutions of the state and the Confederate States, were valid and binding on the citizens of Virginia until the fall of the Confederacy and the submission of the *state to the power of the United States; and that then such of its unexecuted acts of legislation and administration as were the result of secession, and in the interest of the Confederacy, and for its support and maintenance in its resistance to the power and authority of the United States, became inoperative and void. I have, therefore, no fault to find with the decision in *Walker* v. *Pierce,* 21 Gratt. 722, and see no cause to change or modify the opinion I gave in that case. 560

By the ordinance of secession the seceding states dissolved their relations with the Federal government and the other states of the Union. The states thus withdrawing from the Union, entered into new political relations with each other, forming a political entity, or body politic, known as the Confederacy, which they invested with powers of sovereignty, for their government and protection.

The government of the United States refused to acknowledge the right of the states thus to dissolve the bonds of union, to absolve themselves from their obligations to the Federal government, and to form a confederation independent of the Union; and resolved to resist it with arms.

The Confederate States resolved to maintain their right to withdraw from the Union to form a new Confederate government for themselves, and to resist force with force. Then ensued the most gigantic and bloody war of modern times.

The Confederate States, after a brave and gallant resistance, for a period of four years, were obliged to succumb from exhaustion, to a power so vastly superior in numbers, and material resources, whose navy covered the seas, and whose armies were recruited from the four quarters of the globe, and whose arsenals *and commissariat were furnished by a world-wide commerce. 561

During the four years existence of the Confederacy, a currency was created, based alone on faith in the Confederacy, which became the almost exclusive circulating medium of all the states within its limits and under its control. And contracts were entered into by the Confederate, and state governments of the Confederacy, and by the counties and municipalities of the Confederate States (such as the contract sought to be enforced in this case) with individuals and corporations which were not fulfilled before the overthrow of the Confederacy. These contracts are vast in amount, and various in character. There are contracts which were made with the Confederate government itself, through different agencies. There are contracts made by state governments of the Confederacy, in diversified forms. And there are contracts made by counties and municipalities of the states in the Confederacy, under authority of laws passed by a Confederate state legislature. These are large in amount, and relate to diversified subjects. Many of the counties and municipalities, during the war, under authority of acts of the legislature, issued promissory notes, which were designed to supplement the circulating medium, vast amounts of which are still outstanding and unredeemed. Many of the counties under the same authority borrowed Confederate money, to be used in the purchase of supplies for soldiers and soldiers' families, or for the poor generally; or for the purchase of salt for sale or distribution to the people of their several counties, or entered into contracts for the purchase of salt. These were of no higher obligation than either of the former. All these acts of the legislation and administration, whether *by the state, or by the counties, by authority of the state, were binding at the time. But a grave question arises, are they operative now, and can they be enforced after the Confederacy has ceased 562

to exist, and has no representative or successor? Or have those contracts which were made in the interest of the Confederacy, and for its support and maintenance, by the members of the Confederacy, or the subordinate political divisions of the Confederate states, by authority of the states, like the contracts made directly with the Confederate government—the head—become extinct by the death of the Confederacy, without a successor or representative?

It is true the states are indestructible, whilst the Confederacy was transient. It had but a fleeting existence, though it has left its impress on the world's history, which will be ineffaceable by time. But the states remain —though not as Confederate States, nor as a part and parcel of the organized system of resistance to the power and authority of the United States; but as constituents of the United States. They have abrogated and annulled their acts of secession, and have yielded to the demands of the Union, and are a part of it. Is there not an incongruity in holding them, the states or the counties, in the courts of the United States, state or federal, bound to fulfil contracts which were entered into by them as members or parts of a Confederacy which was organized in resistence to the power and authority of the United States, for the support and maintenance of that Confederacy, after they have been reduced to submission to the power of the United States, and have been rehabilitated in the government of the Union?

I do not believe that a precedent can be found in the history of civil wars **563** amongst civilized nations, *or of wars between federal states, of the successful belligerent undertaking to pay the war debt of the conquered party contracted in resisting its authority. We have been referred by counsel in argument to the civil wars and revolutions in England, and were told that the monarchy under Charles II undertook to pay the debt contracted by Cromwell. We are told by the historian hume that the great debts of the *republic* were thrown upon the king after the restoration (Hume's History of England, vol. vi., p. 366, edition——), but not the war debt which was contracted by parliament in the subversion of the regal power which was now restored in the person of Charles II. It is much more likely that the debt contracted by Charles I in the maintenance of the throne would have been assumed by the government which was restored in the person of his son. Indeed I think it will be found that any debts contracted by the king in his unsuccessful and unhappy resistence to the power of parliament were never assumed and paid by the republic under Cromwell which succeeded the monarchy. I think it will also be found that William and Mary, who by a successful revolution soon after the death of Charles II were raised to the throne, from which James II, his successor, was expelled, never undertook to pay the debts contracted by James in the wars waged by him in his fruitless efforts to overthrow their government and to regain what he had lost.

Nor can it be maintained, I think, that the government of the United States was bound to assume and pay the debts contracted by the states or counties of the Confederacy in resisting its authority. And if not, the states which compose the United States and which are constituents of that government, and the subdivisions of the states, the **564** counties, which are in *the protection of the United States government and owe obedience to its constitutions and laws as supreme, are not bound to pay such debts.

If it were competent for the county courts, during the war and when they were subordinate to the Confederacy, to bind the present county courts, which are subordinate to the Union, to make a levy for the payment of debts contracted by them, not in the ordinary course of legislation or administration, but which became necessary by reason of secession and the organized resistance to the power and authority of the United States, and for its maintenance, then we have the anomaly of a county court attached to the Union and a part of it, and subordinate to it, levying a tax on citizens of the United States to pay a debt which was contracted by a county court of the Confederacy, for citizens of the Confederacy, in the interest of the Confederacy, and to maintain it in its hostility to the United States. Such an anomalv can find no support in reason nor in the laws of nations.

The county court, as we have seen, is not the agent or representative of the people of the county to bind them by contract. If it has such power it is a delegated power, and can only be delegated to it as the organ of a *quasi* corporation by the sovereign legislative power of the state. The county, as a *quasi* corporation, is a political entity, which exists only in contemplation of law, and must derive its character from the law which gives it such existence. It was, prior to the 17th of April 1861, a *quasi* corporation of the Union, because it derived its corporate character from the laws of a state which was a member of the Union, and it owed obedience to the constitution and laws of the United States as the supreme law of the land. **565** It then ceased to be a corporation *of the Union, because the people of Virginia, in convention assembled, on that day passed an ordinance repealing and abrogating the ordinance of 1788, which ratified and adopted the constitution of the United States, and declaring that the Union between the state of Virginia and the other states of the Union, under that constitution, was dissolved, and that said constitution was no longer binding on any of the citizens of this state; the said ordinance to take effect as of that day, when ratified by a majority of the people of the state. It was submitted to the people, and the vote was taken by counties, and it was ratified by a majority of about one hundred and thirty thousand. The counties were represented in the convention, and after the said ordinance was thus ratified by the people, they ceased to be corporations of the Union as long as said ordinance was in force.

On the 19th of July following the conven-

tion passed another ordinance ratifying and adopting the constitution of the Confederate States, and declaring that it was binding on all the people of the state; and on the 1st of July "ordained that wherever the words 'United States' occur in the constitution, Code or other laws of Virginia, the words 'Confederate States' shall be and are hereby substituted therefor when applicable." Thence forward the *quasi* corporation of the counties, which submitted to and ratified the ordinance of April 17th, 1861, was a Confederate *quasi* corporation, so far as it was subordinate to, and acted for, and in the interest of the Confederacy, until the Confederacy became extinct, and the ordinances aforesaid were abrogated. See the Historical Synopsis, Code of 1873, page 1.

For as a political entity of the Confederacy, its breath of life was imparted to
566 it by the Confederate *States to which it belonged. And the power which was vested in its organ, the county court, to contract for it, in the interest of the Confederacy, was delegated by a Confederate legislature, which could not survive the Confederacy, but expired when the Confederacy expired.

This is well illustrated by what actually occurred in this state. The last legislature, which was elected under the Confederacy, never met, but was superseded and supplanted by another legislature, which was elected and assembled as the representative body of Virginia, in its legislative department, under oath to support the constitution of the United States. There were then two legislatures in the state at the same time, the one Confederate, and the other Union, unless the former had expired with the Confederacy. It was impossible that both could exist together as the representative legislature of Virginia. The former must therefore have expired with the Confederacy. It was as extinct as the Confederacy itself. And its acts of legislation, which were unusual, and the result of secession, in the interest of the Confederacy, and in aid of it, died with it; and the Confederate *quasi* corporations, with their acts of legislation and administration, by the authority of the Confederate State legislature, expired with *it*. So that contracts made by the county courts, in aid of the Confederacy, as Confederate *quasi* corporations, by virtue of a legislative authority, which had become extinct with the fall of the Confederacy, died with the authority by virtue of which they were formed, just as contracts, which had been made with the head of the Confederacy, died with it.

But it is said to be incomprehensible how a county could be "organized in hostility to the Union." And we are told that "the
567 counties never had any relation *to either the Confederacy or the Union;" and that "the county courts were never in any sense subordinate either to the government of the United States or of the Confederate States;" and that "there was nothing in the constitution or laws of that government (the Confederate) which made the county courts of the states subordinate to the Confederacy."

The counties are integral parts of the states. They are political as well as territorial divisions of the state, to which they severally belong. And their relation to the United States, or to the Confederate States, was to the one or the other just as was the relation of their state. The counties voted for members of congress and for electors of president and vice-president of the United States or of the Confederate States, just as the relation of their state was to the one or the other. The counties had then a relation to the United States or the Confederate States; and during the war it was a relation of amity or hostility, just as was the relation of the state.

The county courts were, and in an important sense, subordinate to the United States or the Confederate States government; and the constitutions of both governments placed them in that state of subordination. For by both the constitution, laws and treaties of the government are declared to be the supreme laws of the land; and "all executive and judicial officers, both of the Confederate States *and the several states*, shall be bound by oath or affirmation to support this constitution." The constitution of the United States has the same provision. See Constitution of Confederate States, article vi, clauses 3 and 4; and Constitution of United States, article vi, clauses 2 and 3. Can it be truly said that the county courts, composed of justices who were bound by one or the
568 other of these oaths, *were in no sense subordinate to either government? To ask the question is to answer it.

And is the assertion that the counties of a Confederate state "were organized in hostility to the United States" so preposterous as to be incapable of comprehension? The orders made by the county court of Dinwiddie from February 1861 to the August term 1864, set out in this record, plainly show how that court was organized in the interest of and subordinate to the Confederacy and in hostility to the United States. We need not to be informed at this day that if the justices of any county in a Confederate state had renounced their subordination to the paramount authority of the Confederate States, and had taken an oath to support the constitution of the United States, they would have soon found that they were subordinate to the Confederacy unless protected by the United States bayonets.

But it is further said, the counties could not have been organized in hostility to the Union, because their organization into counties antedated the Confederacy. I cannot agree that because bodies politic had a prior existence, they could not afterwards be organized in hostility to a common enemy. The states of the Confederacy all had an organization as states which antedated the Confederacy, yet they organized in hostility to the United States.

Having answered these objections, we will now come to the consideration of other grounds against the enforcement of such contracts. They cannot be enforced, because the party contracting to pay, and the

party from whom payment is sought, are not the same.

This court in *Commonwealth* v. *Chalkley*, 20 Gratt. 404, refused to enforce the con-
569 tract, not upon the *ground that the contract was not just, or was not for a humane and lawful purpose; nor upon the ground that it was invalidated by the state constitution; for JUDGE JOYNES, in his opinion, in which a majority of the court concurred, says (page 413) this question *he does not propose to consider*, and he rests his decision upon the ground, that the sales were made by Chalkley to the superintendent of the penitentiary, upon the credit of the Richmond state government, to which he looked alone for payment, and that the government from which he now sought payment (the present government) was not the same government, nor its successor, nor responsible for its acts, nor bound by its contracts.

And this doctrine was again declared explicitly, in *DeRothschild* v. *The Auditor*, 22 Gratt. 41. JUDGE STAPLES, delivering the opinion concurred in by the other judges, says: It is easy "to demonstrate that this is not the Richmond government, nor the successor of that government, and consequently is not answerable for the debts contracted by that government." In both of these cases, it was held substantially, that the party contracting to pay, and the party from whom payment was demanded, were not the same.

The counties, as before said, are territorial and political divisions—integral parts—of the state. And if the government of the state at Richmond, during the war, could not by its contracts bind the present government, because it is not the same government which made the contract, nor its successor, for the same reason the county courts which made the contracts during the war, *by authority alone* of the state government, could not bind the present county courts to their fulfillment. A power cannot be delegated which the party delegating does not itself
570 possess. It *is easier to say that these cases are not applicable to the case in hand, than to show it. In my opinion, those decisions, if they are to be respected, are decisive of this case; and that in fact the latter is a much stronger case against the enforcement of the contract, than either of the former.

Upon another ground, the party contracting and the party from whom payment is sought in this case, are not the same. If the county court which was the contracting party is identical with the present county court, it is really not the paying party, against whom payment is sought to be enforced. Upon whom would the burden fall? Not upon the party who contracted the debt—a Confederate *quasi* corporation, but upon the population of Dinwiddie county, who never contracted with or promised to pay to the appellees —upon men who received nothing for what is now sought to be wrenched from them: for they paid cash for all the salt they got to the agent of the county from whom they purchased; and if the county court misapplied it, it is not their fault, and it is inequitable to hold them bound to pay again. And as has been shown, the county court had no authority to act as their agent or representative to make such a contract. If it had any authority to make the contract, it was a Confederate *quasi* corporation, acting under an authority delegated to it by a Confederate legislature, which power, as we have seen, was only co-extensive with the existence of the Confederacy. For when that was extinguished, the Confederate legislature ceased to exist, was defunct—dead, and has no living representative or successor. And the county *quasi* corporation, as a Confederate entity, to whom the authority to make this contract was delegated, if it was ever in fact delegated, is likewise extinct. To
571 whom then can *the appellees look for payment? To the Confederate *quasi* corporation with whom they contracted? That is extinct. It died with the Confederate legislature, from which it claimed to have derived its authority, which has no more vitality now than the head of the Confederacy has. And if so, this Confederate entity, of which the county court of Confederate Dinwiddie county was the organ, like the Confederate legislature of Virginia, has no successor; and the present Union *quasi* corporation of Dinwiddie county is not bound by its contracts, just as the present government of Virginia was held not to be bound by the contracts of *Chalkley & DeRothschild* with the government of the Confederate state of Virginia. The people of Dinwiddie county who are now sought to be charged, paid for all the salt they got, and it would be very inequitable and unjust to compel them to pay for it again. And it would be equally unjust to compel those to pay who were not citizens of the county at the time.

Upon the foregoing grounds, I think the argument against the enforcement of the contract in question, and all such contracts, may firmly rest, without stigmatizing them as rebellious and treasonable—the ground upon which their payment is inhibited by the state constitution. If there is no other ground upon which they may be avoided than the inhibition of the state constitution, I cannot perceive how the state or the counties can be relieved from any of them.

Regarding Virginia as it is now, though disrupted and dismembered, upon the false pretence that she assented to it, as the identical Virginia which made those contracts, she could not repudiate her own obligations by so providing in her constitution. And we all hold that she is the same Virginia,
572 though under a *different government.

It was so held in *Higginbotham's ex'x* v. *The Commonwealth*, 25 Gratt. 627, by the whole court. No more could she repudiate obligations which her counties had assumed by virtue of authority which she delegated to their county courts. If she could not in the one case, she could not in the other. It is as much her act, if done by a county court by her authority, without which the county court had no power to contract, as if done by the state

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itself. *Qui facit per alium, facit per se,* is a maxim of the law. And the doctrine is well settled that a state can no more impair the obligation of a contract by adopting a constitution than by passing a law. *The Homestead cases,* JUDGE CHRISTIAN, 22 Gratt. 266, 281-2, and cases cited. If the state could repudiate debts so contracted, it can only be upon the ground of a change of relation which affects her *political* identity, and which would authorize her as a member of the Union to disclaim the obligation of debts which had been contracted in resistance to the Union. And this is very questionable, as under the Federal constitution she is prohibited from passing any law (which embraces constitutional provisions, as is well settled,) which impairs the obligation of a contract. If it be said that the contract having been made in resistance to the power and authority of the United States, it imposed no obligation on the state, and her repudiation of it in her constitution could not, therefore, be held to be the impairment of the obligation of a contract, that would be conceding that the contract was voidable, antecedent to, and independent of, the constitution, and that its invalidity does not depend upon the constitutional inhibition; and that is what I maintain.

It is otherwise as to an inhibition in
573 the constitution *of the United States.

If congress may not legislate to avoid a contract, although the provision in the constitution is only an express inhibition to such legislation by the states, upon which it is unnecessary to give an opinion; the states have the power to alter and amend the Federal constitution. They might erase from it the clause aforesaid altogether, or ordain that it shall not be applicable to a law of congress, or they may expressly provide (as they have done by the fourteenth amendment to the constitution, clause four,) that a certain class of contracts shall be null and void; that is, that "neither the United States, nor any state, shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States."

Whether or not it was rebellion, is a question which we do not mean now to discuss. From our standpoint we could not view it in that light, but it is evidently so treated in this amendment to the constitution. And if it was rebellion, it consisted in the act of secession and in the measures taken to sustain it. The withdrawal of a state and its citizens from the Union, and from obedience to the constitution and laws of the United States, and the confederation with other states to organize a government independent of, and alien to the government of the United States, and in defiance of its authority, constituted the rebellion, if there was rebellion; and this would depend upon the question, whether the states in thus seceding and organizing, were justified in so doing, by violation of the compact of Union by the other states, who were parties to it. This is a question which I do not propose now to con-
-r, because it is immaterial how it may be
-ed, as to the point in issue inasmuch as the clause in the fourteenth amend-
574 ment, under consideration, *evidently points to the secession movement as rebellion, and inhibits the payment by the United States, or any state, of all debts contracted in aid of it.

The prohibition of payment is *by the United States or any state.* Therefore it does not extend to debts due from individuals or bodies corporate, as distinguished from bodies politic, or such as constitute, or are a part of the *political* power. It embraces debts contracted by a state, and of course those which are contracted by counties *by authority of the state.*

It is a conclusion, therefore, which cannot be resisted, that if the contract in question was made in aid of the secession movement, but for which it never would have been made, and was important for the support and maintenance of the Confederacy in its resistance to the power and authority of the United States, its enforcement now falls within the foregoing inhibition of the constitution of the United States. It matters not whether the foregoing amendment to the constitution was just and right or not. Thus it is written. It has been accepted as a part of the constitution of the United States, and it is binding upon all the courts, state and federal.

But it is only an authoritative declaration by the United States, in solemn form, of a right which I have endeavored to show belongs to the triumphant party in a civil war, or a war between federal states.

This inhibition in the Federal constitution was a matter of great importance to the government of the United States, indeed a requirement of state necessity. It is easy to see at a glance how embarrassing it would have been to the government to have restored all the states which had united in resistance to its authority, with the immense burden of debt which they and their several coun-
ties and municipalities had contracted
575 *in maintaining the Confederacy. And upon no principle of law or reason or natural right could a refusal on part of the United States be condemned.

But this restriction was even more important to the states who resumed their position in the Union, and to their respective counties and their municipalities, than for the United States. For them to have undertaken to pay such debts, as were made necessary by secession, and were in aid of the Confederacy, would have been to assume a burden which would have been oppressive, insupportable, and absolutely ruinous to them. And this would have been really the source of embarrassment to the government of the United States. This restriction imposed on them, in the constitution of the Union, was therefore for their benefit. The failure of the Confederacy, and the incalculable loss of property which it devolved upon its citizens, utterly incapacitated them to assume and pay the accumulation of debt which the states of the Confederacy and their respective counties and municipalities had contracted in their efforts to maintain it.

From what has been said, it is manifest

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that the contract in question is of the class that falls within the prohibition of the fourth clause of the fourteenth amendment of the constitution of the United States, upon which ground alone, if there was no other, it cannot be enforced. It was a contract made with the organ of a Confederate *quasi* corporation, the county court of a Confederate county. The contract itself was of a novel and unprecedented character, such as would never have been made but for the act of secession, and the formation of the Confederacy, in resistance to the power and authority of the United States. It was not an act of the county court of Dinwiddie, aside from, and inde-
576 pendent of, its relation to the *Confederacy in the exercise of its ordinary functions. It was only by its relation to, and connection with the Confederacy, that it became necessary, and it was done, and could only be done by an act of the legislature of a state, which was a member of the Confederacy, and united in the organized resistance to the power and authority of the United States. And it was essentially in aid of the Confederacy and of that organized resistance to the United States. If the United States, one of whose methods of reducing the Confederate States to submission to their authority, was to cut off their people from a supply of food, of clothing, of medicine, and all the essentials of living, could have cut off the people of Virginia and of the Confederacy from a supply of salt, an article of vital necessity, it would have been effectual to the speedy overthrow of the Confederacy. The effect of these contracts was to supply that article of necessity, and to enable the Confederacy longer to resist the power of the United States. It is too plain for further discussion, that this contract, and all such, were made by the county courts in their relation to the Confederacy, and as the organs of Confederate *quasi* corporations in the interest of the Confederacy, and were important, if not essential, for its support and maintenance in resisting the power and authority of the United States, and were made by authority of a state, which was in the confederation against the United States.

But it is said it was an act of humanity to furnish salt to the suffering Confederates, and the claim for compensation should not be rejected. By another order of the same court, provision was made by a loan of money on the bonds of the county for the support of soldiers of the Confederacy, who were disabled, and of the fathers, mothers,
577 wives and children *of soldiers who were killed or died in the service of their country. Can it be conceived that there rests upon the county of Dinwiddie an obligation to pay the claims of the appellees, which is more sacred and binding than the obligation to pay the former? Yet upon the competing doctrine that obligation is canceled, whilst the families of these soldiers who were killed or died in the service, and the soldiers who were disabled in the service of their country, are to be taxed to pay the latter.

But the case cannot be decided on such grounds. Doubtless the people would have suffered if they had not been supplied with salt, and the Confederacy would have sooner collapsed. And so a besieged city would have been forced to surrender if the besieged could not have been supplied with food. It would certainly be an act of humanity to supply food to the starving. But it could not be addressed to the conqueror as a reason why he should require the man to be paid who furnished salt in the one case, or food in the other, whereby resistance to his power and authority were protracted; that it was an act of humanity to furnish them, and that in so doing he had come to their relief as "angels of mercy."

Doubtless Mess. Stuart, Buchanan & Co. employed their energies, and very commendably, in the production of salt. And whilst they in a legitimate way accumulated for themselves large fortunes, they were rendering essential service to the Confederacy—a service which relieved them from military duty, in the camp and the field, which otherwise would have devolved on them, as on others. Their exemption from military service was, probably, because the supply of salt was essential to the support and maintenance of the Confederacy. Others served the
578 Confederacy in *other ways outside of the army; but all doing what they could for the common cause. They should be paid for the salt which they furnished the county court of Dinwiddie, in the performance of their part of the work, in which all true men in the state were engaged, to defend the liberties of their country, if the party to whom they sold, a *quasi* corporation of the *Confederacy*, were now in existence and had wherewithal to pay. And so they ought to be paid for salt which they sold to the Confederate government, if it were in existence.

But in no just sense are the people of Dinwiddie, who paid for all the salt they got, and never promised to pay Stuart, Buchanan & Co., bound morally, equitably or legally to pay it again. The only advantage they derived from the contract made by the county court, beyond what they paid for, was the aid given to the Confederate cause by the furnishing of salt, and that was as much to the advantage of the appellees as to them. If the appellees must lose it, thousands of our people toiled and periled their lives, and gave their time, their labor and their fortunes, for the common cause, and got nothing. The cause in which all were engaged perished, and desolation and ruin were brought upon the states and their populations, who were consecrated to its success. And it does not seem right that the people who have paid for all the salt they got, and have derived no other advantage from the supply of the salt to the county, than such as was enjoyed in common with them by the appellees, that a people who periled their lives in the field and camp, who were disabled in the service, and the fathers and mothers and wives and children of those who were killed or died in the service of their country—in a word a people who suffered the loss of property
579 *and their almost entire means of subsistence, in their devotion to the cause

which was lost, and which was the common cause of the appellees and themselves, should now be required to pay twice for the salt, in order to make good the losses incurred without their fault, by the appellees, in addition to bearing their own burdens and sustaining their own losses.

Numerous decisions of the Federal courts have been cited in opposition to positions which are attributed to counsel in argument, and consequences are deduced from those positions to show their absurdity. As I have not assumed or sanctioned any of those positions, I am not responsible for the consequences deduced from them. Nor have I in this opinion assumed any position, I believe, which is in conflict with any of the decisions cited, except that I hold that the Richmond government was during the Confederacy the *de jure* government of Virginia; and inasmuch as the Federal courts, for the most part, concede that it was a *de facto government*, the difference of opinion on this point is not material in the decision of this case. If I seem to go further than the Federal courts, in relieving the states and the people who were united in the Confederacy from responsibility, embarrassment and loss, it enures to the benefit of those who suffered the loss of fortune and their almost entire means of subsistence by their devotion to what they believed to be the cause of national independence and liberty. And this should not be surprising when it is considered that the subject is viewed by us from different standpoints.

With regard to *Jones* v. *The City of Richmond*, 18 Gratt. 517, *Town of Danville* v. *Pace*, 25 Gratt. 1, and *Miller & Franklin* v. *City of Lynchburg*, 20 Gratt. 330, it would be easy to show by a review of those decisions
580 *that there is nothing in this opinion in conflict with either of them.

But it is said that the doctrines of this opinion tend to the repudiation of all debts contracted during the war; and this upon the ground that there is no difference as to the present obligation of debts contracted by individuals, and those contracted by the state or the counties of the state during the war; and that if the latter are not binding and valid now, the former are not.

If this is true, the competing view is equally liable to the same objection. For, according to that, contracts made by the state or the counties, by authority of the state, in aid of the rebellion, are valid; and if there is no difference, all contracts made by individuals in aid of the rebellion are invalid. But this court has held otherwise. *Bier & Mann* v. *Dozier*, 24 Gratt. 1. The constitution of the United States makes a difference. For the prohibition is limited to debts or obligations incurred by the *state* or the *United States*, and does not extend to contracts made by individuals. And I think there is good reason for the difference.

It is obvious that the principle upon which the contract is voidable is applicable to contracts of the political power which resisted the authority which is established by the war, and not to contracts in general made by individuals, though they gave aid to the resistance. Individuals were not responsible for the war, nor can be recognized as parties to it. It must, upon well established principles of international law, be regarded as a public war—a war *inter gentes*, and not as a war between *individuals*. Their contracts may, therefore, be enforced, though they were in aid of the war. There are other rea-
581 sons which might be *given in support of this conclusion, if this opinion were not already too extended.

I will notice only one other objection which has been urged against my conclusions. It is, that if the contract in question was not valid and binding on the people of Dinwiddie county *before*, the act of February 28, 1866 (Session Acts of 1865-'6, p. 187) gives validity to it and lays the people of the county under obligation to fulfill it.

I would not indulge in remarks of the slightest disparagement to the legislature which passed this act. It certainly embraced some of our ablest and best men. The lamented death of two of them that I might name I have regarded as a great loss to the state. Yet I cannot indorse as wise all that it did nor all that it did not do. It was assembled soon after the war, in troublous times, when everything was unsettled, and dark, angry clouds hovered over and obscured the political horizon. The times were certainly very unpropritious for calm and unbiased and unconfused legislation. This act shows upon its face that it was hastily, carelessly, and loosely drawn. It undertakes, it seems to me, not only to give validity to contracts made by the state government, but also to contracts made by the Confederate government. I was not aware before that much importance was ever attached to it. It is strange that it has not been relied on more frequently for the settlement of controversies by the courts. I do not remember to have known it to be relied on before, by either party, in any controversy in this, or any other court. If it had never been passed, I hardly think that there would have been any destruction of titles, or ruin of estates, for the want of it; or that the probate of wills, or the acts of executors, admin-
582 istrators, guardians or other *fiduciaries, would ever have been disturbed by reason of its not having been enacted. And it is my impression that if there had been no such act in our statute book, the bonds of matrimony would have been as firm as they are with it, and the offspring of the marriages as legitimate. It is also my impression that the punishment of felons could not have been made false imprisonment, nor murder—and that the bonds of society would have continued as unbroken as they are, and public morals as secure. And I think so because I do not think that it has ever been held by any tribunal that the acts of legislation and administration during the war, in the usual routine and ordinary course of administration, not in the interest or in aid of the Confederacy, and of the resistance to the power and authority of the United States, were not as valid and binding as they would have been

if the states had remained in the Union and there had been no secession. This is my opinion, and I believe it is the opinion of the court.

But I hold that the legislature which passed this act was invested with no power to impose such an obligation on the people of the state or the several counties. It had only legislative powers under the constitution. It had no power to pass judicially upon the question of the liability of a county or of the people thereof, to pay such debts, much less to create a liability on them to pay, when none antecedently existed. It is a judicial question which could only be decided by the courts.

I am of opinion, therefore, that the contract in question ought not to be enforced against the people of Dinwiddie county. I think there is error also in the order of this court, allowing six *per cent.* interest when the contract set up by the appellees stipu-
583 lated *for only three *per cent.* interest.†

I am of opinion that there is error in the judgment of the circuit court, and that the same be reversed.

MONCURE, P., concurred in the opinion of ANDERSON, J.

STAPLES and BURKS, Js., concurred in the opinion of CHRISTIAN, J.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the circuit court did not err in declaring by its decree, that the appellant was liable to the appellees for the claim asserted and proved by them, for salt furnished to the said appellant, under said contract of the 19th May, 1862. But the court is of opinion that the circuit court did err in not scaling the amount of said claim from its nominal to its true value in gold, according to the scale of depreciation of Confederate currency at the time when such contract was made and entered into; and it is decreed and ordered that to this extent the said decree be reversed and annulled. And the court proceeding to enter such decree as the said circuit court ought to have rendered, it is further decreed and ordered, that the appellees recover
584 against the appellant *two thousand and fifty-two dollars and ninety-four cents, with interest thereon, to be computed after the rate of six *per centum per annum*, from the 1st of January, 1863, till payment, and their costs by them expended in the prosecution of their appeal in the said circuit court; and they being the parties substantially prevailing, it is ordered that they also recover against the appellant their costs by them about their defence in this behalf expended in this court. Which is ordered to be certified to the said circuit court of Dinwiddie county.

JUDGMENT REVERSED IN PART, BUT AFFIRMED ON THE IMPORTANT POINT.

†The court in the opinion holds that the claim of the appellees "is a valid claim, arising upon a contract made with the county court of Dinwiddie for salt furnished said county, and the claim for which was recognized by said county in writing, and made a matter of record as shown by the following order:

"Virginia—In Dinwiddie county court, June 16th, 1863: Ordered that the clerk of this court issue a bond for $3,695.30, payable to Stuart, Buchanan & Co., for salt to be delivered by contract, the said bond to be paid the 1st January, 1866, with interest at three *per cent.* thereon from the 1st January, 1863."

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585 *Southern Mutual Ins. Co. v. Yates.

March Term, 1877, Richmond.

Absent, ANDERSON and BURKS, Js.

I. **Fire Insurance—Application for.**—The application to an insurance company for insurance upon a building which is granted and a policy issued based upon the application, is a part of the policy.

II. **Same—Same—Statements in Warranties.**—In such an application, one question is whether there are any incumbrances on the property, to which the answer is none. This is a warranty, and if there was an incumbrance upon it, the policy is not binding upon the company, unless at the time of issuing the policy they had actual knowledge of the existence of such incumbrances.

III. **Same—Same—Same—Parol Evidence.**—If, after the answers to the questions are written in the application, it is signed by the applicant, parol evidence is not admissible to prove that he did not read the application, and no question was asked him as to the existence of incumbrances upon the property.

IV. The insured had taken out two policies upon two buildings, which were consumed in the same fire. The company paid one of the policies, but determined to contest the other. In calling for the payment of assessments upon premium notes, the secretary of the company by mistake, called for the assessment on the note of the policy which was contested, instead of upon the other, and it was paid—HELD:

1. **Same—Waiver and Estoppel.**—If the company knowingly received the assessment with knowledge of the existence of the incumbrance, this would be a waiver of the breach of the warranty whether so intended or not.

2. **Same—Same.**—But if the company received such assessment under the erroneous idea on the part of its officers that it was paid upon another and totally different note, the right to insist upon the forfeiture would not be in the least affected by such payment and receipt.

586 *This was an action of assumpsit upon a policy of insurance on a building, brought in September 1871 by Snowden Yates against the Southern Mutual insurance company. Yates obtained from the Southern Mutual insurance company two policies of insurance, numbered 1,091 and 1,092, upon two buildings at Orange Courthouse, both of which buildings were consumed by the same fire. The loss on the building secured by the policy 1,092 was paid

See monographic *note* on insurance appended to Mutual Assur. Society of Va. v. Holt & als., 29 Gratt. 612.

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by the company; but they contested their liability for the loss on the other building, on the ground that in his application for the policy, among the written questions put to him was the following: "Is your property encumbered; by what, to whom, and to what amount?" To which his answer was, "None." And after the answers to the questions were all taken down, the paper was signed by Yates. And the company insisted this was a warranty; and there having been at the time a deed of trust upon the building, the policy was null.

On the trial of the cause, after the plaintiff had introduced in evidence the policy of insurance and the application for it, which is referred to in the policy, he was introduced as a witness in his own behalf, and stated that the signature to said application was in his handwriting. His counsel then asked him if he had ever read the application for the policy. To which question the defendant by counsel objected: but the court overruled the objection; and the witness said that he had never read the said application either at the time it was prepared or since. The witness was then asked what questions were asked him by the agent of the company at the time he prepared the said application, as to the title to and encumbrances upon the property, and what answers he gave. To this question and answer thereto the 587 defendant by *counsel objected, so far as it might tend to contradict the statement and answers in said application. But the court overruled the objection; and the plaintiff, the witness, answered that the agent of the company asked him in whom the title was, and he replied it was in himself; and that the agent did not ask him any questions as to encumbrances on said property. To the opinion of the court, overruling the defendant's objections to said questions and answers, the insurance company excepted.

When the policies of insurance were obtained by Yates he paid a part of the premiums in cash and gave his premium notes, each for $40, for the balance; and in February 1872, after this suit was instituted, H. S. Price, the secretary and treasurer of the company, in pursuance of a resolution of the directors, called upon him for $10, an assessment on his premium note No. 1,091; and it was paid by Yates. In relation to this payment Price, who was examined as a witness by the defendant, stated that his assessment was made and collected through mistake; that Yates had obtained two policies, one No. 1,091 and the other No. 1,092; and when witness had made out his book of assessments upon premium notes, knowing that the company had determined to contest the policy which insured a building of the plaintiff which had been burnt, he made a memorandum in red ink opposite to the memorandum of the premium note given in consideration of policy numbered 1,092—"burned and contested"—which should have been endorsed opposite the premium note given under policy No. 1,091; and made an assessment on the premium note given for policy No. 1,091, which should have been made on the premium note for policy No. 1,092, and collected the same through his own mis- 588 take; and he *did not make out or collect any assessment upon the premium note given for policy No. 1,092.

After the evidence had been introduced the defendant moved the court to give the following instructions:

1. That the application upon which the policy sued on in this cause is based is a part of the policy; and the answer to the ninth question in said application amounts to a warranty on the part of the plaintiff that at the date of the said application the property covered by said policy was not encumbered.

2. If the jury believe from the evidence in this cause, that at the date of the said application, and also of the said policy mentioned in the first instruction, which is asked to be read as a part of this, there was an encumbrance on the said property, either by trust deed, mortgage or otherwise, then there was a breach of the said warranty on the part of the plaintiff, and the said policy was void on that account at its date, although the said incumbrance had been duly recorded; unless they also believe from the evidence that the defendant, at the time of issuing the said policy sued upon in this case, had actual knowledge of the existence of such incumbrance.

3. And if upon the evidence in this cause the said policy mentioned in the first and second instructions, which are asked to be read with this, was void at its date, it was no contract, and there was no sort of obligation under it on the part of the defendant to the plaintiff; and to render the defendant liable to the plaintiff for an insurance on said property, the plaintiff must prove a new or other contract of insurance between him and the defendant, and it must appear that this suit is founded upon such new or other contract.

589 *4. That although the jury may believe from the evidence, that the defendant demanded and received of the plaintiff an assessment on the premium note of the plaintiff given under said policy, after said breach of the said warranty by the said plaintiff, and after the defendant knew of the breach of the said warranty on the part of the plaintiff, and whilst this suit was pending, yet such demand and receipt did not give validity to the policy so as to enable the plaintiff to recover from the defendant, if such demand was made and money received under a mistake by one of the officers of the defendant, and was not intended by the defendant to be a waiver of the said breach of warranty by the plaintiff, but that when the defendant made such demand he believed that he was demanding and receiving said assessment on a different premium note of the said plaintiff than the one given under the aforesaid policy mentioned in instructions No. 1, 2 and 3, which are asked to be read as a part of this.

5. We ask the court to give the jury the following instruction: That the application for insurance in this case is a part of the

policy; and that any misrepresentation in answer to a question propounded to the assured by the company, if untrue, whether material or not, intentional or not, avoids the contract.

6. If the jury believe from the evidence that, at the time of the application for the policy sued upon in this case, the question was asked the plaintiff whether the property covered by the policy aforesaid was encumbered, and was answered by the defendant, the materiality or immateriality of the answer is not a question for the consideration of the jury; the asking and answering the question was an agreement between the plaintiff and the defendant that the said
590 question *and answer are material; and it is asked that instructions 1, 2, 3, 4 and 5 be read as a part of this.

All of which instruction the court refused to give, except the sixth, which it gave; one of them, the third, he refused to give, and gave none in lieu thereof; and in place of the other four instructions gave the following:

1. That the application upon which the policy sued on in this case is based, provided the same was actually made by the plaintiff and the questions therein contained actually propounded to him by an agent of the defendant, and his answers thereto accurately and subsequently written as given by him, is a part of the said policy, and said answers amount to warranties; and the answer to the ninth question in said application is in that event a warranty on the part of the plaintiff that at the date of the said application the property covered by said policy was not encumbered.

2. If the jury believe from the evidence that the said application was made by the plaintiff, and that the questions therein contained were actually propounded to him by an agent of the defendant, and his answers thereto substantially written down in said application as given by him, and that at the date of said application and the issuing of the policy thereon there was an incumbrance on the said property, either by trust deed, mortgage or otherwise, then there was a breach of said warranty on the part of the said plaintiff, although the said incumbrance had been duly recorded; unless they further believe from the evidence, that the defendant at the time of issuing the said policy had actual knowledge of the said incumbrance, or, upon obtaining actual
591 knowledge thereof *at some subsequent date, did or suffered to be done any act by which any objection thereto was waived, and that said policy was void on that account.

4. That although the jury may believe, from the evidence, that the defendant demanded, and received of the plaintiff an assessment on the premium note of the plaintiff given under said policy, after the said breach of the said warranty by the said plaintiff, and after the defendant knew of the breach of the said warranty on the part of the plaintiff, and whilst this suit was pending, yet such demand and receipt did not give validity to the policy so as to enable the plaintiff to recover from the defendant, if such demand was made and money received, under a mistake made by one of the officers of the defendant, but that when the defendant made such demand, he believed that he was demanding and receiving said assessment on a different premium note of the said plaintiff, than the one given under the aforesaid policy, mentioned in the instructions No. 1, 2 and 3, which is asked to be read as a part of this.

5. That the application for insurance in this case, if actually made by the plaintiff, and the question therein contained actually propounded to him, and his answers thereto substantially written by an agent of the defendant as given by him, as a part of the policy, and that any representation in answer as to any matter specifically enquired of by the defendant in said application, if untrue, whether material or not, intentional or not, avoids the contract, unless actually at the time in the knowledge of the defendant, or unless when brought to its knowledge, objection thereto be waived.

And the defendant excepted.

There were two other instructions asked for by the defendant, but it is unnecessary to state them.

592 *There was a verdict and judgment in favor of the plaintiff for $800, the amount of the insurance, with interest from 18th of June, 1871; and therupon the insurance company applied to the judge of the circuit court for a writ of error and *supersedeas*, which was allowed; but when the case came on to be heard in that court the judgment was affirmed. The company thereupon applied to a judge of this court for a writ of error and *supersedeas*; which was allowed.

Meredith and *Geo. B. Harrison*, for the appellant.

Field & Grey, for the appellee.

STAPLES, J. The plaintiff is the holder of a policy of fire insurance in the Southern Mutual insurance company. In his application upon which the policy issued, he is represented as stating in answer to a question asked by the agent, that there was no incumbrance upon the property. The application is signed by the plaintiff, is made a part of the policy, and has all the force and effect of a warranty.

The property having been destroyed by fire, and the company refusing to pay, the plaintiff brought his action to recover the value. One of the grounds of defence relied on by the company is, that the representation in respect to the incumbrance was untrue, that at the time there was a deed of trust upon the building, nearly equal to its value, the existence of which was wholly unknown to the company. This is not controverted by the plaintiff; but he insists that he made no such representation upon the subject of incumbrances as is set forth in the application.

Upon the trial he was introduced as a witness in his own behalf, and in re-
593 sponse to a question propounded *by his own counsel, he said he had never

read the application either at the time or since; that the agent of the company asked him in whom the title was, and he replied it was in himself, but the agent did not ask him any question as to incumbrances on said property.

This evidence was objected to by the company upon the ground that its effect was to contradict the express terms of the warranty: but the court overruled the objection and permitted the evidence to go to the jury. From this statement it is manifest that the whole question turns upon the admissibility of parol testimony to affect the terms of a written contract.

In *Towner* v. *Lucas' ex'or*, 13 Gratt. 705, all the authorities bearing upon this question are cited and discussed by JUDGE ALLEN with great ability. That was a case of great hardship upon the defendant. He had signed his name as surety to a bond upon the most positive assurance of the obligee he should never be called on to pay it; that his signature was a mere matter of form, only designed to put a stop to the talk of a particular person named in the neighborhood. The defendant offered to show these facts; but the evidence was held inadmissible. In answer to the argument that it would be a fraud to insist on the written agreement in violation of the parol understanding, it was said the rule of the common law excludes oral testimony of the alleged understanding, and as it cannot be proved by legal evidence the understanding itself, in legal understanding, cannot be regarded as existing in fact.

This last case was followed by that of *Woodward, Baldwin & Co.* v. *Foster*, 18 Gratt. 200, where the subject is a good deal discussed by JUDGE JOYNES. In these two opinions all the Virginia cases are referred to, and the argument exhausted. They show that in *594 *this state certainly, the rule is well settled, that when a contract is reduced to writing, the writing is regarded as not only the best, but the sole evidence of the contract, and the parties are presumed to have rejected everything it does not contain.

There is no doubt that this rule applies as well to policies of insurance as to any other class of written contracts. In *Lee* v. *Howard Ins. Company*, 3 Gray's R. 583, BIGELOW, J., discussing the question of the admissibility of parol evidence to affect the terms of the policy, said: "That upon the most familiar principles of the law of evidence, all previous verbal agreements must be taken to be merged in the written agreement of the parties made for the purpose of embodying the terms of the contract, and *designed* to be the depositary and proof of their final intention."

The exceptions to this rule that are sanctioned by the courts, are found in those cases in which the insured is misled by the assurances or declarations of the agent of the insurer, or where the latter seeks to take advantage of a forfeiture of his own creation, or where the insured has given a correct description of the property, which has not been followed by the insurers or their agents in preparing the policy; or where the parties stand on unequal ground, and one of them uses his superior knowledge or influence to mislead the other as to the true import of the contract.

There are numerous others which need not be mentioned. See 2 Am. L. Cases, 912 to 915, 916. It must be conceded that many of these exceptions, if they can be so termed, are utterly irreconcilable with the rule itself, or any just principle upon which it is founded. In such cases it is said, however, the oral evidence is not offered to contradict the *595 writing, but *to show that the representation as it is written ought not to be used against the party, upon the ground of an equitable estoppel. The recent cases of *Georgia Home Ins. Co.* v. *Kinnier's adm'r supra*, 88, and *Manhattan Fire Ins. Co.* v. *Weill & Ullman, supra*, 389, recently decided by this court are illustrations of this doctrine.

It is believed, however, that no well considered case can be found which has gone so far as to allow the introduction of parol proof such as is offered here. The application contains a particular and minute description of the building—its location, size, the material of which it is constructed, the uses to which the rooms are appropriated, and of other matters which could only have been furnished by the insured himself or his agents; following this, the description, is the representation in respect to the liens and encumbrances. It is conceded that whatever relates to the former was furnished by the plaintiff; but it is insisted that the representation in respect to the encumbrances was inserted without his knowledge or consent. It is not pretended that the agent of the company was guilty of any fraud or wilful misrepresentation. The effort of the plaintiff is to defeat a written representation and warranty by a simple denial on his part, that either was in fact made. And the difficulty of thus contradicting the plain terms of his contract is sought to be obviated by asserting that it was never read to him. If such evidence is admissible, it is difficult to imagine a case in which it would not be allowable to vary the legal import of a deed by parol testimony.

In *Cooper* v. *Farmers' Mutual Ins. Comp.*, 50 Penn. R. 299, a case very similar to this, an effort was made to show that the representation in regard to the incumbrance had been introduced into the application by *596 *mistake, and that the contract should read as if the property had been represented as incumbered. The supreme court said: "Had the evidence been received, it would have proved what doubtless is true, that there was no fraud or wilful misrepresentation; but it did not tend to show that the warranty has not been made, or that it had not been broken. But were it conceded that parol evidence is admissible for the purpose of reforming a policy, it is still true that no written instrument can be reformed on proof of a mistake, unless it be a mistake of both parties. Mistake of the assured alone will not answer. If it would, insurers might be held by a contract to which they never as-

sented. It is mutual mistakes only which make a contract reformable in equity."

One of the later cases on this subject is *Ryan* v. *World Life Ins. Comp.*, 41 Conn. R. 168. There, as here, the insured asserted that she and her husband had signed the application without reading it and without its being read to them. The court said, that of itself was inexcusable negligence. The application contained her agreements and representations in an important contract. When she signed it she was bound to know what she signed. The law requires that the insured shall not only in good faith answer all the interrogatories correctly, but shall use reasonable diligence to see that the answers are correctly written. It is for his interest to do so; and the insurer has the right to presume that he will do it." The cases of *Barrett & als.* v. *Union Mut. Fire Ins. Comp.*, 7 Cush. R. 175; *Jenkins* v. *Quincey Mut. Fire Ins. Comp.*, 7 Gray R. 370; *Holmes et als.* v. *Charlestown Mut. Fire Ins. Comp.*, 10 Metc. R. 211, are all authorities in point, and fully sustain the view here taken.

The introduction of parol evidence
597 in such cases is *but an attempt to substitute for the representations and warranties contained in the written agreement oral representations and warranties of an entirely different character.

We are therefore of opinion that the circuit court erred in receiving the evidence set out in the defendant's first bill of exceptions; and for this error the judgment must be reversed and the cause remanded for a new trial, upon which, if the same evidence is again offered and objected to by the defendant, it must be refused by the court.

The next question for consideration is in respect to the several instructions set out in the defendant's second bill of exceptions. It is apparent that the action of the court in giving some of these instructions, and in refusing others, was based entirely upon its opinion with regard to the admissibility and effect of the parol testimony already considered.

The first, second and third instructions asked for by defendants, assert the proposition that the application is a part of the policy, that the answers therein given, in respect to the non-existence of any incumbrance upon the property, amount to a warranty, and if the jury should believe there was such an incumbrance at the time, this constituted a breach of warranty, and the policy was on that account void, unless the defendant had notice of the incumbrance. These instructions correctly state the law, and ought to have been given by the court.

The fourth instruction substantially affirms, that the act of the defendant in demanding and securing assessments upon the premium note of the plaintiff would not amount to a waiver of the breach of warranty, unless so intended by the defendant. In this respect the instruction is clearly er-
598 roneous. If the *defendant, with knowledge of the existence of the incumbrance, knowingly received assessments upon the note involved in this controversy, such conduct would amount to a waiver of the breach of warranty, whether so intended or not. On the other hand, if the defendant received such assessments under an erroneous idea on the part of one of its officers, that they were paid upon another and totally different note, it is clear that the right to insist upon the forfeiture would not be in the least affected by such payments and receipt. This proposition would seem to be too plain to require argument or authority to support it.

The fifth instruction lays down a proposition of law in the broadest and most comprehensive terms, not involved in the case, and not necessary to its proper decision. Without undertaking now to say whether the proposition is sound, we are of opinion, for the reason just stated, it was properly refused. The sixth instruction was given, and no complaint is made by any one on that ground.

The second instruction given by the court, in lieu of the fourth asked for by the defendant, is erroneous, at least so much of it as refers to the supposed acts of waiver on the part of the defendant. The instruction informs the jury that the existence of an incumbrance, under the circumstances therein detailed, was a breach of the warranty, unless the defendant had actual knowledge of such incumbrance, or upon obtaining actual knowledge thereof at some subsequent date did, or suffered to be done, any act by which any objection thereto was waived. This instruction was calculated palpably to mislead the jury. It left them unrestricted to explore the field of inquiry, and to assume that any act done, or suffered to be done, by the defendants, might be construed by
599 *them as a waiver without regard to the circumstances under which the act was done, whether done with full knowledge or under a plain mistake of the facts. What has been said in regard to the fourth instruction asked for on the part of the defendants, and refused by the court, will show the character of the instruction which ought to have been given on this branch of the case.

The bill of exceptions sets out other instructions asked for by defendant; but they involve no new propositions. They only tend to cumber the record, without elucidating the matter of controversy. All of them are connected in a greater or less degree, with the parol evidence already adverted to. When that is out of the case, the instructions must be regarded as wholly immaterial.

Upon the grounds here stated, we are of opinion the judgment of the circuit court must be reversed, and a new trial awarded.

MONCURE, P., and CHRISTIAN, J., concurred in the opinion of STAPLES, J.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the testimony of the defendant in error, set forth in the plaintiff in error's first bill of exceptions, was not competent to contradict the legal import and effect of the representation

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contained in the declaration, upon which the policy of insurance in this case was founded; and the county court erred in overruling the objection of the plaintiff in error to the same. The court is further of the opinion that the county court erred in refusing to 600 *give to the jury the first, second and third instructions asked for by the plaintiff in error; but did not err in refusing to give the fourth and fifth instructions asked for by the said plaintiff in error. The court is further of opinion that the said county court erred in giving to the jury the second instruction given by the court in lieu of the fourth instruction asked for by the plaintiff in error; this court not deeming it material to pass upon the first and second instructions asked for by the plaintiff in error in the second series. Therefore it is considered that the judgment of the said circuit court, affirming the judgment of said county court, be reversed and annulled; and that the plaintiff in error recover against the defendant in error its costs by it expended in the prosecution of its writ of *supersedeas* aforesaid here. And this court proceeding to render such judgment as the said circuit court ought to have rendered, it is further considered that the judgment of the said county court be reversed and annulled, that the verdict of the jury be set aside, and the cause remanded to the said circuit court for a new trial to be had therein in accordance with the principles of this judgment.

Which is ordered to be certified to the said circuit court.

JUDGMENT REVERSED.

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601 *Tancil v. Seaton.

March Term, 1877, Richmond.

1. **Lost Property—Title of Finder.***—The finder of a bank note, as against a bailee without reward, to whom he delivers it to be kept for such finder, has such a possessory interest in the note as entitles him to recover the same of the bailee, on his refusal to redeliver it to the finder on request, and in the absence of any claim of the rightful owner made known by him to such bailee.
2. **Bailee without Reward—Liability.**—Such bailee is not bound to use as great care and diligence in the keeping of the note as he would be if he were a bailee with compensation; and if the note was stolen from his possession, he will not be liable for it, unless the loss was the result of gross negligence on his part.
3. **What Plaintiff Must Show to Recover.**—In such a case to entitle the plaintiff to recover, he must show that the note was a genuine note, and of the value claimed.

This was an action of *assumpsit* in the corporation court of Alexandria, brought by Isaac Tancil against George L. Seaton, to recover the amount of a National Bank note for $1,000, deposited by the wife of the plaintiff with the defendant. The facts are stated by JUDGE BURKS in his opinion.

In the progress of the trial, the plaintiff asked for two instructions, which were refused; and the defendant asked for three, which were given; and the plaintiffs excepted. It is unnecessary to state the instructions asked for by the plaintiff; those of the defendant are as follows:

First. If the jury believe from the evidence, that the note of one thousand 602 dollars was a National Bank *note, and that Tancil had no other right to it than such as he might have acquired by finding it, and that he delivered it to the defendant for safe keeping, communicating to the defendant the fact that he had so acquired it by finding, that then they must find for the defendant.

Second. If the jury believe from the evidence, that the deposit was made for the accommodation of the plaintiff, and without compensation to the defendant, and that the note was stolen from his possession along with money of his own, without gross negligence on the part of the defendant, they must find for the defendant.

Third. In order to find for the plaintiff, it is necessary, not only for the jury not to find the facts as stated in the foregoing instructions, but must find the further fact that the said note was a genuine note of the value of $1,000.

There was a verdict and judgment for the defendant; and Tancil thereupon applied to this court for a *supersedeas*; which was allowed.

F. L. Smith, Jr., for the appellant.

Claughton, for the appellee.

BURKS, J., delivered the opinion of the court.

On the 10th day of May 1869, the plaintiff's wife handed to the defendant what was claimed to be a thousand dollar National Bank note, she representing that her little son had found it, and offering to pay the defendant one hundred or one hundred and fifty dollars if he would find out 603 whether the note was good. *The defendant declining to make any charge, took the note and put it into his iron safe in his store-house for safe-keeping. Within a few days afterwards, according to the statement of the defendant, his store-house was broken into, the safe forced open, and the note, together with several hundred dollars of the plaintiff's own money in the safe was stolen, and never recovered. Suit was brought by the plaintiff in the corporation court of the city of Alexandria to recover the amount of the note from the defendant, and on the trial verdict and judgment, were rendered for the defendant, to which judgment a writ of *supersedeas* was awarded the plaintiff by one of the judges of this court.

At the trial both plaintiff and defendant prayed instructions to the jury. Those asked by the defendant were given, and those asked by the plaintiff were refused, and the plaintiff excepted. The plaintiff also moved

*Lost Property—Title of Finder.—See 3 Min. Inst. 39; Bartons' Law Pr. 129 (2nd Ed.); Carrington v. Ficklin, 32 Gratt. 670.

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the court to set aside the verdict of the jury and grant him a new trial, on the ground that the instructions given were erroneous. The motion was overruled, and the plaintiff again excepted.

It appears from the bills of exceptions that the plaintiff's recovery was resisted mainly on two grounds: First, that the title of the plaintiff, acquired by the finding, which was communicated to the defendant at the time the note was delivered to him, was not sufficient to support the action; second, that the note was stolen from the possession of the defendant without negligence on his part.

If the owner of a personal chattel voluntarily and wholly abandons it, intending not to reclaim it, the first occupant acquires an absolute right to it. If, however, he merely loses it accidently, he does not part with his title, and the finder becomes a *quasi* depositary, invested with such possessory interest as will *entitle him to hold it against all the world except the rightful owner. This rule of law has never been seriously questioned since the leading case of *Armory* v. *Delamirie*, reported in 1 Strange 504 (see 1 Smith's Lead Cases, part 1, side p. 471, and notes).

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It is contended, however, that the rule is limited to the finding of a personal chattel, and has no application to *choses in action;* and in support of this proposition we are referred to the case of *McLaughlin* v. *Waite*, 9 Cow. R. 670, affirmed (with much dissension) in 5 Wend. R. 404.

The reasoning of the distinguished chancellor (WALWORTH) in the case last named is somewhat subtle and not very satisfactory: but if his conclusion is sound, that negotiable notes, bankers' checks and lottery tickets, payable to the holder, are not within the operation of the rule, still it by no means follows that current bank notes, convertible at par into money, are not subject to the rule. The finder of money, we apprehend, would acquire by the finding the same title to it that the chimney sweeper's boy in the leading case acquired to the jewel which he found, and which he was permitted to recover in an action against a wrongdoer.

Bank notes are not money in a strict sense. They are not a lawful tender in discharge of debts and obligations solvable in money; but for most purposes in the transaction of business, and by common consent, they are considered and treated as money. "They are not esteemed," says LORD MANSFIELD, "as goods, *securities*, or *documents of debt*; but are looked on *as money*, as cash, in the ordinary course and transaction of business, by the general consent of mankind; which gives them *the credit and currency of money* to all intents and purposes." They are as much money as guineas *themselves are, or as any other current coin that is used *as* money or cash. *Miller* v. *Race*, 1 Bur. R. 452, 457.

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Such being their character, we can see no good reason why the finder of a bank note of a solvent institution does not acquire by the finding the same title as the finder of a personal chattel, and why he is not entitled to the same remedies against third parties.

That his title and remedies are the same, notwithstanding what is said by the Chancellor in *McLaughlin* v. *Waite, supra*, would seem deducible from the case of *Bridges* v. *Hawkesworth*, 7 Eng. L. & Eq. R. 424. The plaintiff in that case having picked up from the floor of the shop of the defendant a parcel containing *bank-notes*, handed them over to the defendant to keep *till the owner should claim them.* They were advertised by the defendant, but no one appearing to claim them, and three years having elapsed, the plaintiff requested the defendant to return them, tendering the costs of the advertisements, and offering an indemnity. The defendant having refused to return them, it was decided that the plaintiff was entitled to the *notes as against the defendants.* The recent case (1874) *New York & Harlem R. Road Co.* v. *Haws & al.*, 56 N. Y. R. 175, though not directly to the point, is suggestive.

Now, if the reasoning of CHANCELLOR WALWORTH in the case cited from 5 Wend., *supra*, justly applies to bank notes, then the plaintiff was not entitled to recover in the case of *Bridges* v. *Hawkesworth, supra.* It is true, that in the last-named case indemnity was offered to the defendant before action brought; but it would seem that was necessary in that case because the notes were deposited by the finder with the defendant "*to keep until the owner appeared to claim them.*" It is so expressly stated; and the defendant having, by *the terms of the bailment and the advertisements, come under obligation to the owner, it was but just and reasonable that before he should be required to return the notes to the finder he should be indemnified against the liability he had incurred to the owner, should he afterwards appear and establish his right. There would seem to have been no necessity for the indemnity but for the undertaking of the bailee by his contract of bailment and by his advertisements, to account to the owner for the notes if he should appear.

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As a general rule, the bailee is not allowed to dispute the title of his bailor, and we see no good reason why the depositary of a lost bank note, as between himself and the finder, should be an exception to this rule, where the owner is unknown and there is no assertion of claim on his part against the depositary. To permit the latter, under such circumstances, against his contract of bailment, to withhold the note from the finder, and if the owner never appears, to appropriate it to his own use, would be to protect him in his fraud and dishonesty—a thing not to be tolerated, much less sanctioned, in any court of justice.

The defendant being a mere depositary of the note, a bailee without reward, holding the note only for the benefit and accommodation of the plaintiff, he was not bound to use as great care and diligence in the custody of the note as if he had been a bailee with compensation, and therefore it the note was stolen from his posses-

sion he was not accountable for it unless the loss was the result of gross negligence on his part.

The first instruction given to the jury on the motion of the defendant, and the two instructions prayed by the plaintiff, and refused by the court are in conflict with our views of the law hereinbefore ex-
607 pressed. *The second and third instructions given seem free from error.

The court is therfore of opinion, that while the corporation court of the city of Alexandria did not err in giving the second and third instructions as prayed by the defendant, nor in rejecting the instructions prayed by the plaintiff, yet the said court committed an essential error in giving the first instruction asked for by the defendant: and for this error the judgment of the corporation court must be reversed and annulled, the verdict of the jury set aside and a new trial ordered.

The judgment was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the finder of a bank note, as against a bailee without reward, to whom he delivers it, to be kept for such finder, has such possessory interest in the note as entitles him to recover the same of said bailee on his refusal to re-deliver it to the finder on request and in the absence of any claim of the rightful owner made known by him to such bailee; and such bailee is not bound to use as great care and diligence in the keeping of said note as he would be if he were a bailee with compensation, and if the note were stolen from his possession he would not be liable for it unless the loss was the result of gross negligence on his part; and the court is further of opinion, that while the said corporation court did not err in giving the second and third instructions to the jury prayed by the defend-
608 ant in *error, nor in refusing to give the two instructions prayed by the plaintiff in error, yet the said court did err in giving the first instruction asked for by the defendant in error, and further erred in overruling the motion of the plaintiff for a new trial; it is therefore considered by the court that the said judgment be reversed and annulled, and that the defendant in error pay to the plaintiff in error his costs by him expended in the prosecution of his said writ of *supersedeas* here; and this court proceeding to render such judgment as the said corporation court ought to have rendered, it is further consider that the verdict of the jury be set aside, and a new trial of the issues in the cause be granted, and upon such trial the said corporation court, in the giving or refusing of instructions to the jury, shall be governed by the opinion and principles herein expressed; and this cause is remanded to the said corporation court for further proceedings to be had therein in conformity with the directions herein contained: which is ordered to be certified to the said corporation court of the city of Alexandria.

JUDGMENT REVERSED.

609 *Garrett's Adm'x v. Bradford.

March Term, 1877, Richmond.

Absent, ANDERSON, J.

I. **Appealable Decrees.***—A decree which overrules certain exceptions to a commissioner's report, and confirming the report as to the questions involved in these exceptions, is a decree settling the principles of the cause as to these questions, from which the party excepting may appeal, although the report is recommitted to the commissioner as to other matters involved in other exceptions.

II. In 1860, G, of Washington city, and B, of Culpeper county, in Virginia, form a partnership for grazing and selling sheep, to be conducted by B; and G executes his bond to B for $3,700, for a half interest of the sheep on hand, which is to be paid by G's share of the net profits; and B is to be allowed such compensation for managing the business as they shall agree upon. The partnership is closed in December 1862, when G's share of the profits is $2,428.75. B invests the money in Confederate bonds.—HELD:

1. **Accounting.**—G is entitled to have his bond credited for the $2,428.75, at its scaled value in December 1862.
2. **Same—Separation by War.**—As the parties were separated by the war, so that they could not agree upon B's compensation, he is entitled to have a just allowance made him for his attention to the business.

This was a suit in equity in the circuit court of Fauquier county, brought in 1866 by Milton Garrett, a resident of Washington city, against Samuel S. Bradford, of Culpeper county, to have a settlement of a partnership account in relation to the grazing and selling sheep.

By an agreement under seal bearing
610 date the 1st day *of January 1860, Bradford agreed to sell to Garrett one equal undivided half of eight hundred and twenty-five of his fine wool sheep, to be kept thereafter as a copartnership flock, in the possession and under the control and management of Bradford, so long as it should be mutually agreeable and satisfactory to them both. For this interest in the sheep Garrett was to pay to Bradford $100 in hand, and to execute his bond bearing interest from date for $3,700, on which he was to pay $100 each month of the year 1860, and his portion of the proceeds from sales from the flock of sheep, after paying the necessary expenses; and after that year to make monthly payments of fifty dollars, in addition to his half of the net proceeds from the sheep each year until the bond was fully paid. Bradford was to keep account of expenses, &c. And after the first year Bradford should have such remuneration for his services in the general control of the flock as he and Garrett might agree upon.

At the June term 1866, there was a decree for an account, in which the commissioner

*Appealable Decrees.—See Alexander v. Byrd, 85 Va. 696, citing the principal case. Reed v. Cline, 9 Gratt. 136 and Elder v. Harris, 75 Va. 71. See also, Farneyhough v. Dickerson, 2 Rob. 582; Triplett v. Jameson, 2 Munf. 242; Bart. Ch. Pr. (2nd Ed.) 828.

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was directed to take an account of the bond executed by Garrett to Bradford, and of all payments thereon, or other proper credits to which the same was entitled, and charge each party with all partnership moneys received, or which ought to have been received by him, and give him credit by all sums expended by him for the firm, and also for moneys which came properly to his hands, but perished on his hands without fault of his. And each party was required to answer interrogatories before the commissioner, &c.

A great mass of testimony was taken before the commissioner, and both the parties were examined; and in April 1870 the commissioner returned his report; to which the plaintiff filed eighteen exceptions.

611 *This report terminated the partnership in December 1862.

The cause came on to be heard on the 20th of September 1870, when the court made a decree overruling the exceptions Nos. 2, 3, 4, 5, 7, 8 and 14, and sustaining exceptions Nos. 1, 6, 10, 11, 12, 13, 15, 16, 17 and 18, recommitting the report to the commissioner with instructions to allow the items excluded from said report and embraced in the last named exceptions, if the same shall be sustained by satisfactory evidence; and sustaining exception No. 9, instructed the commissioner to exclude the item embraced in said exception from his report. And thereupon Garrett's administratrix applied to a judge of this court for an appeal; which was allowed.

The only exceptions noticed in this court are the fifth, seventh and eighth. The fifth is to an allowance to Bradford in the partnership of two sums of money, one of $50 and the other of $410, for his services. This was on the ground that under the contract Bradford was not entitled to compensation. The seventh exception is that in the account shewing the balance due on the bond of Garrett to Bradford, the commissioner does not credit Garrett with $2,428.75, half of the net profits due the 1st of December 1862, as by the terms of the contract Bradford obliged Garrett to appropriate the net profits to the payment of said bond. And the eighth exception is that in the account of Garrett & Bradford with Garrett, the commissioner has credited Garrett & Bradford, and thereby charged Garrett, with a Confederate bond of $2,000, and Confederate notes $662.75. It appears by the commissioner's statement of the partnership account, that one-half of the net profits of the concern was, on

612 *the 1st of December 1862, $2,428.75.

Instead of crediting this sum on the bond, it is brought into the account of Garrett with the partnership as a credit to him, and he is charged with the Confederate bond of $2,000, and the account is balanced by a charge to him of $662.75 in Confederate notes, which Bradford had received and which had become worthless. The facts in relation to this Confederate bond are stated by JUDGE CHRISTIAN in his opinion.

Field & Gray, for the appellant.

Wm. Green, for the appellee.

CHRISTIAN, J., delivered the opinion of the court.

This is an appeal from the circuit court of Fauquier. The court is of opinion that the decree of the circuit court, overruling certain exceptions to the commissioner's report, was an interlocutory decree, "adjudicating the principles of the cause," from which an appeal might be taken without awaiting a final decree disposing of all the questions involved in the cause. The main subject of controversy between the parties was, whether under their contract the bond of the appellant's intestate should be credited by one half of the net profits of the partnership in the business of sheep raising; and whether under the contract of partnership the appellee was entitled to compensation for services rendered in conducting the business of said partnership. These questions were distinctly raised by the exceptions to the commissioner's report, and distinctly adjudicated by the court when it overruled these exceptions.

The fact that the report was recom-

613 mitted *as to other matters did not affect these questions. They were finally passed upon by the court and withdrawn from further consideration by the commissioner; and *quoad* these questions the decision of the court was final.

The court is therefore of opinion that the appeal in this case was not improvidently awarded.

The court is further of opinion that the decree of the circuit court was erroneous in overruling the eighth exception to the commissioner's report taken by appellant. By the express terms of the contract Garrett's bond was to be credited by "his portion of the proceeds from the sales from the flock of sheep." According to the commissioner's report (not excepted to) one half of the net proceeds of the partnership amounted to $2,428.75. This amount Bradford received in the fall of 1862. At that time Confederate currency was but slightly depreciated, not more than Federal currency. It was then universally received in payment of debts, and its purchasing value was little less than gold. At that time property was bought and sold for this currency, and except where *gold* was purchased with it, the depreciation was inconsiderable.

It is shown by incontrovertible proof in the record that Bradford in the fall of 1862 sold four hundred sheep, of which Garrett was joint owner, and received the proceeds, and invested the same in Confederate bonds *not* for the firm, but in *his own name*. He now claims that these Confederate bonds, by the result of the war being worthless, he is not accountable to Garrett for the funds he received in the fall of 1862. To support this pretension he says he "delivered" to Garrett in 1863 one of these bonds for $2,000, and claims credit for that. It must be ob-

614 served, however, *that neither in his answer, nor in his deposition, which is twice taken, does he pretend that the delivery of this bond to Garrett was received by him *in payment* of what was due him on

account of the partnership, or that he, Bradford, so informed him that he designed it as a payment to him of what was due on account of the partnership transactions. He simply says he "delivered" to Garrett one of those bonds for $2,000. Garrett's account of this transaction is as follows: "The Confederate bond for $2,000 (No. 2,173) was given or loaned to me to carry to Washington to show our friends, and keep them from being imposed upon by spurious Confederate bonds which the northern people were trying to sell in Washington, as the genuine Confederate bond could not be assigned except with the knowledge and consent of an officer of the Confederacy, and I never dreamed of its being my personal property." This account of the transaction is not denied by Bradford, and must be taken as true, and is entirely consistent with Bradford's allegation in his answer, that he "delivered" a $2,000 Confederate bond to Garrett. Garrett's statement must, therefore, be taken as true. And it is further confirmed by the production of the bond which bears date *August*, 1863, is issued to Bradford and had never been assigned to Garrett.

The court is therefore of opinion, that under the contract of the parties Garrett was entitled as a credit on his bond to the scaled value of the sum of $2,428.75 on the 31st December 1862, the date at which, by the report of the court, the partnership ceased, showing one-half of the net profits to be the sum above named.

The court is further of opinion, that there is no error in the decree of said cir-
615 cuit court in overruling *the appellant's exception as to certain allowances made to Bradford for services rendered in the joint business of sheep-raising. By the contract of the parties it was stipulated that, after the year 1860, Bradford "should receive for his services, in the general control of the flock, such remuneration as he and Garrett may agree upon." The parties being separated by the existence of the war, could make no agreement on the subject for themselves, and none was made, but we think that Bradford is entitled to reasonable compensation for the services he has rendered, which have been fairly estimated by the commissioner.

The court is therefore of opinion, that for the error above referred to in overruling the appellant's eighth exception, the said decree be reversed, and in all other respects the same be affirmed.

The decree was as follows:

The court is of opinion, for reasons stated in writing, &c., that the decree of the said circuit court was erroneous in overruling the appellant's eighth exception to commissioner Latham's report; this court being of opinion that under the contract of the parties, set forth in the appellant's bill, the bond of Garrett was entitled to a credit of the scaled value of the sum of $2,428.75, that being one-half of the net profits of the joint business of sheep-raising in December 1862, as ascertained by said commissioner's report. It is therefore adjudged and ordered that for this error the said decree be reversed and annulled, but that the same be affirmed in all other respects, and that the appellant recover against the appellee his costs by him expended in the prosecution of his ap-
616 peal here; and *it is ordered to be certified to said circuit court, with instructions to said court to direct its commissioner, in making a settlement of accounts between the parties, to credit the bond of said Garrett with the said sum of $2,428.75, scaled from its nominal value to its value in gold, as of the 31st of December 1862, which is ordered to be certified to said circuit court.

DECREE REVERSED.

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617 *Old Dominion Granite Co. & als. v. Clarke & als.

Same v. Jones & als.

March Term, 1877, Richmond.

Absent, ANDERSON, J.

Statute—Docketing—Indexing.*—C obtained a judgment against B and P, as partners trading under the firm of B & Co. He delivered an abstract of his judgment to the clerk of the county court of the county, wherein there was a tract of land belonging to P; and the same was properly entered by the clerk in the body of the judgment docket, but was not indexed in the name of P, but merely in the name of "B & Co." Subsequently P sold and conveyed his land to O, who had no knowledge of C's judgment. Upon a bill filed by C, to subject the land in the hands of O to the lien of his judgment. —HELD: That under ch. 186, § 4, 8, Code of 1860, indexing was not a necessary part of the docketing, and that the land was therefore subject to the lien of C's judgment.

These were suits in equity in the Richmond chancery court, brought one by William R. Clarke and Harrison E. Woodward, partners, and the other by T. J. Jones and Thomas Knapp, late partners, to subject a tract of land in the county of Chesterfield, to satisfy judgments recovered by them against D. B. Bridgford and N. Tinsley Pate, partners under the name and style of Bridgford & Co. The judgments were recovered in the hustings court of the city of Richmond, the one first named in February 1866 for $2,390.76, with interest from the 1st of July 1861, and the other in April 1861 for $1,714.22, with interest from the 1st of January 1861. They were both docketed on the 15th of August 1866, in the clerks' of-
618 fices of the hustings *court of the city of Richmond and the county court of Chesterfield; and they were indexed in the name of Bridgford & Co., but not in the names of D. B. Bridgford and N. Tinsley Pate.

***Docketing—Present Statute — Indexing Required.**—Sec. 3561, Code 1887, provides that "Every judgment shall, as soon as it is docketed, be indexed by the clerk, in the name of each defendant, and shall not be regarded as docketed as to any defendant in whose name it is not so indexed." See also, Bartons' Ch. Pr. (2nd Ed.) 1050, 1061.

At the time these judgments were docketed in Chesterfield Pate owned a valuable tract of land in that county. By deed bearing date the 6th of June 1868, Pate, in consideration of the sum of $7,500, conveyed to Hiram Woods, in trust for Alice L. Norris, about one hundred and fifty acres of this land. And on the 29th day of October, 1868, in consideration of the sum of $20,000, he conveyed to Allison White, of Philadelphia, seventy-one acres. And on the 22d of April 1871 White, in consideration of $20,000 conveyed this land, which had a granite quarry upon it, to the Old Dominion granite company. All these deeds were immediately admitted to record in the clerk's office of the county court of Chesterfield.

The defendants to the suits were the debtors Bridgford and Pate and the grantees in the said deeds. Woods and the Old Dominion granite company demurred to and answered the bills. They stated and proved that before the conveyances to Woods and White were made counsel had been employed to examine the record for incumbrances upon the land; that the counsel again and again, with the assistance of the clerk of the county court of Chesterfield, examined the records; that they took a list of every judgment against Pate that appeared on the index to the judgment docket; that all these judgments were satisfied out of the purchase money of the land; that the judgments of the plaintiffs, not having been docketed in the name of the defendant Pate, were not discovered, and therefore were not paid; 619 and that after satisfying *the judgments known they had paid over to Pate an amount of purchase money much more than sufficient to satisfy the judgments of the plaintiffs. And they insisted that the judgments not having been indexed in the name of Pate, as required by the statute, they were not properly docketed, and were not valid liens upon the land as against them.

The two causes came on to be heard together on the 20th of June 1872; when the court held that the index was not a part of the docket, and the defect in that did not affect the docket of the judgments; and the judgments having been docketed before the conveyances to Woods and White were made and recorded, the liens of the judgments upon the land were valid against the defendants; and a commissioner was directed to make certain enquiries. And thereupon the Old Dominion granite company and Woods, as trustee, &c., applied to this court for appeals; which were allowed.

Ould & Carrington and *Nash*, for the appellants.

Sands, Leake & Carter, for the appellees.

STAPLES, J. The appellants purchased the land in controversy from Nelson T. Pate. Before paying the purchase money they caused to be made a diligent search of the proper clerk's office, to ascertain whether there were then any incumbraces upon the property. They did not search the judgment docket; but their counsel made a careful examination of the index to the docket, and failed to discover any trace of a judgment against Pate. Thereupon the appellants paid the purchase money and recorded their deed. It now appears that the appellees had recovered judgments 620 *against D. B. Bridgford and N. Tinsley Pate, partners trading under the firm and style of Bridgford & Co., and in this form the judgments were docketed. The clerk, however, did not index the judgments in the individual name of Pate, as required by the statute, but only in the partnership name of Bridgford & Co.; and thus it was, the appellants, in making their search, failed to discover the judgments against Pate.

The question arising here is, whether the appellants are entitled to hold the land discharged of the lien of those judgments. In *Beverley* v. *Ellis & Allen*, 1 Rand. 102, this court held, that when a purchaser deposits his deed with the clerk for recognition, it is a full compliance on his part with the statute, although the deed is never recorded. A construction, said the court, could never be tolerated which would make the rights of a purchaser depend on the acts or omissions of the clerk, over whom he has no control, and with whom the law compels him to deposit his deed.

In the present case the chancellor, relying upon the principle as laid down in *Beverley* v. *Ellis & Allen*, was of opinion, that all the statute requires of the creditor to preserve his lien, is that he shall deliver to the clerk an authenicated abstract of his judgment and require him to docket it; that every other step must be taken by the clerk, over whom the creditor has no control, and for whose failure the creditor cannot be held responsible; and if the purchaser is misled by the failure to index, he must look to the clerk.

The learned counsel for the appellant has strongly controverted this proposition. He insists that the statute under which *Beverley* v. *Ellis & Allen* was decided, is different in its phraseology from the statute relating to the docketing of judgments; and he has cited numerous decisions in other states, to 621 show that *in cases of this character it is the duty of the creditor to see that his judgment is duly and properly docketed, and every requirement of the law fully complied with; otherwise the purchaser will hold the land discharged of the lien; and the creditor must look to the clerk.

In the view we have taken of this case, it is unnecessary to decide this question. Conceding for the sake of the argument, it is the duty of the creditor to have his judgment docketed, the question still arises whether that has not been done in the case before us. As already stated, the abstract of the judgment was properly placed on the judgment docket, but it was not indexed in the individual name of the defendant Pate. The point presented is, whether "indexing" is a part and necessary part of the docketing. In other words, is the docketing incomplete until the judgment is also properly indexed in the name of the defendants. This ques-

tion must of course be solved by the provisions of our statute exclusively.

The first act passed upon this subject was in April 1843. A recurrence to that act will very materially aid us in reaching a correct conclusion. The first section provides, it shall be the duty of the clerk of the county court to keep in well bound books a *judgment docket*, in which shall be regularly *docketed* all such unsatisfied final judgments, decrees, &c., as any person interested therein shall require him to docket. In such docket there shall be plainly set down in separate columns the date of such judgment or decree, the name, description and residence of the parties, the amount of the debt, costs, &c., appearing in each case, and the amount and date of the credits, if any. We have here plainly pointed out what constitutes a *docket*, the manner and form in which it 622 shall be made out, *and the facts it is required to set forth for the information of parties concerned. Having thus provided for a docket, the act makes provision for an *index* as follows: "And, for the purpose of more convenient reference, there shall be made and preserved in the same books a plain and accurate *index* of all judgments, decrees, &c., *docketed*, and every judgment, &c., in the said index shall be set down in alphabetical order, the names of the debtors, and each of them."

The second section provides, that "if any clerk shall fail to *docket* without delay, in the manner herein prescribed, any judgment, &c., which he shall be required to *docket*, or shall fail to make and preserve the index hereby required of him, he shall be liable to the action of the party aggrieved for such damages as he may sustain thereby." It will thus be seen that the docket is one thing, and the index another, and quite a different thing. Nothing can more strongly enforce this distinction than the language of the second section just quoted. The clerk is required to docket only when requested, but it is his duty to index, whether requested or not. While the statute imposes upon the creditor the duty of requiring the clerk to docket the judgment, it imposes no duty upon him with respect to the indexing. With that the creditor need not concern himself. Certainly he is not compelled to make any demand upon the clerk by the express terms of the provision. The sole object of the indexing, as disclosed in the statute, is "for the purpose of a more convenient reference, to facilitate the search, to enable parties more readily to find that which is contained in the docket." The index is a guide to the docket; it saves labor and trouble in examining the docket, but it is not the docket itself, nor a part of it. We come then to the fourth section, which 623 provides that "no *judgment or decree shall bind the land against a *bona fide* purchaser for valuable consideration without notice, unless the same shall be *docketed* in the manner prescribed in the first section."

Now if this section had provided that the judgment shall not constitute a lien unless docketed and indexed according to the first section, the question would be free from difficulty. But it does not say so. The forfeiture results only from a failure to docket; and as we have seen, the docketing is complete without the indexing. If the clerk fails to make the index as prescribed by the statute and the purchaser is misled, the latter doubtless may have his action for damages. But this is no concern of the creditor. Having docketed his judgment, he may safely leave the rest to the clerk, whose duty as to the index does not depend upon any act or request of the creditor. The provisions found in the revisal of 1849 are substantially the same as the act of 1843. The only difference is, that in the former the revisors omitted the phrase "for the purpose of a more convenient reference." It is certain that no material change was thereby intended. It was probably thought those words were unnecessary, and consequently they were left out in conformity with the plan of condensing all the statutes.

In the decision of questions of this character little aid is to be derived from the decisions of other states, unless their laws substantially correspond with ours. The statutes of the state of New York are perhaps more nearly like these of Virginia in this particular than those of any other state. There the law requires a record book of all deeds and mortgages; and it further declares that the clerk shall provide books for making general indices, and shall form indices therein in such manner as to afford convenient and easy reference 624 *to the several books of record in their offices respectively. This act was passed about the same time as ours, in the year 1843. In a very recent case—*Mutual Life Ins. Company* v. *Drake*, reported on the Central Law Journal, 340, of April 13th, 1877—the question arose as to the rights of a *bona fide* purchaser as against the lien of a mortgage. There also the purchaser had examined the index, but found no reference to a mortgage, although in fact it was duly recorded. The court of appeals held that the provision in respect to indexing instruments did not show any ground for claiming that the index should constitute notice. The index was simply required to be attached to each book; and all this was for the convenience of these searching the records, but was not considered part of the records. JUDGE SMITH, who spoke for all the judges, in closing his opinion, uses the following language: "On the whole, I am of opinion that under our statute the index is not an essential part of the record for the purpose of notice; that in this case the plaintiff's mortgage was duly recorded so as to be regarded as giving notice to after-purchasers, and that the lien of the plaintiff's mortgage is superior to that of the Balty mortgage held by the defendant Dake. In reaching this conclusion, I have not overlooked the practical inconveniences that may result from it in searching records. But the duty of the court is only to declare the law as the legislature has laid it down. Arguments

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ab inconvenienti may sometimes throw light upon the construction of ambiguous or doubtful words; but where, as here, the language of the law makes it plain they are out of place. Inconveniences in practice will result, whichever way the question shall be decided. The power to remedy them is in the legislature, and not in the
625 *courts. Even as the law now stands, the party injured by the omission of the clerk is not without remedy, for he has his action against the clerk."

All that is here said is equally applicable to the case before us. Indeed it would be difficult to find an authority more directly in point. JUDGE SMITH further states, that the statutes of Vermont and Missouri are the same in many respects as those of New York, and he relies upon *Curtis* v. *Lyman*, 24 Vermont R. 338, and *Bishop* v. *Schneider*, 46 Missouri R. 472, in which the same questions arose, and the same doctrine was affirmed by a unanimous court. See also the recent case of *Chatham* v. *Bradford*, 50 Georgia R. 327, upon the construction of a statute similar in many of its provisions to the New York statute. These cases substantially assert that the index is no part of the record, but a means of easy reference to the record. If the clerk fails to make the index, he injures those who desire to make the search. The clerk's duty is therefore to the searcher and to the public, and not to the holder of the deed. When the latter has placed his deed upon the record book he has done all the law requires him to do. Any one who will take the trouble can examine this record. The time and labor expended in making this examination is merely a question of degree. If the party pursuing the search is content with looking at the index, without an examination of the record, and he is thereby misled, his remedy is against the clerk, whose duty it is to prepare the index for the benefit of the searcher, and not of the holder of the deed. These views are not only in conformity with the provisions of our statute, upon a fair and reasonable interpretation, but they are intrinsically just and sensible in themselves. All that is said with reference to the holder of a deed
626 admitted to *record, but not indexed, is equally applicable to a judgment creditor, whose judgment is docketed and not indexed. Upon the whole, we are of opinion there is no error in the decree of the chancery court, and the same must be affirmed. Before concluding this opinion, it is proper to state that the legislature has recently amended the statute on this subject. And it is now provided, every judgment shall so soon as it is docketed be indexed by the clerk in the name of each defendant thereon, and unless so *indexed* it shall not be regarded as docketed. With the wisdom or propriety of this amendment the courts have no concern. Being prospective necessarily in its operation, it can have no application to the present case.

MONCURE, P., and CHRISTIAN and BURKS, Js., concurred in the opinion of STAPLES, J.

DECREE AFFIRMED.

627 ***Lewis' Ex'ors v. Overby's Adm'or.**

March Term, 1877, Richmond.

Sealed Instruments.*—A paper which in the body of it says, "as witness my hand and seal," has the word "seal" affixed to the signature of the maker. It is a sealed instrument within the meaning of the statute. Code of 1849, ch. 143, s. 2, p. 580.

This was an action of debt in the circuit court of Mecklenburg county, brought by Robert Y. Overby's executors, and afterwards revived in the name of his administrator *de bonis non*, &c., against the executors of John Lewis. The plaintiffs declared upon a writing obligatory for $1,800, executed by John Lewis and James E. Haskins. The defendants filed the pleas of "payment," and "*non est factum.*"

The paper declared on was as follows:

Dolls. $1800. On demand with interest from the first of April next, we promise and bind ourselves, heirs, &c., to pay to Rob't Y. Overby eighteen hundred dollars, for value received. As witness our hands and seals this 24th day of March, 1853.

JAS. E. HASKINS, *Seal.*
JNO. LEWIS, *Seal.*

On the trial of the cause the defendants objected to the introduction of this paper, because it had no scrolls by way of seals affixed opposite to the signatures with which the paper writing is subscribed;
628 and *therefore was not a writing obligatory within the meaning of the law of Virginia. But the court overruled the objection, and admitted the paper as evidence; and the defendants excepted. There was a verdict and judgment for the plaintiff; and thereupon the defendant applied to one of the judges of this court for a *supersedeas;* which was awarded.

Jones & Bouldin, for the appellants.
Jno. A. & Alex. Coke, for the appellees.

MONCURE, P., delivered the opinion of the court.

The court is of opinion that the word "seal" has the same force and effect as a "scroll" in the true intent and meaning of the Code, which declares, that "any writing to which the person making it shall affix a scroll by way of seal, shall be of the same force as if it were actually sealed." Code of 1849, ch. 143, § 2, p. 580. And the persons making the writing on which this action is founded, having severally annexed to their names subscribed to the said writing the said word "seal;" and having clearly indicated in the body of the said writing, their intention to make it a sealed instrument, by using therein the words: "as witness our hands and seals," &c.; the court is of opinion that the said writing is a sealed instrument accordingly. See 2 Rob. Pract., ch. 1, pp. 2-8, and cases therein cited.

Therefore it is considered by the court

***Sealed Instruments.**—See Dinwiddie County v. Stuart, Buchanan & Co., 28 Gratt. 526, and *note;* Bartons' Law Pr. (2nd Ed.) 95.

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that there is no error in the said judgment; that the same be affirmed; and that the plaintiffs in error, John T. Lewis and Richard B. Lewis, executors of John Lewis, out of the estate of their said testator in
629 their hands to be administered, *do pay to John A. Coke administrator *de bonis non* with the will annexed of Robert Y. Overby, dec'd, damages according to law and his costs by him about his defence in this court expended.

Which is ordered to be certified to the circuit court of Mecklenburg.

JUDGMENT AFFIRMED.

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630 *Connecticut Mut. Life Ins. Co. v. Duerson's Ex'or.

July Term, 1877, Wytheville.

1. **Contracts of Insurance—Effect of War.**—Contracts of insurance entered into before the late war, between parties afterwards separated in domicil by the belligerent lines, were not abrogated, but only suspended, by the war. Acc. *Ins. Co.* v. *Hendren*, 24 Gratt. 546, and cases there cited.
2. **Same—Same—Extent of Suspension.**—This suspension extends to the stipulation requiring payment of premiums at dates falling within the period of such separation.
3. **Same—Same—Tender of Premium.**—Nor in such case is it material whether tender of such payment was made at the day or not, even though the insurer's agent, resident in the state of the domicil of the insured prior to the war, continued to reside there on the same side with the insured whilst the insurer and insured were so separated.
4. **Same—Same—Same—Acts of Company's Agent.**—If such tender would in any case be material, it will at any rate not be when before the premium in question became due such agent had publicly proclaimed his purpose not to receive any more premiums, which declaration was propably made known to the insured and was the cause of the failure to tender, and especially when insurer after the war refused to ratify the act of said agent in receiving payment of a premium from another person as much as a month before the premium in question was due.
5. **Same—Same—Same—Time for Making.**—In such case, however, it is the duty of the insured to tender payment within a reasonable time after the war, if living; and his failure so to do will occasion a forfeiture of the policy.
6. **Same—Same—Same—Duty of Personal Representative.**—But in case of the death of the insured pending the war, his personal representative would be under no obligation to make such a tender, for then there would be in the hands of the insurer a fund of the insured out of which he could deduct the unpaid premium. Nothing more would then be necessary on the part of the insured than that the insurer should within a reasonable time from the ending of the war be informed of such death and of its date.

631 *7. **Same—Same—Sufficiency of Notice of Death.**—Such information will be sufficient though unaccompanied by any formal demand of payment or assertion of right to it.

8. **Foreign Insurance Companies—Right to Plead Statute of Limitations.**—An insurance company chartered by another state, but doing business in this state in compliance with the statutes of 1855-'6, is to be considered, for the purpose of being sued, as domiciled in this state, and is entitled to rely on the statute of limitations just as if it were a company which had been chartered by the legislature of this state.
9. **Statute of Limitations—Suspension during War—Validity of Acts.**—The several acts of the government of Virginia during the war, suspending the statutes of limitations, were valid to prevent the running of said statutes to 3d March 1866. Acc. *Johnston* v. *Gill*, 27 Gratt. 587. And the time from 2d March 1866 to 1st January 1869 is to be left out of the computation under said statutes by virtue of the seventh section of the act of March 2d, 1866, commonly known as the stay law. Acc. *Danville Bank* v. *Waddill*, 27 Gratt. 448.
10. **Foreign Corporations—Revocation of Agency—Service of Process.**—Though such company had after the war expressly revoked the powers of the resident agent it had before the war, and had never afterwards, appointed another in his place, service of process on such agent will nevertheless be effectual under the statutes in that behalf to give jurisdiction of an action against such company.
11. **Same—Acceptance of Conditions of Doing Business in State.**—The provisions of said statutes of 1855-'6 were amendatory of the previous law, and extended as well to policies previously issued as to policies thereafter issued; and a foreign company doing business in the state under the same at the time said amendments were enacted, and continuing to do business afterwards in compliance with all said statutes, must be taken to have accepted said provisions and to be bound by them.

This case was heard at Richmond, but was decided at Wytheville. It was an action of *assumpsit* in the circuit court of Spottsylvania county, brought in December 1873, by William R. Duerson, executor of Robert C. Duerson, deceased, against the Connecticut Mutual life insurance company, to recover the amount of two policies of insurance upon the life of the said Robert Duerson issued by the said company. The process was served on A. A. Little, who had been the general agent of the company.

632 *Upon the calling of the cause in September 1874, the defendant, by counsel, moved the court to quash the process in the cause, on the ground that the defendant had, in 1861, revoked the agency of A. A. Little in Virginia, and declined to reinstate it after the war, on account of the change in the legislation in Virginia by the act of February 1866, affecting foreign insurance companies.

It appeared from the evidence, that A. A. Little was an agent of the company from 1850 to some time in 1861, when the war breaking out, communication was cut off with Hartford, Connecticut, the home of said company, and he ceased to act as agent; and his agency was formally revoked by the company in March 1866; that he had done no act as agent of said company since; and no

See McLean v. Piedmont & Arlington Life Ins. Co., 29 Gratt. 361, and *note*.

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agent of the company had since been appointed in Virginia.

The company further insisted in behalf of said motion, that these contracts of insurance were made in 1850 and 1851, before the act of 1855-'56, which first required foreign insurance companies in Virginia to appoint an attorney to accept service of process in any suit against said company; and said act was therefore no part of the contract of insurance in these cases, and the company could not be required to retain an attorney in Virginia to accept service of process in this case. And second, that the act of 1855-'56 had been repealed by the act of February 3rd, 1866, inaugurating an entirely new policy, and requiring new regulations, licenses and deposits of foreign insurance companies doing business in Virginia; and the defendant declining to continue its business in Virginia, because of said legislation, has now no agent in Virginia, and no party upon whom process against said company in this case can be legally served.

633 *But it was shewn in evidence, that in April 1856, the company executed a power of attorney, appointing Little their agent in Virginia, to accept service of all lawful processes against the company in the state of Virginia, and to cause an appearance to be entered in any action, in like manner as if the company had existed and been duly served with process within said state. And this power of attorney was filed in the office of the auditor of the state. It appeared further, that Little made his returns to the auditor, and paid the tax on the premiums received by him from May 1st, 1859, to May 1st, 1861.

The court overruled the motion to quash the process; and the defendant excepted.

The cause came on for trial on the 12th of December 1874, upon the general issue, with leave to the defendants to prove anything under that issue that they might prove under any special pleas; and when all the testimony had been introduced before the jury, the defendant demurred to the evidence, and the plaintiff joined in the demurrer. There was a verdict for the plaintiff for $3,500, with interest from, &c., subject to the demurrer; and the court holding that the evidence was sufficient to sustain the plaintiff's action, rendered a judgment upon the verdict in his favor for the amount. And thereupon the defendant applied to a judge of this court for a writ of error and *supersedeas*; which was allowed.

R. C. Duerson, of Spotsylvania county, Virginia, effected with the said company, a corporation chartered by the state of Connecticut, and having their home office in Hartford, through their agent in and for Virginia, A. A. Little, of Fredericksburg, two policies of insurance upon his life, dated respectively 10th June 1850, and

634 9th June 1851, one for $2,000, *and the other for $1,500, and numbered 9,990 and 14,678 respectively.

By these policies, the company in consideration of the payment of the respective sums named therein by said Duerson, and of the annual premiums named, to be paid on or before the 9th and 10th days of June respectively in every year during the continuance of said policies, assure the life of said Duerson in the said respective amounts of $2,000 and $1,500 "for the term of the whole continuance of his life." And said company promise and agree to pay said sums within ninety days after due notice and proof of the death of said Duerson, deducting therefrom all notes taken for premiums unpaid at that date. There are numerous provisos and conditions, as usual, contained in said policies, none of which are material to this case, or necessary to be adverted to, except the clause which provides, that in case the assured shall not pay the said annual premiums on or before the several days therein before mentioned for payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured, or any part thereof, and the policies shall cease and determine, and all interest shall be forfeited.

The premiums upon these policies were regularly and promptly paid or settled for by Duerson with said Little up to and including the premiums falling due on the 9th and 10th days of June respectively, 1860, by which said policies were continued in force for the years following said dates. Before the next premiums fell due, to wit: the 9th and 10th days of June 1861, the great war between the Confederate States, of which Virginia was one, and the United States, of which Connecticut was one, had intervened.

All intercourse with the north, the home

635 of the company, had ceased, *and the agent who, as well as the insured, resided in Fredericksburg, had publicly and freely proclaimed in the town—there being a number of policy holders therein—before said dates, that he would not receive any premiums from any policy holders. And after the war the company refused to allow a credit for the amount of a premium which had been paid to Little on the 4th of May 1861 to another person holding a policy of the company, which he wished to have reinstated.

Little, who was examined as a witness by the defendant, states that Duerson at this time resided in Fredericksburg, was sergeant of the corporation; he was a prompt business man, prompt in paying his premiums, had abundant means, and said agent "supposes Duerson would have paid his premiums during the war had not he heard that said Little would not receive them, as he was prompt and punctual, and had paid the others promptly," though said Little cannot recollect whether he had any conversation with Duerson on the subject of the premiums and policies after the war begun. But said Little would not say he had not conversed with said Duerson during this time, and that the premiums were not tendered. And "it was generally known in town that Mr. Little was not receiving any premiums?"

Duerson died on the 17th day of March, 1863, in Fredericksburg, Va., of pneumonia —his disease not having been induced by any military service, as he never was en-

gaged as either soldier or sailor during the late war, and he died a natural death.

At the time of his death there were remaining unpaid the premiums for 1861 and 1862, and four notes given for premiums, &c.

In August, 1863, Mrs. Duerson qualified as executrix of said R. C. Duerson. She having died in June, *1865, and the executor named in the will being under age, J. C. Cammack qualified as administrator *d. b. n. c. t. a.*, on the 12th October, 1865.

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On the 31st January, 1866, Cammack wrote to the company, informing them of the death of R. C. Duerson during the war, from natural causes, and stating that Duerson "was prevented from making further payments by the then existing war."

He says: If Duerson could have made one more payment his family, now in very reduced circumstances, would have been entitled to the full amount of the premiums. I do not know what has been your custom in such cases, but having heard that you were very liberal in the renewal of policies that had expired under similar circumstances, I thought it probable you might pay something on account of these policies. I administered upon Duerson's estate, besides which he married my sister.

I am, very respect'y,
JOHN C. CAMMACK.

To this letter the company reply:

HARTFORD, June 15, 1866.

Jno. C. Cammack, Esq., Louisa C. H. Va.,

Dear Sir—An answer to your letter of January 31st, 1866, has been delayed by the great demands upon my time. It has not been our custom, nor is it usual with other companies, to give any consideration in the case of the decease of persons that have allowed their policies to lapse. This being a mutual company, the right of each member to its benefits is based upon the fulfillment of his or her contract. The case you state is a somewhat peculiar one, and is perhaps entitled to more *consideration than most cases, where whole or partial payment is desired after the forfeiture of the policy and the death of the insured: but the question will arise, if payment is made in this case, why not pay upon policies that lapsed in 1860, and if payment is made upon policies that lapsed in 1860, why not upon policies that lapsed in 1855, and so on. The practice once commenced, there is no point at which to stop. We are compelled, for the reasons stated above, to decline making partial payments upon policies Nos. 9,990 and 14,678.

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Very respectfully yours,
GUY R. PHELPS, *Pres't*,
Per. Howard.

Cammack having died, and the executor named in the will, said W. R. Duerson, son of the assured, having come of age, he qualified as executor on the 12th June, 1873. And on the 1st July, 1873, he wrote to the company, reminding them of Cammack's previous application, and the death of his father, and calling upon them for settlement. To this letter no reply was made.

After waiting for some time to hear from the company, the executor of Duerson placed the matter in the hands of attorneys to procure a settlement by suit or otherwise, and there was some correspondence between the attorneys and the company. In the letter of the assistant secretary of the company, under date of August 8th, 1873, directed to the attorney of Duerson's executor, he says: "We have your favor of the 5th ultimo, relating to policies Nos. 9,990 and 14,678, on the life of R. C. Duerson, forfeited for non-payment of premiums in 1861. For reasons satisfactory to us and, as we believe, conclusive in law, we recognize *no claim on these forfeited policies and acknowledge no liability by virtue thereof."

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William A. Little, for the appellant.

Marye & Fitzhugh, J. T. Goolrick and *J. G. Mason*, for the appellee.

ANDERSON, J., delivered the opinion of the court.

It must be regarded as settled law, at least in Virginia, that contracts of life insurance entered into before the late war, by parties who were separated by the belligerent lines, are not abrogated, but only suspended, by the war. *The New York Life Ins. Co.* v. *Hendren*, 24 Gratt. 536; citing *Manhattan Life Ins. Co.* v. *Warwick*, 20 Gratt. 614; *Mutual Benefit Life Ins. Co.* v. *Atwood's adm'x*, 24 Gratt. 497; and *New York Life Ins. Co.* v. *White*—special court of appeals of Virginia—Insurance Law Journal for December 1873, p. 917. These Virginia decisions are in accord with the decisions of the supreme courts of the states of Kentucky, New York, New Jersey and Mississippi, and the Federal circuit courts for the southern district of New York, J. Blatchford, and for the eastern district of Virginia, J. Bond.

In the case under judgment one of the policies of insurance was issued by the plaintiff in error on the 10th day of June 1850, for the insurance of the life of Robert C. Duerson, of Spotsylvania county, in the state of Virginia, in the amount of $2,000, for the term of the whole continuance of his life, in consideration of the sum of $70.20 to the said company in hand paid by the said Robert C. Duerson, and of the annual premium of $70.20 to be paid on the 10th of *June in every year during the continuance of the policy. The other policy, which is also an insurance for the term of the whole continuance of his life, is dated June 9th, 1851, and is for $1,500, in consideration of $54.45 in hand paid and of the annual premium of same amount to be paid on the 9th of June of every year during the continuance of the policy.

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The plaintiff in error was an incorporated company of the state of Connecticut, and had an agent, A. Alexander Little, at Fredericksburg, Virginia. The testator of the defendant in error, R. C. Duerson, was a resident citizen of Virginia. The premiums on both policies were regularly and

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punctually paid to the agent, in the mode prescribed by the policies, by the insured, in fulfillment of his contracts up to the 9th and 10th of June 1861. At those dates the next premiums were due. They were not paid. The late war between the states, at those dates and prior thereto, was flagrant, and separated the home office and domicil of the company from its agent at Fredericksburg, and from the insured, R. C. Duerson, by the belligerent lines. The contract was thereby suspended, the agent of the company having resolved to receive no further premiums after the preceding 4th day of May, which he made known to the public. There is no direct proof that the premiums then due were tendered by Duerson to the agent. I think the presumptions is they were tendered; or, if not tendered, it was because Duerson knew they would not be received, as the agent had stated publicly he would receive no more premiums; and he now testifies that if they had been tendered he would not have received them.

But I do not think it material whether they were tendered or not, inasmuch as the war suspended the contract, and if they had been tendered they would
640 *not have been received. In the *Manhattan Life Ins. Co.* v. *Warwick, supra,* it is true we held that a payment tendered to the agent in July 1861, and received by him, was valid and binding on the company, and that the insured should be credited with it, although the company never received it. But in that case it was shown that the agent had received it in compliance with express instructions from the company, which was therefore charged with it. But in this case there is no special authority given to the agent by the company to receive any premiums during the war, and after the war it refused to ratify his act in receiving payment of a premium from Gordon on the 4th of May 1861. If it had been competent for the agent to receive premiums without special authority, he resolved not to receive them, and it would not be right to hold the assured to a forfeiture of his policies in this case for not tendering them, in asmuch as if they had been tendered, the agent declares they would not have been received, and if they had been tendered and received the company would have refused to ratify it, as is inferrable from the fact, that they disclaimed the authority of their said agent in another case to receive payment of a premium, even at an earlier stage of the war, and refused to ratify it.

But the contract being suspended by the war, all acts which were to be done in its execution were suspended; and the stipulations that the insured should pay the premiums of the 9th and 10th of June 1861, as the conditions of the policies, were suspended.

But this being so, it was obligatory on the insured, if living, to have tendered payment in a reasonable time after the termination of the war. But if the insured had not survived the war, but had died *pendente bello,* the case, it seems to me, is different, and the
641 assured *is not liable to a forfeiture of the policy by reason of the failure of the personal representative of the insured to make a tender of the unpaid premiums after the termination of the war. The insurer had in his own hands money due from him to the assured, out of which he was entitled to retain the unpaid premiums, and a tender of them by the personal representative would have been unnecessary if not improper. But the insurer should have been informed in a reasonable time after the war ended of the death of the insured, that he might know what his liabilities were. The non-payment of premiums pending the war, and by reason of its existence, were facts within his knowledge, and need not have been communicated to him by the personal representative, because not necessary to inform him of his liability or its extent.

In this case the insured died March 17, 1863, *pendente bello.* His wife qualified as his executrix, and died in June 1865, soon after the termination of the war. Letters of administration *d. b. n., c. t. a.,* were granted to her brother, J. C. Cammack, on the 12th of October following; and he wrote to the secretary of the company in January following, informing him of the death of R. C. Duerson from disease. He also informed him of the date of his death, and of whatever it was necessary for the company to learn from him to form a conclusion as to its liability. I do not regard this letter as conceding that there was no legal liability on the company to pay the policy as contended for by its counsel. On the contrary, it seems to me that, according to its natural import, the writer was of opinion that the assured had a claim upon the company, but to what extent, or whether it could be legally enforced or not, he was not informed, and wished to have the views of the company with regard to it. Relying
642 *upon what he had heard as to its liability in other cases, he hoped it would come to just conclusions. I do not think it can be regarded as a surrender in any manner of any just or legal claim, which, as the personal representative of R. C. Duerson, he had upon the company, though it is not a positive assertion of any legal claim. The company replied through its president, after a delay of some five months, declining to pay anything, and for its conclusion assigns reasons which absolutely ignore the only fact, the existence of the war, which might relieve the insured from a forfeiture on account of the non-payment of premiums, but puts its refusal to pay anything upon the ground of the non-payment of premiums, and upon that ground alone. No objection is made upon the ground of the delay in communicating the death of the insured, or for the want of a more formal notice of his death, or for the non-compliance with any formal requirement of the policies, but only on the ground of the non-payment of premiums, which may therefore be regarded as a waiver of such requirements if not strictly observed. It does not appear that Cammack made any response to the said letter.

On the 12th of June 1873, William R. Duerson, son of decedent, qualified as his executor, and on the 1st July following he wrote

to said company, informing them that he had in his possession as executor the said policies, and demanded payment. This letter was not answered, and the claims were placed in the hands of an attorney for collection, who, after some correspondence with the company, instituted suit, the company having denied all liability.

I am not aware that the claims in this suit can be defeated on account of delay in their assertion and prosecution by suit, 643 unless it was such delay as would *bar the plaintiff's recovery under the statute of limitations, which is pleaded by the company. And the company, under the Virginia act, having a local existence and domicil in this state, for the purpose of being sued, the statute of limitations may be relied on just as if the company had been chartered by an act of the Virginia legislature. It is necessary therefore to inquire whether the assured's right of recovery in this case is barred by the statute.

The questions arising under this head have been answered by recent decisions of this court. In *Johnston* v. *Gill*, 27 Gratt. 587, it was held that the several acts of the government of Virginia during the war, suspending the statutes of limitations, were valid, to prevent the running of the statute prior to the 3d of March 1866. Consequently the claims involved in this suit were not barred by the statute on the 3d March 1866. And in the *Danville Bank* v. *Waddill*, 27 Gratt. 448, it was held that in an action of assumpsit, on the plea of the statute of limitations, the time from the 2d March 1865, to the 1st day of January 1869, is to be left out of the computation by virtue of section 7 of the act of 2d March 1866. The statute could not therefore begin to run before the 1st January 1869, and suit was brought on the 29th day of December 1873, within the five years, so that the plea of the statute of limitations is not sustained.

But it is contended for the plaintiff in error, that if it had a domicil in this state, to the end that it might be sued here, the right of action was not suspended by the war, and consequently the right to collect the premiums, and unless the defendant in error has shown a tender to the agent on the day, and refusal, he cannot be relieved from a forfeiture of the policy. To this objection, it is only necessary to reply, 644 that it *does not lie in the mouth of the plaintiff in error to put in such a plea, since its agent, after the 4th day of May, publicly refused to receive any more premiums, and declares that if the premiums had been tendered by Duerson, he would not have received them. And his determination was not only approved by it, but it actually refused to ratify his act in receiving a premium on the 4th of May preceding.

But it is further contended for the plaintiff in error, that the judgment of the court below is erroneous for the want of jurisdiction, no process having been served on it,—the service on A. A. Little being futile, as he was not its agent, his agency having been revoked by the war, and also by express revocation after the war was over. But by the express provision of the Virginia act of 1855-'56, it was not authorized to grant policies in this state, or make renewals, until it had appointed an agent in the way described by the statute, and was not allowed to revoke the authority of said agent until it had appointed another in his place, as long as any of its obligations in the state remained unsatisfied. So that by virtue of this act the agency which had been constituted in A. A. Little was irrevocable as long as those obligations remained unsatisfied, no other agent having been appointed by the company.

But it is contended, that said provision of the law not being in force at the time the contracts in question were made, but being subsequently enacted, were not binding upon the company in this case. The said provisions were amendatory of the previous law, and extended to policies which had been previously made, as well as those which were made subsequently, and the company by its acts of compliance with its terms and by operating under it, must be held 645 to have accepted *its provisions, and cannot now, at this late hour, after having for years carried on its business, and exercised corporate powers and enjoyed special privileges under its provisions, without protest or objection, be allowed to plead that those provisions of the law requiring it to keep an agent here, not only for negotiating new policies, but for executing those which had been previously made, were not binding on it, and that it could, at its pleasure, revoke the authority of its agent with regard to the fulfillment of its obligations already incurred, without appointing another in its place. I am of opinion, therefore, that A. A. Little continued to be the agent of the company for receiving the service of the process in this case. Upon the whole, I am of opinion that there is no error in the judgment of the circuit court, and that the same be affirmed.

JUDGMENT AFFIRMED.

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646 *Kendrick & als. v. Whitney & als.

July Term, 1877, Wytheville.

Absent, BURKS, J.*

1. Interlocutory Decrees—Statutory Bar.†—There is no statutory bar to the time within which a petition may be filed to correct error in an interlocutory decree.

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*The case was heard before the election of JUDGE BURKS.

Interlocutory Decrees—Statutory Bar.†—In Woodson v. Leyburn, 83 Va. 846, the court, citing and distinguishing the principal case in reference to the rule that there is no statutory bar to the time within which a petition may be filed to correct error in an interlocutory decree, says: "This, as a general rule of equity practice, is well established and undisputed; but it has no application to the case in hand, because it is met and neutralized by another rule equally well established and understood, which is, that an interlocutory decree affirmed by the court on ap-

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2. Same—Rehearing—Judge's Discretion.‡—Whether in such case a rehearing shall be granted, depends upon the sound discretion of the court upon all the circumstances of the case.

3. Statute—Limitations.§—The motion to correct error in a judgment or decree by default given by ch. 177, § 5 (Code of 1873), is barred after the lapse of five years from the date of the judgment or decree.

4. Same—Cumulative Remedies.‖—That statutory remedy is, however, cumulative, and has not superseded or abolished petitions for rehearing, which may still be had, according to the course of equity, in the same manner as before the enactment of that statute.

5. Same—Same.—Though the motion here, if treated as made under ch. 177, § 5, is barred by the lapse of time, still, inasmuch as the notice, on which that motion was founded, was signed by counsel, was served upon all the parties in interest, and was regularly filed, and contained all the requisites of a petition for a rehearing, it will be treated as a petition for a rehearing and relief given accordingly.

6. Sales—Liens—Priorities.¶—It is error to decree a sale of land before taking an account of the liens thereon, and their respective priorities.

7. Deed of Trust — Sureties — Chancery Practice.—When a deed of trust has been given upon land by a debtor to protect his sureties on the debt against harm, it is error to decree a sale of the land before making the creditor a party to the suit.

8. Sales—Accounting.—Where judgment creditors file their petitions in a suit for the sale of their debtor's land, it is error to enter a decree for sale in their favor, before referring the cause to a commissioner, so that the judgment debtor may have an opportunity of showing any payments made, or set-offs to which he may be entitled.

647 *This was a suit in equity in the circuit court of Scott county, brought in November 1859, by Whitney, Cushing & Comstock, partners, to subject the land of George H. Kendrick to satisfy a judgment they had recovered against him. The bill states that they recovered a judgment for $125, with interest, against Kendrick on the 3d of February 1856, which was docketed on the 9th of November 1858. That, by deed dated the 12th of August 1857, Kendrick had conveyed a tract of land to John A. Mann, in trust to secure H. F. Kendrick and William Nash, his sureties, in a debt of $1,065.66, due to Kent, Paine & Kent. This debt, plaintiffs were informed and believed, had been paid. That on the 20th of October 1858 Kendrick had conveyed the land to said Mann, to secure a debt of $895.58 to one William Dingus. They charge that at the time of executing this deed Mann and Dingus had notice of their judgment; and that said debt has been fully paid; but, be that as it may, they claim priority over it, and charge that said deed was made to hinder and defraud the plaintiffs in the collection of their debt.

George H. Kendrick, John A. Mann, Henry F. Kendrick, William Nash and William

peal cannot therefore be reheard by the court in which it was pronounced." As sustaining the principal case on this point, see Adkins v. Edwards, 83 Va. 301; Trevelyan v. Lofft, 83 Va. 146; Newberry v. Stuart, 86 Va. 967; Fultz v. Brightwell, 77 Va. 750; Staples v. Staples, 85 Va. 79; Rawlings v. Rawlings, 57 Va. 91; Wayland v. Crank, 79 Va. 604. See also, 4 Min. Inst. (2nd Ed.) 1390; Bartons' Ch. Pr. (2nd Ed.) 132. See especially, Lloyd v. Kyle, 26 W. Va. 534, for construction of the West Virginia statute forbidding petitions for appeal from any decree or judgment after five years.

‡**Same—Rehearing—Discretion of Judge.**—The rule laid down in the principal case, that in the case of an interlocutory decree, the granting of a rehearing is in the discretion of the judge, is sustained in Ryan v. McLeod, 32 Gratt. 383; Welsh v. Solenberger, 85 Va. 445.

§**Statutory Remedy—Cumulative.**—The principal case is cited with approval in Gallatin Land, etc., Co. v. Davis, 44 W. Va. 112 (28 S. E. 747), on the point embodied in the fourth headnote. Citing also, Bank v. Shirley, 26 W. Va. 563; Sturm v. Fleming, 22 W. Va. 404.

‖**Notice—Bill of Review.**—In Dick v. Robinson, 19 W. Va. 165, the court says: "The defendant Handly appeared to the notice, and in his answer insisted on the statutory bar of five years thereto. The decree dismissing the bill as to Handly had been entered more than six years before the service of the said notice. As a notice it was clearly barred. But it is contended by counsel for appellees, that if as a notice it is barred, the court will treat the notice as a bill of review to the said final decree. We cannot so treat it even under the liberal rules as to chancery pleadings laid down in Laidley v. Merrifield, 7 Leigh 346; Kendrick v. Whitney, 28 Gratt. 646; Dillard v. Thornton, 29 Gratt. 392 and Hill v. Bowyer, 18 Gratt. 364." See also, Martin v. Smith, 25 W. Va. 583 and Sturm v. Fleming, 22 W. Va. 413.

¶**Sales—Liens—Priorities.**—As sustaining the rule laid down in the sixth headnote of the principal case, to the effect that it is error to decree a sale of land before taking an account of the liens thereon and their respective priorities, see Shultz v. Hansbrough, 33 Gratt. 567, and *note*; Alexander v. Howe, 85 Va. 198 and Daingerfield v. Smith, 83 Va. 81, citing the principal case. See also, Bartons' Ch. Pr. (2nd Ed.) 189, 859, 1155, 1156. See Marling v. Robrecht, 13 W. Va. 462, citing the principal case and Moran v. Brent, 25 Gratt. 104; Simmons v. Lyles, 27 Gratt. 922; Wiley v. Mahood, 10 W. Va. 206; Cralle v. Meem, 8 Gratt. 530; Buchanan v. Clark, 10 Gratt. 165; Livesay v. Jarrett, 3 W. Va. 283; Murdock v. Welles, 9 W. Va. 552.

Same—Same—Nature of New Evidence.—In Corey v. Moore, 86 Va. 730, the court says: "The well established rule is, that whether the proceeding be by bill of review to a final decree or by a petition to rehear an interlocutory decree, if it be founded on after-discovered evidence, the bill or petition, as the case may be, must not only allege that the new matter was discovered after the rendition of the decree sought to be reviewed or reheard, but should be supported by an affidavit that the newly discovered evidence could not have been procured, with the use of due diligence, in time to have been used when the decree was rendered; and the affidavit must also state the substance of the evidence, which must be relevant, and not merely cumulative, and such as, if true, ought to produce a different result on another hearing. LEWIS, P., in Trevelyan's Adm'r v. Lofft, 83 Va. 141; citing Kendrick v. Whitney, 28 Gratt. 646; Connolly v. Connolly, 32 Gratt. 657; Whitten v. Saunders, 75 Va. 563; Douglass v. Stephenson's Ex'or, 75 Va. 747; 1 Bart. Ch'y Pr. 126."

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Dingus were made parties defendant to the bill; but none of them answered. The cause as set for hearing at the March rules for 1860. At the May term of the court Hubbard, Gardner & Carlton and Smith & Roberts filed their petitions, claiming to be creditors by judgment of George H. Kendrick, recovered at the November term 1856 of the county court of Scott county, the first for $408.64, with interest, and the second for $294.47, with interest. Although no order seems to have been made admitting the petitioners as defendants, their names were inserted in the bill, and they filed their answers.

648 *On the same day on which these petitions and answers were filed, the cause came on to be heard on the answers of Hubbard, Gardner & Carlton and Smith & Roberts, and the bill taken for confessed as to Kendrick, Mann and the other parties originally made parties by the bill; and the court decreed that the complainants, Hubbard, Gardner & Carlton and Smith & Roberts, should respectively recover against George H. Kendrick the amount of their judgments. And that time be given to said Kendrick to pay the said sums decreed against him until the 10th of September next; and in case of his failure to pay the same, a commissioner was appointed with direction to sell the land, or so much thereof as might be necessary, to pay the said decree, &c., on a credit of six, twelve and eighteen months. And he was directed to report his proceedings to the court.

Nothing seems to have been done under this decree; but the cause was regularly continued until the March term 1874 of the court, when George H. Kendrick, Henry F. Kendrick, William Nash, and John A. Mann, filed a notice to Whitney, Cushing & Comstock, Hubbard, Gardner & Carlton, and Smith & Roberts, and their counsel, that they would at the March term of the court move the court to reverse, vacate and annul the decree made in the cause in May 1860. The notice was signed by counsel, and sets out the case and the decree by default in favor of the different parties, and the appointment of a commissioner to sell the land. And it sets out the errors on which they rely for the reversal of the decree. Such of these errors as were acted on by this court are sufficiently stated in the opinion of JUDGE STAPLES. Service of the notice was acknowledged by the counsel of the parties on the 19th of November 1873.

649 *The motion was fully argued at the March term of the court, but the case was retained for consideration until the August term, when the court held that by the fifth section of chapter 177, of the Code of 1873, the motion authorized by that section of the Code must be made before the judge in vacation, or the court in term, within five years from the rendition of the decree or judgment complained of; and if the motion comes within the seventh section of the act of 1866, yet more than five years had elapsed between the date of the decree and the motion made on the 2d day of March term last past. The motion was therefore overruled, but without prejudice to the rights of the parties to seek relief in the cause, which was still pending in the court, in any legitimate mode, by petition, motion or otherwise, as they may be advised. And thereupon George H. Kendrick, and the other plaintiffs in the motion, applied to this court for an appeal; which was allowed.

Wm. H. Burns, for the appellants.
P. Hagan and *Morrison*, for the appellees.

STAPLES, J., delivered the opinion of the court.

The appellants moved the circuit court of Scott county, at the March term 1874, to reverse an interlocutory decree by default of the same court rendered on the 17th May, 1860. It appears that the notice upon which the motion was founded was served the 19th November, 1873. If the date of serving the notice be adopted as the true time, rather than the date of making the motion, and if the period provided for by the seventh section of the act of March 3d, 1866,

650 *known as the stay law, be excluded from the computation, still the motion was not made in five years from the date of the decree of the 17th May, 1860. It was upon this ground the learned judge of the circuit court refused to entertain the motion, and not because in his opinion the decree of 1860 is correct.

The appeal in this case brings in review the correctness of that decision. The motion, it is insisted, was made under the fifth section of chapter 181, Code of 1860; and the question is as to the true interpretation of that section and the one immediately following. It is there provided, that the court in which there is a judgment by default, or a decree on a bill taken for confessed, or a judge of said court in vacation thereof, may on motion reverse such judgment or decree for any error for which an appellate court might reverse it, if the following section (which is the sixth) was not enacted, and give such judgment as ought to be given. It is further provided that every motion under that chapter (181) shall be after reasonable notice to the opposite party, his agent or attorney in fact or at law, and shall be within five years from the date of the judgment or decree.

The sixth section provides that no appeal, writ of error or *supersedeas* shall be allowed by an appellate court, or judge, for any matter for which a judgment or decree is liable to be reversed or amended, on motion, as aforesaid, by the court which rendered it, or the judge thereof in vacation, until such motion be overruled in whole or in part.

There is no difficulty in regard to the proper construction of these two sections, as applied to final decrees by default. Under former laws, the limitation upon the right of appeal was five years. The same limitation was by analogy prescribed for

651 motions *under the fifth section just cited. The object of that section, as stated by JUDGE ALLEN, in *Davis, sheriff*, v. *Commonwealth*, 16 Gratt. 134, 137, was to

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save parties the delay and costs of an appeal to correct irregularities and formal errors, which seldom affect the merits of the controversy, and which would have been corrected at once by the court if pointed out. See also *Hill et als.* v. *Bowyer et als.*, 18 Gratt. 364. As the party aggrieved could after the lapse of five years take no appeal from a final decree, it was proper to apply the same limitation in case of a motion which in such case is made a substitute for an appeal. All this is plain enough. The real difficulty is in respect to interlocutory decrees; as to which there is not and never was any limitation. An appeal may be taken from such a decree at any time, so long as the cause is pending in court. And whilst a bill of review to a final decree cannot be brought after three years, a petition to rehear an interlocutory decree is not limited by any statutory bar. Cases may be found in which the court has reheard a cause at the distance of eighteen years from the time the decree complained of was pronounced. In another case the court has refused to discharge an order for a rehearing, though at a distance of twenty-five years. Newland Chy., page 188. See also *Cocke's adm'r* v. *Gilpin*, 1 Rob. R. 20. Whether a rehearing shall be granted is said always to depend upon the sound discretion of the court upon all the circumstances of the case. Adams Eq., marg. 379; *Land* v. *Wickham*, 1 Paige R. 256.

I think it was not the design of the legislature, in enacting the sections already quoted, to abolish these long established rules of practice and proceeding in courts of equity; but to afford an additional remedy by motion in certain classes of cases to re-
652 verse or amend *a decree interlocutory or final. If the party aggrieved resorts to the motion allowed by the statute, he must commence his proceeding in five years from the date of the decree.

A motion is, necessarily to a great extent, a proceeding of an informal character. It is an application *ore tenus* addressed to the court by counsel. Under the statute it may be made even in vacation and upon notice to an agent or attorney. In many cases it is *insufficient* to bring before the court all the equities and matter proper to be understood by the court, and which may have arisen after the lapse of years. It was proper, therefore, to provide some limitation to such motions, even where the decree is purely interlocutory, and that limitation is fixed at five years.

But the remedy by motion, thus afforded by the fifth section, is not exclusive but cumulative. The party aggrieved may, if he pleases, still resort to his petition for a rehearing, even within the five years, for a petition is in effect a motion, and answers all the purposes of the latter under the statute. But if more than five years have elapsed since the date of the decree, the party is deprived of his statutory motion; but his remedy by a petition for a rehearing still remains. And there may be cases in which he might even still resort to his motion, according to the course of proceeding in the courts of chancery. Every one familiar with the practice in these courts is aware that both in England and Virginia errors in decrees are often corrected upon motion, especially where the decree is by default. Indeed there does not appear any very distinct line of demarcation between the cases in which applications of an interlocutory nature should be made by motion, and those in which they should be made by petition, the practice in this respect
653 *being generally regulated by the circumstances of each case. 3 Daniel's Ch. Prac. 244; Newland's Ch'y, 185, 186; *Moore* v. *Hylton*, 12 Leigh 1, 26.

These rules of practice were not intended to be interfered with by the statute; the only alteration being, that when the decree is by default, the party aggrieved must proceed by motion, or by a petition for a rehearing, which is in effect a motion, before an appeal can be taken to this court.

Any other construction would involve incongruities in the practice never contemplated by the legislature. If the statute has abolished petitions for rehearing after five years, the effect will necessarily be, that no appeal can be taken from the interlocutory decree by default after that time. And yet the party aggrieved in such case has only to wait until there is a final decree, and then take his appeal, which necessarily brings in review all the proceedings, including the interlocutory decree. Where any such a decree adjudicates the principles of a cause, or directs the payment of money, or the title or possession of property to be changed, the policy is to allow an appeal without waiting for a final decree. If the defendant in such a case may wait until there is a final decree, and then take his appeal, no matter what may be the time elapsed between the interlocutory and final decree, why should he not be allowed to appeal from the interlocutory decree at any time before a final decree; and if he may appeal, why may he not petition for a rehearing, when the justice of the case requires it, whatever may have been the lapse of time, if in fact no final decree has been rendered. The policy of the law is to encourage petitions for a rehearing as cheaper and more expeditious than the expensive remedy by appeal; and the courts ought to give to the statute
654 such an interpretation *as will preserve this mode of proceeding according to the long established course of the courts, rather than to compel parties to await a final decree, and then incur the expense of appeals, or to lie down under interlocutory decrees grossly unjust and illegal.

My opinion, therefore, is, that the circuit judge did not err in holding that a motion under the statute is barred after five years, whatever may be the character of the decree. But while concurring with him in this view, I think there was no good reason for not treating the motion in this case as substantially a petition for a rehearing. The notice upon

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which that motion was founded was signed by counsel, it was served upon all the parties claiming under the decree of May 17th, 1860, and was regularly filed in the circuit court. It accurately describes the suit in which that decree was rendered; and it specifies with sufficient minuteness all the grounds upon which appellants rely for reversing the decree. It contains, therefore, every feature necessary to constitute a petition for a rehearing; and if it had been so called, there would be no difficulty in so considering it. Why, then, may it not be treated as a petition? In Virginia the practice of courts of equity is marked by the greatest liberality with respect to the pleadings. Sometimes a petition for a rehearing is treated as a bill of review, and *vice versa*. In *Laidley* v. *Merrifield*, 7 Leigh 346, it was declared that an application of a party is not to be rejected altogether because he has given it the form and name of a bill of review, instead of a petition or a supplemental bill in the nature of a bill of review. JUDGE CABELL said, the court should regard its substance, and treat it accordingly as a petition or a supplemental bill in the nature of a bill of review. In *Mettert's adm'r* v. *Hagan*, 18 **655** Gratt. 231, an answer *was held sufficient for all the purposes of a cross bill. See also *Sands* v. *Lynham, escheator*, 27 Gratt. 291. These cases show the disposition of the courts of equity to regard substance rather than mere form, and so to mould the pleadings as to attain the real justice of the case.

I think, therefore, the notice in this case was substantially a petition to rehear and set aside the decree of May 17th, 1860, and ought to have been so treated by the court. The parties being before the court, the grounds for the reversal being distinctly set forth, the court ought to have given the defendants in the motion an opportunity of answering, if they desired, and then to have gone on and decided the question raised as upon a petition for a rehearing.

It only remains to inquire whether there is any error in the decree of May 17th, 1860, for which it is liable to be reversed. I think there is. The court plainly erred in decreeing a sale of the land before taking an account of the liens thereon, and settling priorities of the different creditors. The necessity of such an account has been repeatedly affirmed by this court. *Moran* v. *Brent*, 25 Gratt. 104; *Simmons* v. *Lyles*, 27 Gratt. 922. But this is not all. A part of the judgment creditors, Hubbard, Gardner & Carlton, and Smith and Roberts, were permitted to come in by petition and make themselves defendants, and on the very same day a decree was entered in their favor for the sale of the land. The defendant, George H. Kendrick, ought to have been afforded an opportunity of showing any payments made, or set-offs, to which he may have been entitled as against those creditors. To that end the court ought to have referred the matter to one of its commissioners, to summon the parties, and inquire and report the amount of indebtedness properly chargeable on the land.

656 *The decree of May 17th, 1860, is erroneous in another respect. It appears that the appellant, George H. Kendrick, on the 12th August 1857, executed a deed of trust for the benefit of H. F. Kendrick and William Nash, his sureties, upon a bond due Kent, Paine & Kent. The bill avers that this debt had been paid and the deed discharged; but there is no proof of the fact in the record. Kent, Paine & Kent, although not expressly provided for in the deed, were, upon familiar principles of equity, entitled to the benefit of the security, and they ought to have been made parties before any decree for the sale of the land.

These errors, if promptly insisted on, it is very clear were sufficient to vacate the decree of 1860. But since that time new rights may have accrued, other equities may have attached, which would render it impossible to interfere with the sale of the land without much inconvenience and injustice to parties, and even to third persons. The errors alluded to are not fundamental, but such as may have been cured or effectually waived. It may be that Kent, Paine & Kent had been paid their debt, so that they are no longer interested in the subject matter of controversy. It is not improbable, certainly not impossible, that all the creditors may have been before the court, or their claims have been satisfied, or that the land, if sold at all, was sold at its full value. The record furnishes no information upon these points, and it would be improper for this court to pass upon them finally without giving the parties an opportunity of being heard upon them, or upon any others, bearing upon the decree of 1860, and the sale thereunder. The case must therefore be remanded to the circuit court for further proceedings in conformity with the views herein expressed, and a decree to be entered accordingly.

DECREE REVERSED.

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657 *Schurtz & als. v. Johnson & als.

July Term, 1877, Wytheville.

Absent, ANDERSON and STAPLES, J's.

I. In 1859 W conveyed to P a tract of land in York county, in trust to secure a debt of $8,000 with interest. In May 1866 W conveyed his equity of redemption in this land to N, in trust to secure a debt of $2,000 then lent to him. All the parties to this deed then living in Baltimore, the deed provided that in default of payment the trustee should sell, "at such place as he may think proper," the said property at public auction, &c. In July 1869 the trustee advertised and sold the said equity of redemption at public auction in Baltimore, when the creditor became the purchaser; and she afterwards sold it at a small advance, but not sufficient to pay the whole of her debt. At the time of the sale by the trustee the amount of the prior lien was ascertained. In November 1859 M recovered two judgments against W in Accomac county; and J and S, who claimed to have paid these judgments, had them docketed in York county in May 1867. On a bill by J and S to set aside the said sales and conveyances.—HELD:

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1. **Sale by Trustee—Selection of Place—Trustee's Discretion.***—The deed of trust leaving the place of sale to the discretion of the trustee, he had the authority to sell the property in Baltimore, or at any other place which he in his discretion might select. And the only question is, whether he exercised that discretion fairly and prudently—in other words, whether he committed a breach of trust.
2. **Equity of Redemption—Sale.**†—The amount of the prior lien being certain and ascertained, the sale of the equity of redemption was proper.
3. **Deeds—Judgment Liens—Priorities.**‡—The deed of trust having been taken without any notice to the trustee or creditor of the existence of the judgments in Accomac, and before these judgments were docketed in York county, the liens of the judgments were subsequent to that of the deed of trust and presented no objection to the sale.

II. **Responsive Answers—Effect.**§—When the plaintiff in equity by his bill calls for a material disclosure from the defendant on oath, and
658 the defendant in his answer *on oath makes such disclosure fully and unequivocally, the answer, to the extent of such disclosure, is said to be responsive to the bill, and the statement must be taken as true, unless overcome by the satisfactory testimony of at least two opposing witnesses, or of one witness with clear corroborating circumstances.

This case was argued in Richmond and decided at Wytheville. It was a suit in equity to set aside a sale of land under a deed of trust, and the conveyance to the purchaser from the trustee, and also a sale and conveyance by that purchaser to a purchaser from her. The case was heard upon the bill, the answers, and the exhibits; and the sales and conveyances were set aside and certain accounts ordered. And the trustee and the last purchaser applied to this court for an appeal; which was awarded. The case is sufficiently stated by JUDGE BURKS in his opinion.

John H. Gilmer and *Grattan*, for the appellants.

John S. Wise and *Crump*, for the appellees.

BURKS, J. This case presents the question as to the validity of a sale made by a trustee under a deed given to secure the payment of debts.

On the 17th of January, 1859, Samuel C. White by deed of that date conveyed his tract of land called "Temple Farm," lying in York county, Virginia, to W. S. Peachy, in trust to secure the payment of $8,000, with interest, to James P. Selby. By deed of the 31st of May, 1866, he conveyed the equity of redemption of this deed of trust to Nathaniel F. Williams, of Baltimore, to secure the payment to Martha E. Williams and Clara M. Hewson, of Baltimore, to each the sum of $1,000 and interest, for money borrowed of them. Williams (the trustee)
659 on the 17th *of July, 1869, made sale by public auction at Baltimore, of the equity of redemption conveyed to him by the last-named deed, and the said Clara M. Hewson becoming the purchaser, he conveyed the same to her by deed dated 23d of July, 1869.

Clara M. Hewson afterwards sold the equity of redemption to William D. Shurtz (the appellant here) and conveyed the same to him by deed of the 28th of February, 1870.

After the making of the trust deed aforesaid, but precisely when does not appear, White made a contract with Anthony M. Kimber and others, of Philadelphia, for the sale to them of eighty acres of the "Temple

*Sale by Trustee—Selection of Place—Trustee's Discretion.—In Morriss v. Virginia State Insurance Co., 90 Va. 379, the question of the right of the truste to exercise his discretion in selecting a place of sale when no place is specified in the deed is discussed at length and while the rule laid down by the principal case is affirmed, it was held that where the trustee selected a place of sale to which the debtors objected, the debtor's wishes should have governed, LEWIS, P., dissenting. See Barton's Ch. Pr. (2nd Ed.) 473.

†**Equity of Redemption—Sale.**—As to the sale of the equity of redemption where the land is encumbered by ascertained liens, see Wise v. Taylor, 44 W. Va. 496, (29 S. E. 1003) and Curry v. Hill, 18 W. Va. 375.

‡**Deeds—Judgment Liens—Notice—Priorities.**—In Morrison v. Bausemer, 32 Gratt. 232, the principal case is cited and distinguished on the point laid down in the third headnote. See also, Freeman v. Eacho, 79 Va. 43; Tabb v. Tabb, 82 Va. 48; Carr v. Branch, 85 Va. 605 and Williams v. Lord & Robinson, 75 Va. 404, citing the principal case and Wickham v. Lewis Martin & Co., 13 Gratt. 427, 437; Evans v. Greenhow, 15 Gratt. 155, 157; Exchange Bank v. Knox, 19 Gratt. 739.

§**Responsive Answers—Effect.**—The rule laid down by the principal case in regard to the effect of an answer responsive to the bill is followed in Shultz v. Hansbrough, 33 Gratt. 567; Batchelder v. White, 80 Va. 109 and Thompson v. Clark, 81 Va. 428, citing the principal case and Jones v. Abraham, 75 Va. 466; Bell v. Moon, 79 Va. 341; Moore v. Ullman, 80 Va. 307. See also, 4 Min. Inst. (2nd Ed.) 1325, citing Maupin v. Whiting, 1 Call 224; Pryor v. Adams, 1 Call 388; Buck v. Copland, 2 Call 229; Bullock v. Goodall, 3 Call 49; Hoomes v. Smock, 1 Wash. 390; Thornton v. Gordon, 2 Rob. 719; Fant v. Miller, 17 Gratt. 187. See Barton's Ch. Pr. (2nd Ed.) 422.

Sale by Trustee—Duty to Parties.—In Muller v. Stone, 84 Va. 837, the court says "That a trustee is considered as the agent of both parties and bound to act impartially between them; that it is his duty to use every reasonable effort to sell the estate to the best advantage, and that it is his duty to apply to a court of equity where there is a cloud upon the title, or where there is doubt or uncertainty as to the amount to be raised, or as to prior encumbrances on the trust subject, or where there is a conflict between the creditors, or in any case in which the aid of a court of equity is necessary to remove impediments in the way of a fair execution of his trust, are propositions which none will deny, and which have been repeatedly affirmed by this court. Shurtz v. Johnson, 28 Gratt. 657; 1 Lom. Dig. 323; Lane v. Tidball, Gilm. 130; Gay v. Hancock, 1 Rand. 72; Miller v. Argyle's Ex'or, 5 Leigh 460; Wilkins v. Gordon, 11 Leigh 547; Miller v. Trevilian, 2 Rob. 1; Bryan v. Stump, 8 Gratt. 241; Rossett v. Fisher, 11 Gratt. 492; White v. Mech. Building Fund Ass'n, 22 Gratt. 233."

Farm;" but this contract was never carried out, and after the purchase of the equity of redemption by Hewson, it was rescinded.

On the 5th day of November, 1859, William K. Merritt & Co. recovered two judgments against White in the circuit court of Accomac county, which were never docketed in the county of York, where "Temple Farm" lies, until the 21st day of May, 1867.

Abel T. Johnson and E. K. Sneed, (appellees here) claiming, as sureties of White on an injunction bond, to have paid off these judgments, filed their bill in the circuit court for the county of James City and the city of Williamsburg, against Shurtz, N. F. Williams, (trustee), Clara M. Hewson and others, to set aside the sales aforesaid, and subject the equity of redemption to the payment of said judgments.

Shurtz, Williams, (trustee), Martha E. Williams, and Clara M. Hewson filed answers to the bill, and the cause having been matured as to all of the defendants, was removed to the circuit court of Gloucester county, where it was heard on the bill, answers and exhibits, (no depositions having been taken), and a *decree entered 660 setting aside the sale to Hewson by Williams (trustees), and ordering certain accounts, which need not be noticed. An appeal from this decree allowed to Shurtz and Hewson brings the case here for review.

It is admitted that the sale by the trustee was made at Baltimore, in the state of Maryland. The estate sold was an equitable interest in lands lying in the state of Virginia; and it is contended that the trustee had no power under the laws of this state to make sale at a place outside its limits and beyond its jurisdiction, and for this reason alone, if for no other, the sale was invalid; and such seems to have been the ground on which the decree complained of was based.

I know of no law of this state forbidding such a sale, and no decision of any court has been cited in support of the general proposition, that a trustee who is invested with power to make sale of real estate for the payment of debts, without express limitation as to the place of sale, cannot lawfully make such sale at a place outside the territory and beyond the jurisdiction of the state in which such real estate may be. The powers of the trustee must be determined from an examination of the deed under which he acted. The deed speaks this language: "Should said Samuel C. White fail to pay or cause to be paid such sums of money, or any interest, as the same becomes due and payable, it shall be the right and privilege of the said Nathaniel F. Williams, trustee, his heirs or successors, immediately upon such default to advertise for sale the whole or any part of the hereby mortgaged property in such public manner, and for such length of time, (not less than thirty days), and at such place as he or they may think proper, and after having done so, to sell said 661 *property at public auction for cash or on credit, at his or their option, and apply the proceeds of sale, &c."

It thus appears that neither Baltimore nor any other place is specially designated in the deed as the place where the sale is to be made, but, by the plainest implication, the selection of such place is left to the discretion of the trustee, as is usual in deeds of this character.

It may not be doubted, therefore, that the trustee had the power under the deed to make the sale at Baltimore, or at any other place which he in his descretion might select. The real and only question is, whether he exercised that power fairly and prudently; in other words, whether he committed a breach of trust. The statement in the answer, that at the time the deed was executed there was a parol agreement amongst the parties that the sale, in case of default, should be made at Baltimore, cannot be considered. It is an affirmative statement; and if, when proved, it had been competent evidence, still it was not proved.

In a deed of trust to secure the payment of debts, the trustee is the agent of both parties, debtor and creditor, and should act impartially between them; and in making sale of the trust subject he should use all reasonable diligence to obtain the best price. And if there be any cloud hanging over the title or uncertainty as to the amounts of the debts secured, or of prior encumbrances, or any other impediment to the fair execution of the trust which cannot be otherwise removed, the aid of a court of equity should be invoked by him to remove the impediment before sale; and if he fail or refuse to resort to the court for that purpose, the parties in interest who may be injured by his default, whether debtor, secured creditor, or subsequent encumbrancer, may apply to the 662 court for relief. **Rossett* v. *Fisher*, 11 Gratt. 492, and cases there cited; *Hogan* v. *Duke & als.*, 20 Gratt. 244.

The gravamen of the bill in this case is, that the sale was in Baltimore, outside the limits of this state; that no notice of the time and place of sale was ever published at any place in this state; and that the property was sold while it was heavily encumbered with prior liens and while clouds were hanging over the title, and was consequently sacrificed and sold for much less than it would have brought at a fair sale made in the county of York or its vicinity. These allegations the several defendants were called upon to answer on oath; and Samuel C. White, Nathaniel F. Williams (the trustee), Martha E. Williams and Clara M. Hewson were especially required to discover and state the consideration, if any, for the deed of trust executed to Williams (trustee); whether the sale by said trustee was not made in Baltimore, and at the instance and request of the said Samuel C. White; and whether any notice of the said sale was ever published or given in the county of York, in the state of Virginia, or in any other part of said state.

The defendants, N. F. Williams (trustee), Martha E. Williams and Clara M. Hewson, in their joint and several answer, state, as required by the bill, the consideration of the deed made to said trustee, and say that it was for money loaned by Martha E. Williams and Clara M. Hewson to the said Sam-

uel C. White; and in that connection they state the circumstances under which the loan was made. They admit that the sale was made in Baltimore, and state the facts and circumstances attending the sale. They deny that the sale was made, as alleged in the bill, at the instance and request of Samuel C. White. They further deny that no notice of the sale
663 was published in Virginia, *as alleged in the bill; and state that notice was given by the advertisement in the Baltimore Daily Sun for thirty consecutive days, and a copy of the advertisement is filed with their answer; and in direct response to the inquiry of the bill, they say that notice of the sale was given and published in the county of York, in the state of Virginia, and elsewhere. They expressly and positively deny that there was any cloud hanging over the title at the time of sale, and state the amount of the encumbrances, which amount was known at the day of sale. They deny that the property was sacrificed, as alleged in the bill, or that it would have brought more money if it had been sold in Virginia; and aver that the sale was fair and for an adequate price. The affirmative averments in the answer as to repeated ineffectual efforts to sell the land, and as to other matters, need not be noticed, as no proof was offered in support of them.

When the complainant in a bill in chancery calls upon the defendant to answer an oath material allegations of the bill, and the defendant in his answer made on oath, expressly, directly and positively denies the truth of such allegations, or when the bill calls for a material disclosure from the defendant on oath, and the defendant in his answer on oath makes such disclosure fully and unequivocally, in either case, the answer, to the extent of such denial or disclosure, is said to be responsive; and it is an elementary principle of equity jurisprudence that an answer, as far as it is responsive, is evidence for the respondent, and its statements so far must be taken as true, unless overcome by the satisfactory testimony of at least two opposing witnesses, or of one such witness with clear corroborating circumstances.
664 1 Daniell Ch. Prac. 843, *844, and notes; 2 Story's Eq. Juris. § 1528; *Fant v. Miller & Mayhew*, 17 Gratt. 187.

The answer of the defendants, Nathaniel F. Williams, Martha E. Williams and Clara M. Hewson, in all particulars before referred to, is responsive to the bill, and must so far be taken as true. No testimony has been taken to contradict it; and the exhibits filed in the cause go for the most part to confirm it. Taking these responsive statements as true, the complainants made no case for relief, and their bill should have been dismissed.

The mere fact, as we have seen, that the sale was made at a place outside of this state, did not render the sale invalid. The trustee, in the exercise of a sound discretion, was authorized to make it in Baltimore, or at any other place. The place selected was convenient to all the parties interested. The debtor, the trustee and the creditors secured by the deed, all resided there, as well when the deed was executed as when the sale was made. The complainants resided in the county of Accomac; and Baltimore was probably more convenient to them than Yorktown. In the condition in which that portion of Virginia in which "Temple Farm" lay was in the year 1869, it is fair to presume that a better sale could have been effected in Baltimore than at Yorktown or any other place in its vicinity. The sale appears to have been well advertised. Notice was published for thirty consecutive days in a leading newspaper in Baltimore and further published in York county, Virginia, where the farm was situated, and in other places. It would seem there was no lack of bidders at the sale. The debtor was present, and so were the creditors secured by the deed, and persons from Virginia, who actually
665 *bid for the property; and every effort seems to have been made to obtain the highest price. There was really no cloud on the title. The record shows that when White conveyed the land to Peachy in trust he had a perfect title in fee. Certainly no question has been made as to this, nor was there any doubt that the estate which Williams as trustee sold was White's equity of redemption of the Peachy trust deed. That estate was certain and well defined. The equity of redemption was substantially the Temple farm, with the encumbrance upon it of the debt secured in the deed to Peachy. The amount of that incumbrance appears to have been ascertained and known at the day of sale. White (the debtor) knew the amount and all about it, and was present to give information to all desiring it, and no doubt did give it. Clara M. Hewson did not desire to purchase the property. She was interested in making it bring as much as possible, in order that she might save her debt. White had a like interest; and both seem to have used every exertion to get the highest price. The encumbrance of the judgments of Merritt & Co. was not then known to the trustee Williams, nor to the creditors secured by the deed, and therefore had no effect on the sale; and if it had been known and proclaimed, it would have had no effect, for, as I shall presently show, the liens of the judgments were inferior and subordinate to the other encumbrances.

And the same may be said of the sale of the eighty acres of land to Kimber and others. This was a contract for a sale made *after* the conveyance to Williams, and could not affect the title previously conveyed to Williams, and therefore could not have affected the sale made by Williams. The contract was executory and was afterwards
666 rescinded without any substantial *benefit accruing to Hewson, of which the judgment creditors could justly complain.

Nor does it appear that the property was sacrificed, as alleged in the bill, or sold for an inadequate price, or, as further alleged in the bill, for a less sum than it would have brought if it had been sold in York county. The answer positively denies these allegations, and thus shifts the burden of proof to the complainants, and although they allege in

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their bill that they are "prepared to establish" these allegations, they offer no proof whatever of them. If they could have established them, surely after the flat denial of the answer it behooved them to do so, and as the proof was most material to their case, the fair presumption is, that it could not be had. The difference in the price paid by Mrs. Hewson, and the price obtained by her from the appellant Shurtz, is not sufficient evidence of sacrifice by the trustees' sale, and although she obtained some advance on the price paid by her, still several hundred dollars of her debt against White remained unpaid.

The judgments sought to be enforced by the bill in this case were recovered 5th November, 1859. They were never docketed in the county of York where "Temple Farm" lies, until 21st May, 1867. At the time the deed was made to Williams, (trustee), 31st May, 1866, neither the trustee nor the creditors secured by the deed had any notice of them. If they had been docketed in said county within twelve months from the date of their recovery, they would have constituted *liens* on White's equity of redemption of the deed to Peachy, (trustee), as of the date of their recovery; (Code of 1860, ch. 186, §§ 6, 8;) which, being prior, would have been superior to the *lien* created by the deed to Williams, (trustee). The trustee in 667 the *last named deed and the creditors secured therein are "purchasers for valuable consideration" within the meaning of section 8, ch. 186, Code of 1860, and having had no notice of the judgment at the time the deed was executed and recorded, the *lien* created by the deed takes precedence of the *lien* of the judgments. *Evans, trustee*, v. *Greenhow & als.*, 15 Gratt. 153; *Exchange Bank of Va. for &c.* v. *Knox & als;* and *Farmers Bank of Va. for &c.* v. *Anderson & Co.*, 19 Gratt. 747.

As the sale and conveyance of the equity of redemption to Clara M. Hewson were valid, it follows that the title of the appellant Shurtz under his purchase and conveyance from Hewson is good; it therefore becomes unnecessary to express any opinion as to the defence of Shurtz relied on in his answer, that he is a purchaser for valuable consideration without notice of the alleged equity of the complainants set up in the bill.

I have taken no notice of the deed of the 6th of February, 1868, from Samuel C. White to his son Isaiah H. White, because it is confessedly voluntary and subject, by its terms, to all the liens, sales and encumbrances on the land existing at the time it was made. It could not in any way have affected the sale made by Williams.

I am of opinion, that the decree of the circuit court of Gloucester county should be reversed and annulled, and the bill of Johnson and Sneed (appellees here and complainants there) dismissed.

My attention has been called to the case of *Walker* v. *Beauchler*, 27 Gratt. 511, not reported, and not seen by me until after the foregoing was written. It is supposed by some that the opinion of the court delivered by JUDGE STAPLES in that case is to some extent in conflict with the views hereinbefore 668 expressed. I have *examined that case carefully, and do not find any such conflict. On the contrary, the proposition stated in my opinion, to wit, that where the place of sale is not prescribed by the deed, it is left to the *discretion* of the trustee, is there affirmed. "In the exercise of that discretion," says JUDGE STAPLES, "it would seem clear that the sale ought to have been made at least in the county where the property was situated, more particularly as at that time access to Georgetown was rendered more difficult by the presence of the military and by the requirements of permits for persons resident in the county of Alexandria." Whether discretionary power in any case has been abused in its exercise must be determined by the facts and circumstances of such case; and all that was intended, I apprehend, to be affirmed by JUDGE STAPLES in what he says, *supra*, was that the discretion of the trustee was not properly exercised in *that* case. The sale "ought to have been at least in the county where the property was situated," for the reasons stated by him. He does not even intimate that under different circumstances the sale would have been *void* upon the *sole* ground that it was made at a place *outside the state*, there being no other objections to the sale. It is unnecessary to notice further the opinion in 27 Gratt. 511. An examination of it will show that the decision in that case rests upon facts essentially different from those established by the record in this case.

MONCURE, P., concurred in the opinion of BURKS, J.

CHRISTIAN, J., dissented.

The decree was as follows:

669 *This cause, which is pending in this court at its place of session at Richmond, having been fully argued there, but not determined, this day came here the parties by their counsel; and the court, having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said decree is wholly erroneous. It is therefore decreed and ordered, that the said decree be reversed and annulled, and that the appellees, Abel T. Johnson and E. K. Sneed, pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid in this court. And this court now proceeding to render such decree as the said circuit court ought to have rendered, it is further decreed and ordered that the bill of the complainants, Abel T. Johnson and E. K. Sneed (appellees here), be dismissed, and that they pay to the defendants their costs by them about their defence in the said circuit court expended: which is ordered to be certified to the said circuit court of Gloucester county.

And it is further ordered that this decree be entered on the order book here, and be forthwith certified to the clerk of the court at the place of session where this cause is

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pending as aforesaid, who shall enter the same on his order book and certify it to the clerk of the circuit court of the county of Gloucester.

DECREE REVERSED.

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670 *Ware v. Ware's Adm'r.

July Term, 1877, Wytheville.

Absent, ANDERSON and BURKS, J's.

A guardian of an infant husband received in satisfaction of the wife's distributable share in her father's estate, certain bonds due the estate. These bonds the guardian surrendered to the obligors, and took from them other bonds payable to himself as guardian; upon which latter he recovered judgments and sued out executions, which were levied upon the property of the debtors respectively. Forthcoming bonds were given and forfeited, and executions again issued and levied; but no sales were made of the property. All this occurred in the lifetime of the husband, and he died before he became of age. After the death of the husband, the wife filed her bill against the administrator of the husband to have the debts delivered to her, or to have a settlement out of them—HELD:

1. **Choses in Action—Reduction into Possession.***—The guardian had the power, as guardian, to reduce into possession for the husband the wife's *choses in action*; and what was done in this case was such a reduction into possession of these *choses in action*.
2. **Same—Same—Husband and Wife.**—The property having been reduced into possession the wife is not entitled to a settlement.

This case was heard at Richmond, but was decided at the term of the court at Wytheville. It was a suit in equity in the circuit court of Gloucester county, brought in October, 1872, by Mary E. Ware, the widow of Cincinnatus J. Ware, deceased, and daughter of Henry Hughes, deceased, against the administrator of Cincinnatus J. Ware, to have decreed to her certain judgments which had been recovered by the guardian of her husband, and which were based upon debts 671 transferred *by the representatives of her father to the guardian of C. J. Ware, as a part of the distributive share in her father's estate. There was a decree dismissing the bill; and thereupon Mrs. Ware applied to a judge of this court for an appeal; which was allowed. The facts are stated in the opinion of STAPLES, J.

J. S. Wise, for the appellant.

Wm. B. Taliaferro, for the appellee.

STAPLES, J., delivered the opinion of the court.

There can be no doubt that the acts done by the guardian of the husband, in this case, if done by the husband himself, would be held to be a reduction into possession of the wife's choses in action. After the intermarriage of Mrs. Ware, the appellant, with Cincinnatus J. Ware, the administrator of her father's estate delivered to the guardian of Cincinnatus J. Ware, certain bonds in payment or satisfaction of Mrs. Ware's distributive share in that estate. These bonds, as is conceded, the guardian surrendered to the obligors respectively, taking in their place others payable to himself as guardian. Upon these he afterwards instituted suits, recovered judgments, sued out executions, which were levied upon the property of the debtors respectively. Forthcoming bonds were given and forfeited, and executions again issued and levied, but no sales were made of the property, in consequence of the stay laws passed in the early part of the war. All this occurred in the life time of Cincinnatus J. Ware, and during his minority. He was killed in battle while in the public service and before he attained twenty-one years of age. It is not seriously controverted, that these acts were sufficient to extinguish 672 the entire interest *of Mrs. Ware in the subject matter of controversy, if it be competent for a guardian of an infant husband to reduce into possession for the husband, the wife's choses in action. The learned counsel for the appellant takes the ground that the guardian has no such power; that it is a marital right personal to the husband, which he alone can exercise, and which he may exercise or not, at his pleasure; and in this case, the husband never having elected to reduce the wife's choses into possession, and not having ratified the acts of the guardian, whatever was done by the latter was without authority, and wholly ineffectual to divest the wife's interest. This point has been elaborated with great force and ingenuity in the printed brief of the counsel for the appellant. And it is to this our attention must be chiefly directed.

It is well settled, that, as to the choses in action of the wife, marriage is only a qualified gift to the husband, upon condition that he gets possession during the coverture; for if he die before the wife, without having gained such possession, she, and not his personal representatives, will be entitled to them: but it is equally true, and has been so expressly held by this court, that the marital right, though it confers no absolute title to the property while a chose in action, yet attaches to the *chose in action*—vests an appreciable interest therein—gives the right to make the property of which it is the representative absolutely that of the husband; and this right, vendible and assignable, is the subject of sale or gift to the extent of the husband's interests. When the assignment is without consideration, as in case of a gift, if the husband dies before the chose is reduced into possession, the legal right of the wife of survivorship attaches and defeats the right of the assignee. If the assignment is 673 special *for value, it is considered in many cases a *quasi* reduction into possession, which defeats the legal right of survivorship, and the assignee is only subject to the wife's equity to a settlement. See *Dold's trustee* v. *Geiger's adm'r*, 2 Gratt. 98—

*See 1 Min. Inst. (4th Ed.) 331 and 464; Barton's Ch. Pr. (2nd Ed.) 753.

110. In that case, the wife being entitled to a distributive share in her father's estate, it was agreed by the husband, who was then insolvent, it should be settled upon the wife, and it was accordingly settled to her separate use. Although the husband thus declined to reduce the property into possession, and expressly waived his martial right thereto, this court was unanimously of opinion, that it was liable to the claims of the husband's creditors, and might be subject to their payment, notwithstanding the settlement upon the wife.

It will thus be seen that the husband has an appreciable interest in the wife's choses in action, which may be the subject of sale, gift, assignment or release, and may be appropriated by his creditors to the payment of their claims. See upon this point *Yerby and wife* v. *Lynch & als.*, 3 Gratt. 439, 474, 477, 493-4, 567-8.

This being so, it is difficult to understand why the chose is not subject to the ordinary rules and incidents applicable to any other estate of property of the ward which may be brought under the control and supervision of the guardian. Although the guardian has no beneficial interest in the estate of his ward, still his authority is coupled with an interest, and is not barely an office. In respect to the real estate, he may make a lease for years, upon which ejectment may be maintained; he may have an action of trespass against a stranger, in his own name, for spoiling the grass; he may have a writ of right of ward, and recover the land and damages, as well as the body of 674 the ward; he *may assign dower and institute proceedings for partition. *Truss* v. *Old*, 6 Rand. 556.

In respect to the personal estate, his powers are very extensive. His authority extends to the collection of debts and other *choses in action* belonging to the ward; to the receipt of legacies and distributive shares, and granting acquittances for the same. He may assign mortgages, compromise and submit to arbitration, and in fine, do whatever is necessary to protect the ward's interest.

In *Hunter* v. *Lawrence's adm'r & als.*, 11 Gratt. 111, a bond given to an executor was transferred by him to a guardian as part of the ward's estate. This court held, that whatever interest the ward had in the bond was subject to the control of the guardian, who may receive the money thereon, if voluntarily paid; may sue for it in the common law courts in the name of the executor for his own use as guardian, and cannot be prevented by the executor; or he may sell and transfer the bond to a *bona fide* purchaser.

Seeing that the guardian is thus clothed with very extensive powers in respect to the personal estate of the ward, conferred for the benefit of the latter, he ought, for the same reason, to have the power of making available the ward's interest in the wife's personal property. If the guardian is not authorized to do so, who is?—not the wife certainly, because she is under the disability of coverture; nor the ward himself, he being under the disability of infancy. The result would be the loss of the debt or other interest, in many instances, for want of legal authority to collect or secure it. And however great might be the necessity of the husband and wife, and however ample the estate of the wife, there would be no hand to receive and apply it to their maintenance and support. The 675 *same difficulties must arise with respect to the ordinary personal effects of the wife—such as horses, jewels, and the like—in the possession of third persons. No title vests in the husband until he takes them in his possession; but according to the theory of the learned counsel, he, being an infant, cannot elect to divest the wife's interest; and as the guardian is incompetent in such case to elect for him, the property must remain beyond the control of the husband or guardian until the former arrives at twenty-one years of age and makes his election to reduce it to his possession. It is no answer to this view to say that a court of equity might give relief. In the large majority of cases of goods and chattels belonging to the wife, and *choses in action* due her, no ground could be plausibly suggested for the jurisdiction of a court of chancery. Besides, according to the theory advanced, the right to reduce the wife's *choses* to possession is a marital right personal to the husband, to be exercised by him and him alone.

In the case before us, the personal representative of the estate of Hughes, the wife's father, might have paid the guardian the wife's distributive share in money instead of bonds—and such a payment would have been as valid as a payment made to an adult husband. If the administrator was willing to transfer, and the guardian to accept, solvent bonds, in discharge of the wife's interest, it was equally a good payment. There is no doubt that the guardian might at once have received payment from the obligors in these bonds. If he had done so, and loaned the money to third persons, or even to the same obligors, the transaction would have been substantially the same as that before us. In either case, it was the exercise of a rightful authority, and was effectual to 676 place the fund *under his control for the exclusive use and benefit of the husband. In every view that may be taken, the question is free from all difficulty.

The last point to be considered is, whether the appellant has a valid claim to a settlement upon her of the whole or any part of the fund. The rule on that subject in this state is settled under repeated decisions of this court.

It is thus laid down in *Poindexter and wife* v. *Jeffries*, 15 Gratt. 363-369: Whenever the husband, in right of his wife, has obtained possession of and title to her property, his own title *jure mariti* becomes complete, and the property to the extent of his title, is subject to his right of disposition, and to the claims of creditors, like any other property of his otherwise acquired. And when the property, by being reduced into the husband's possession, has once been released from the wife's equity, it can never again be subjected to it. If it be recoverable at law, and

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the aid of a court of equity be not invoked to recover it, her equity does not exist.

Tested by this rule, it is manifest that the appellant is not entitled to a settlement out of the fund which is the subject of controversy. That fund the personal representative of the husband was proceeding to collect at law, under judgment and execution, when this bill was filed by the appellant requiring him to account with and pay over to her such portion of it as might constitute a fair settlement. If the appellant's intestate be limited to her distributive share in her father's estate, that interest was satisfied by the transfer of the bonds to the guardian. If it be regarded as extending to the bonds so transferred, that interest was divested by the execution of the new bonds payable to the guardian, followed by the judgment and
677 execution in *the name of the guardian. Whatever, therefore, may have been the nature of the wife's *chose*, it was reduced into the possession of the husband through the guardian in the lifetime of the former. The property being thus released from the appellant's equity cannot now be subjected to it. See opinions of judges in *Yerby* v. *Lynch*, 3 Gratt. 439. See also, *Harcum's adm'r* v. *Hudnall*, 14 Gratt. 369, 380; 3 Rob. Prac. 204. For these reasons the decree of the circuit court must be affirmed.

DECREE AFFIRMED.

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678 *Rhea v. Jordan.

July Term, 1877, Wytheville.

Specific Performance—Sale of Land—Parol Contracts.*—Where a tract of land was conveyed jointly to J. and R., and about the same time J. agreed to sell his moiety thereof to R. for a certain price, and under and in pursuance of said agreement R. took and held exclusive and undisturbed possession of said land for about twenty-eight years, made valuable improvements thereon, and paid to J. the agreed price for his moiety, it was held that a bill filed by J. for partition must be dismissed, and that R. had acquired a full equitable title, which the court would enforce by compelling J. to make conveyance of the legal title also.

This was a suit in equity in the circuit court of Washington, brought in August, 1870, by Zachariah Jordan against Wm. R. Rhea, to have partition of a tract of land which had been conveyed by William Chiles to said Jordan and Rhea, by deed bearing date the 4th of January, 1842. Rhea insisted that he had purchased from Jordan his undivided moiety of the land and had paid him for it in full; that he went into possession of the land in 1843 and had held it ever since, without any claim by Jordan, either of the land or the proceeds of it; and that he had made expensive improvements upon it, which he specifies. He afterwards filed a cross-bill to have a conveyance of the title; but on the hearing upon the admission of his counsel, at the hearing, that the bill was multifarious, the demurrer to it was sustained.

The cause same on to be heard on the 9th of October, 1874, when the court held the plaintiff was entitled to a partition
679 of the land; and commissioners *were appointed to make it. And a commissioner was directed to state an account, &c. Rhea thereupon applied to a judge of this court for an appeal; which was allowed.

There was a great deal of evidence taken in this case, and it was somewhat contradictory. The view of it taken by this court will be seen in the opinion of the court delivered by MONCURE, P.

York & Fulkerson and *Campbell & Buchanan*, for the appellant.

J. W. and *J. P. Sheffey* and *Vance & Wood*, for the appellee.

MONCURE, P., delivered the opinion of the court.

The court is of opinion that it appears from the pleadings and the proofs in this case, that at or about the time of the execution of the deed from William Chiles to the plaintiff, Zachariah Jordan, and the defendant, William R. Rhea, bearing date on the 4th day of January, 1842, and duly admitted to record in the clerk's office of Washington county on the 6th day of that month, of which deed an official copy, marked, "Exhibit A," is filed with the plaintiff's bill, there was a parol agreement entered into by and between the said Jordan and Rhea, that the latter should purchase of the former his interest in, or undivided moitey of, the land conveyed to them jointly by the said deed, at its cost price, to wit: the sum of five hundred dollars, the whole costs being one thousand dollars; that it was made a condition of the said agreement by the said Rhea, that he should be able to obtain by purchase the dower interest of Mrs. Chiles in the said land; that
680 *on the 18th day of September, 1846, he accordingly obtained by purchase the said dower interest, which, by deed of that date, was relinquished and transferred by her to the said Rhea and Jordan; that the said Rhea was unwilling to go upon the said land and improve it, unless he could purchase the interest of said Jordan therein, which was accordingly agreed to be sold to him as aforesaid; that immediately after the said agreement was made, the said Rhea, under and in pursuance of the same, entered into the exclusive possession of the said land, and

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Equity Jurisdiction—Cross-Bills.—In Ragland v. Broadnax, 29 Gratt. 422, the court said: "We think the circuit court was right in retaining the cross-bill and adjudicating the questions raised by it. All the parties interested were before the court. It had jurisdiction of the subject matter and the parties. It ought not after protracted and costly litigation, to have dismissed the cross-bill and turned the parties over to another tribunal to litigate the same questions. In furtherance of a favorite maxim of courts of equity it ought to have put an end to the litigation between the parties, having all the parties before it and doing justice to all." Citing the principal case and Mettert v. Hagan, 18 Gratt. 231; Clark v. Long, 4 Rand. 452.

***Specific Performance—Sale of Land—Parol Contracts.**—See Barrett v. Forney, 82 Va. 269, citing the principal case; Floyd v. Harding, 28 Gratt. 401, and *note*; Frame v. Frame, 32 W. Va. 463.

remained in such possession either in person or by his tenants, peaceably and undisturbed, without any adverse claim on the part of said Jordan or any other person or persons whomsoever, from the time of the commencement of such possession down to, or shortly before the time of the commencement of this suit in 1870, a period of about twenty-eight years; that during that period, and upon the faith of the said agreement, he expended large sums of money in making improvements on said land, having repaired the dwelling house, made an addition to it, built a store house, smoke house, spring house and barn, repaired all the fencing, made meadows, &c., and he cultivated the said land and received and enjoyed the proceeds thereof, without let or hindrance from any person or persons whomsoever, the said Jordan, though he lived all the time within about a mile of the said land, and had full knowledge of what was going on as aforesaid in regard to the same, never claiming any part of the profits of the said land, or any rent or account of the same, or any interest therein, although he was in limited circumstances and in need of any interest he might have had in the rents and profits of said land; and that the said
681 Rhea, during the said period and *long before the institution of this suit, fully paid the purchase money agreed to be paid by him for the interest of the said Jordan in the said land, as the said Jordan has repeatedly admitted to different persons who have testified to that effect in the cause.

The court is, therefore, further of opinion that the whole of the said land, in equity at least, if not at law also, belongs to the said Rhea, that the said Jordan has no interest therein, that he is not entitled to partition thereof, and that his bill therefore, should be dismissed.

The court is further of opinion, that the said Rhea is not only entitled, in equity at least, to the said Jordan's interest in the said land, but is also entitled to a conveyance of the legal title to the said interest, and might have obtained a decree for such conveyance on a bill for the specific execution of the said agreement, or on a proper cross-bill filed in this suit. And although the cross-bill which was filed in this suit was dismissed as being multifarious; yet the court is further of opinion, that the answer in this case contains all the necessary and proper averments of a cross-bill, and may be regarded as such, and ought to be so regarded for the purpose of doing justice to all parties and making an end in this case of litigation between them on the subject in controversy in the case.

The court is, therefore, of opinion, for the reasons aforesaid, that the decree appealed from, so far as the same is in conflict with the foregoing opinion, is erroneous, and ought to be reversed and annulled, and in lieu thereof, a decree rendered dismissing the plaintiff's bill, and directing the legal title to the said Jordan's interest in the said land to be released and conveyed to
682 the said Rhea, so as to invest *him with an absolute title in fee simple to the whole of the said land.

In the argument of this case questions were raised and authorities were cited by the counsel, which we have not deemed it necessary to refer to in detail. The grounds relied on by the plaintiff in resistence of the claims asserted in the answer, are that the claim is barred by the statute of frauds and perjuries, and that there has not been a sufficient part performance of the parol agreement in the proceedings mentioned to entitle the defendant to specific execution of the said agreement. In the view we have taken of the pleadings and proofs in this cause, and upon the case which is thereby, in our judgment, clearly made out, we think that there can be no doubt that according to all the authorities on the subject, there was a sufficient part performance of the agreement to entitle the parties to a specific execution of the same. Indeed, the performance, on the part of Rhea, was not partial, but complete. It was argued by the counsel for Jordan, that possession is not a sufficient part performance where the vendee is a lessee of, or a joint tenant or tenant in common with the vendor, and that in such case the continued possession after the date of the agreement will be referred to the former title rather than to the parol agreement. If the continued possession stood alone, perhaps that might be so. But where, as in this case, it is accompanied by clear and positive proof *aliunde* that the continued possession, if so it can be called, was, in fact, exclusive and not joint, and that many costly improvements were erected by the vendee on the land, there can be no room for doubt on the subject.

The certainty of the terms of the parol agreement in this case, the long lapse
683 of time during which actual *and exclusive possession was held under it, the number and costliness of the improvements erected on the faith of it, and the full payment of the purchase money, are concurring circumstances which render this a peculiarly strong case for specific execution. Nothing in fact remains to be done to complete the execution but for the vendor to release the legal title to the vendee, who has already a perfectly equitable title. The ground on which part performance has been held to be sufficient to make a case out of the operation of the statute of frauds or perjuries is, that it would be a fraud on the vendee to permit the vendor after such part performance to take advantage of the statute and deprive the vendee of possession. A statute made to prevent fraud will not be allowed to be perverted to the purpose of perpetrating fraud. That reason plainly and strongly applies to this case.

The law on the subject of specific execution of parol agreements for the sale of land is well collected in the books referred to by the learned counsel. 1 Story's Eq. Ju. §§ 760-787: Hilliard on Vendors, chap. ix., on "part performance." We have examined what is said in these books on the subject and find nothing in it which is at all in conflict with the foregoing opinion. We have also read against the case of *Anthony* v. *Leftwich*, 3

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Rand. 238, referred to by the counsel on both sides, and if it does not fully sustain what we have said, it is not at all in conflict therewith. See also 2 Minor's Institutes, 2d edition, pp. 771-775, referred to in the argument; and *Lester* v. *Foxcroft, &c.* Leading cases in equity, vol. 1, part 2, p. 1207, (edition of 1876), and notes. Other books might be cited to the like effect, but it is unnecessary, and they are not now at hand. Those above referred to are at hand, and are sufficient for the purpose. In the opinion of this
684 *court, delivered by JUDGE CHRISTIAN, in a recent case, which has since been very often cited, and was cited by the counsel in this case, *Wright* v. *Pucket*, 22 Gratt. 370, there is a concise and perspicuous summary of the law in regard to the doctrine of part performance of contracts concerning real estate. The decision of the present case will be found to be perfectly consistent with the doctrine as there laid down.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the appellant Rhea is not only entitled, in equity at least, to the appellee Jordan's interest in the said land, but is also entitled to a conveyance of the legal title to the said interest, and might have obtained a decree for such conveyance on a bill for the specific execution of the said agreement, or on a proper cross-bill filed in this suit. And although the cross-bill which was filed in this suit was dismissed as being multifarious, yet the court is further of opinion, that the answer in this case contains all the necessary and proper averments of a cross-bill, and may be regarded as such, and ought to be so regarded for the purpose of doing justice to all parties, and making an end in this case of all litigation between them on the subject of controversy in the case.

The court is therefore of opinion, that the decree appealed from, so far as the same is in conflict with the foregoing opinion, is erroneous; and it is decreed and ordered that the same be reversed and annulled, and that the appellee pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here. And this court proceeding to render such decree as the circuit court ought to have rendered, in
685 *lieu of so much of the decree as is reversed as aforesaid, it is further decreed and ordered, that the original bill of the plaintiff in the court below, Jordan, be dismissed, and that he pay to the defendant Rhea his costs by him about his defence in that court expended. And the court proceeding to treat the answer of the said defendant as a cross-bill for the specific performance of the parol agreement in said answer mentioned, it is further decreed and ordered that the said Jordan by deed duly executed and acknowledged by him for record, release and convey all his interest in the land in the original bill mentioned to the said Rhea.

Which is ordered to be certified to the circuit court of Washington county.

JUDGMENT REVERSED.

686 ***Nash v. Nash & als.**

July Term, 1877, Wytheville.

1. **Chancery Pleading—Uncertainty—Effect.***—Where in a suit in equity, the rights of the parties involves the decision of questions which were not put in issue by the pleadings, or so vaguely and uncertainly as not to inform the opposite party of what were the issues between them, so that he might prepare his case in a way to secure a full investigation by the court, and a decision according to the very right of the case, and which would do justice to all concerned, the appellate court will reverse the decree of the court below, and send the cause back, will leave to the parties to amend their pleadings.
2. **Same—Unrecorded Deeds—Allegations.**—Where the bill does not, in terms, allege that the plaintiff had no knowledge of an unrecorded deed of trust when he purchased the land, though it might be construed as virtually making such averment; and it is not affirmatively averred in the answer that he had such notice, so as to put that matter in issue; proof upon that question by both parties was upon a matter not issue in the cause.

In April, 1861, Samuel H. Nash brought his suit in equity in the circuit court of Russell county, against William Nash, Charles S. Bekem and John M. Preston. In his bill he says that on the 31st of March, 1861, he purchased of his brother, William Nash, certain lands in Russell county, being seven-tenths of the lands of their father Wm. Nash, deceased, and also other adjoining lands which he describes. That Wm. Nash wrote, signed and delivered to complainant what he called a title bond, and which he filed as part of his bill marked A. That complainant being unlearned and ignorant, supposed the said bond to be properly written, and set forth the contract plainly
687 and definitely, *though he is now told that the same is very awkwardly and vaguely drawn. He charges that at the time of the contract, Wm. Nash, as administrator of their father and also of their mother, and as complainant's guardian, owed him a large sum of money. That no settlement had been made, and it was agreed and inserted in the said bond (though very indefinitely) that whatever was due by Wm. Nash to the complainant on these accounts should be credited towards the purchase money of the lands. That Wm. Nash also owed him for ten or twelve years work, and there were other claims held by complainant against him, for all of which he was to have credit, and a settlement was to be made and the whole matter closed up. He charges that he had made frequent efforts to have a settlement with William Nash, and they made frequent appointments of time and place to meet and close the matters between them, but that he always failed to attend. Being a brother, complainant has borne with him thus long, and probably would have still delayed to

Preston v. Nash, 75 Va. 949, and Preston v. Nash, 76 Va. 1, are continuations of the principal case.

***Chancery Pleading—Uncertainty—Effect.**—See Fisher v. White, 94 Va. 236, citing the principal case; Barton's Ch. Pr. (2nd Ed.) 275, and cases cited.

resort to law, but not very long since complainant was told, to his great surprise, that there was a deed of record in Russell conveying to Charles S. Bekem the lands sold complainant, together with other tracts, in trust, to secure a debt due by William Nash to John M. Preston; and to his still greater astonishment on the 3d of April 1861, he saw an advertisement on the front door of Russell C. H. for the sale of these lands on the 23rd of April, 1861. The advertisement was dated the 9th of March, 1861. A copy of this deed is filed as a part of the bill, and complainant understands that the debt due by said deed has been paid down to about $2,000. And complainant further understands and charges that the lands lying in Scott county
688 and conveyed by said *deed, are more than sufficient to pay the debts secured by the deed if the whole were still due.

The complainant charges that the execution of this deed by William Nash was a great fraud, and breach of faith on his part, and a sale of the lands claimed by complainant would result in his ruin; for everything of value he owns is invested in said lands, and he is not able to purchase for cash at the trustee's sale. He believes that on a settlement with William Nash he will be found to have fully paid the purchase money. He prays that Bekem and Preston be restrained from selling under the said trust deed the lands in Russell county claimed by complainant, until the lands in the county of Scott shall be sold, and shall prove insufficient to discharge the debt to Preston; that an account be taken between complainant and William Nash of all matters in which William Nash is concerned either as individual or as guardian of complainant, or as administrator of William Nash or Margaret Nash; that William Nash be decree to convey the land sold to complainant upon its appearing that the purchase money shall have been paid; or if he cannot by reason of the trust deed or otherwise, specifically execute the contract, that he be decreed to pay to the complainant what in justice and in equity may be due to him under all the circumstances; and for general relief.

The injunction was granted. And at June rules 1861 William Nash filed his answer. He states at length his construction of the paper filed by the plaintiff as a contract, and insists it was no contract, but a proposition, which from the refusal of a party to whom the plaintiff was to pay a part of the purchase money, to take the plaintiff as his debtor, unless the defendant would convey the land to the plaintiff, and he would
689 *give a deed of trust to secure it, which defendant refused to do, the proposition fell; and that plaintiff is wrong in saying there is a contract between him and respondent. He states a number of claims he had against plaintiff; from which, and from the provisions of an article of partnership between them, he says it may readily be inferred that the respondent does not owe the complainant anything, and that the complainant is in his debt.

After the filing of this answer the case seems to have slept until May 1868, when the death of John M. Preston was suggested, and it was ordered that the suit be revived against James M. Preston, surviving administrator of Walter Preston, and as administrator of John M. Preston, deceased, and that he have leave until June rules to file his answer.

Nothing further was done until October 1870; when the court made an order in which the death of John M. Preston was again suggested, and that Walter Preston, by gift from John M. Preston, became entitled to the fund secured by the deed of trust, and that he was dead; it was entered that the suit be revived against John M. Preston's administrator, and that plaintiff should amend his bill and make the administrators of Walter Preston parties.

The amended bill was accordingly filed; and at the April term, 1871, Bekem and the administrators filed their answers. Bekem makes a statement of credits upon the debt secured by the deed of trust, allowed by John M. Preston, up to November 1858, and credits for payments made by William Nash since, and also of orders drawn upon him by Walter Preston, to be paid when moneys were received from the trust fund. He refers to the answer of William Nash as to the paper relied on by the plaintiff
690 as a contract, and *insists it was but a proposition, not accepted by the plaintiff, and certainly never complied with in any way. He says: Even had it been accepted as a contract, nothing was known of the pretended purchase till the bill of the complainant was filed. When the trust was executed the records of Russell showed no claim or incumbrance upon the lands; and, though there might have been a contract between complainant and William Nash for part of the land conveyed by the deed of trust (and that is not admitted), unknown to John M. Preston and not on the record, it could not be set up to the prejudice of the said Preston.

The administrators of John M. and Walter Preston, after stating the gift of the debt by John M. to Walter Preston, say: The complainant claims that he purchased of William Nash certain property contained in the trust, while William Nash denies it. Even if he did contract for it (and that is not admitted), it cannot be set up and enforced to the prejudice and injury of the estate of Walter Preston. Nothing was known or heard of the alleged purchase till about the time of the filing of the bill by complainant, as respondents are informed.

At the September term of the court for 1872 the cause was referred to a commissioner to state and settle an account of the transactions in controversy between the plaintiff and the defendant William Nash, and also an account showing the amount of the debt due by William Nash to John M. Preston, the several payments made thereon, or the credits proper to be allowed, and to whom the remaining portion of the debt is due, &c.

In May 1873 Bekem filed in the clerk's

office a statement showing moneys which
691 had been received *from William Nash by the Prestons and himself on account of the debt secured by the deed of trust, and also a statement of his sale of the land embraced in the deed which was not covered by the injunction of the plaintiff. And in August 1873 the commissioner made his report. After allowing the credits for moneys received as aforesaid and the bonds given for the purchase money of the lands sold by the trustee, he stated the amount due July 24th, 1873, at $7,217.60, of which $4,488 was principal. He makes statements of the different accounts between the plaintiff and William Nash; and the result is, that on the 1st of March 1851, when William Nash executed the instrument purporting to be a title bond, he was indebted to the plaintiff to an amount equal to the purchase money of the land in controversy. And he mentions other credits claimed by the plaintiff which he did not bring into the account.

William Nash excepted to the report: 1st. Because every item charged in the account is barred by the statute of limitations. 2d. Because by the terms of the paper A, which plaintiff claims as a title bond, he was to pay to James R. Canell $1,000 at once, and was to pay the defendant $1,000 more in six weeks from the date of the paper, $600 more in October, and the balance in eighteen months. 3d. Because the hires of slaves is estimated too high, and also the wages of complainant.

Neither the account nor the evidence is in the record, though the report of the commissioner giving the result of the account is; and it shows that a number of witnesses were examined before him. It is unnecessary to set out the paper A filed with the bill. Both the circuit court and this court held it to be a contract for the sale of
692 the land. The deed of trust *in favor of Preston was dated the 18th of April 1850. The clerk's certificate stated that on the 30th of April 1858 it was proved before him in the clerk's office of Russell county by two of the subscribing witnesses, naming them, and on this the 7th day of September 1858 admitted to record.

The cause came on to be heard on the 10th of March 1874; when the court overruled the exceptions of the defendant William Nash, and held that, charging the plaintiff with the whole price of the land purchased by him of William Nash and all other charges, and crediting him with all offsets and payments, the said William Nash will be indebted to him the sum of $2.96, as of the 1st of March 1851; and that said plaintiff is entitled to a conveyance of the land from the defendant Nash; but that the trust deed had priority over his claim. It was therefore decreed that William Nash pay, in consideration of the lands sold by him to the plaintiff, to C. S. Bekem, trustee, the sum of $7,217.60, with interest on $4,488, part thereof, from the 20th of July 1873, being the balance secured by the said deed of trust. And it was further decreed that the injunction granted to the plaintiff be dissolved, and that Bekem proceed to sell the land embraced in the deed of trust upon the terms of the deed, unless, &c.

From this decree the plaintiff, Samuel H. Nash, applied to this court for an appeal; which was allowed.

W. H. Burns, for the appellant.
Johnston & Trigg and *White & Buchanan*, for the appellees.

ANDERSON, J., delivered the opinion of the court.

693 *The court is of opinion, that the plaintiff, Samuel H. Nash, fairly purchased the lands in question from the defendant William Nash, as evidenced by the paper made an exhibit in the cause, bearing date March 31st, 1851, and marked (A); that he was let into possession, and continued in the quiet and peaceable possession of the same, under his said contract, from the date of his purchase until the bringing of this suit; that he had fully paid the purchase money at the date of his contract, and is entitled to a conveyance of the title from the said Wm. Nash. And consequently that there is no error in the interlocutory decree of the 10th of March, 1874, as between the plaintiff and the defendant Wm. Nash; and in this respect it must be affirmed.

The court is further of opinion, that there is no error in the decree, so far as it ascertains the balance due of the debt of Wm. Nash to John M. Preston, which he undertook to secure by deed of trust, and to that extent, and in that respect, it is also affirmed.

But the decision that the deed of trust has priority over the contract of sale to Samuel H. Nash involves the decision of questions which were not put in issue by the pleadings, or so vaguely and uncertainly, as not to inform the opposite party of what were the issues between them, so that he might prepare his case in a way to secure a full investigation by the court, and a decision according to the very right of the case, and which would do justice to all concerned.

The bill does not allege in terms that the plaintiff had no knowledge of the then unrecorded deed of trust when he purchased the lands, though it might be construed as virtually making such averment. And it is not affirmatively averred in either of
694 the answers *that he had such notice, so as to put that matter in issue. So that the proof upon that important question, which was given by both parties, was upon matter which was not in issue.

Again, the bill does not allege that the plaintiff had possession under his contract, though there is proof of it in the record. It alleges, substantially, payment of the purchase money; but does not allege notice to Bekem, the trustee, or to the beneficiaries of the trust deed, when they had it recorded, of the prior sale to him of the lands in question. Nor does he allege that he had held such possession and improvement of the lands from 1851, the date of his purchase, until the recording of the deed of trust, on the 7th of September, 1858, and thereafter, as would charge the trustee and the benefi-

ciaries of the trust, with notice of his prior equities.

It is true that C. S. Bekem, and R. H. Lynch and James W. Preston, administrators, in their answers, virtually deny notice at the recordation of the deed of trust, of the prior contract of sale to the plaintiff; but notice not having been charged in the bill, and especially as the bill only *specifically* seeks to require the trust creditors to subject the lands in Scott county, which were not a part of his purchase, but which were conveyed by the deed of trust, before they undertook to subject the lands which he had purchased, to the payment of the trust debt, the trustee and trust creditors might well have inferred that it was not the purpose of the plaintiff, in this suit, to set up his contract of purchase against their deed of trust.

The plaintiff alleges in his bill, which doubtless he then believed, that the Scott lands were enough to pay the trust debt. And consequently he did not deem it necessary to litigate the question of priority
695 of right *between him and the trustee as to the lands he had purchased. But it turns out in the progress of the cause, that the trust debt was much larger than he supposed, and that the sum realized from the sale of the Scott lands fell greatly short of his estimate, or of paying the debt. (This is not surprising, when we consider the extraordinary disturbances and revulsions to which this country has been subjected since his bill was filed in 1861, and which have greatly depreciated the values of real estate.) The Scott lands proving so insufficient, and the defendants renewing their efforts, and purposing to subject the lands which the plaintiff had purchased (which seems to have been suspended), to the payment of the large arrearage of their debt, he was forced to go into this litigation or to surrender his purchase. He seeks, therefore, upon the proofs in the cause, to establish a preference for his contract of purchase over the subsequently recorded deed of trust. Whether he can, upon the prayer for general relief, without an amendment of the pleading we deem it unnecessary to decide, in view of the conclusion we have reached, as to the proper disposition of the case. If he could, it seems to the court, that it might be a surprise to the trustee and the beneficiaries under the deed of trust; and that, on the other hand, it would be unjust to the plaintiff, under the circumstances of this case (which have been merely glanced at), to deny to him the privilege of litigating the question of priority of the deed of trust over his purchase.

As to that question, the court deems it improper to intimate an opinion until the question has been fairly put in issue, and each party has had an opportunity to fully prepare and mature his case. As the
696 case now *stands, a decision might do injustice to one or the other of the parties.

The court is of opinion, therefore, to reverse and set aside that part of the decree which decides that the trust deed has priority over the contract of purchase, and which dissolves the injunction and directs a sale of the lands in question, and to remand the cause to the circuit court, with instructions to allow the plaintiff to file an amended and supplemental bill, if he desires it, in which to put fairly and directly in issue, the matters hereinbefore adverted to, or any other matters deemed important by the plaintiff, and which are proper; and also to allow the defendant, Bekem, trustee, and the beneficiaries of the trust, to make any amendment to their answers which they may desire and which may be proper; and for further proceedings to be had therein in order to a final decree.

The decree was as follows:

The court, having maturely inspected the record in this cause, for reasons stated in writing and filed with the record, doth affirm so much of the interlocutory decree of the 10th of March 1874 as confirms the sale of the lands in question by William Nash, one of the defendants, to Samuel H. Nash, the plaintiff; declares that the whole of the purchase money had been paid at the date of the contract of sale, and that the plaintiff is entitled to a conveyance of the title to said lands from the said William H. Nash; and also so much of said decree as ascertains the balance due of the debt from William Nash to John M. Preston, which the deed of trust in question was given to secure. And
697 the court *being further of opinion that under the pleadings the cause was not in a condition to decide the questions of priority of right under the deed of trust and the contract of purchase, so as to secure a fair and just decision thereof between the parties, it is adjudged, ordered and decreed, that so much of said interlocutory decree as decides that the deed of trust had priority, dissolves the injunction, and directs the sale of the land, be reversed and annulled; and that the appellees pay to the appellant his costs expended in the prosecution of his appeal here; and that the cause be remanded to the circuit court, with instructions to allow the plaintiff, if he desires it, to file an amended and supplemental bill in which to put in issue the question aforesaid and any other matters which may be proper and relevant, and to allow the defendants, or either of them, to file amended answers, to put in issue any other matters which they may desire and which may be deemed proper and relevant, and for further proceedings to be had therein in order to a final decree.

DECREE REVERSED.

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698 *Watson v. Hoy & als.

July Term, 1877, Wytheville.

Absent, ANDERSON, J.

M & L, commissioners under a decree for the sale of land, sold to W a tract called C described as containing five hundred and three acres, for $25,000. On this tract there were valuable buildings, and attached to it was a fishery in the adjoining river and the privilege of the free use of a public bridge

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over the river. This sale was reported to the court and confirmed. W was put into possession; and before the last payment fell due it was ascertained that there was a deficiency of thirty-four and one-half acres in the quantity of land stated in the contract. W then applied to the court to have an abatement of the price to the extent of this deficiency; which was resisted, on the ground that it was a contract of hazard.—HELD:

1. **Contracts of Hazard—How Regarded in Equity—Presumption.***—While contracts of hazard in such cases are not invalid, courts of equity do not regard them with favor. The presumption is against them; and while such presumption may be repelled, it can only be done by clear and cogent proof.
2. **Same—Evidence.**—Upon the evidence in this case, held, that it was not a contract of hazard, and W is entitled to an abatement for the deficiency in the land.
3. **Mistake—Compensation—Method of Reckoning.**†—W retaining the buildings, fishery and bridge privileges, the value of these is to be deducted from the price, $25,000; and the balance of that sum is to be taken as the value of the five hundred and three acres of the land, and from which a *pro rata* abatement is to be made for the deficiency of thirty-two and one-half acres.
4. **Judicial Sale—Confirmation—Subsequent Relief.**‡—Though it is true that in Virginia it would seem to be the general rule that objections by purchasers to judicial sales *for defect of title* must be made before the sale is confirmed by the court, and that objections afterwards come too late, yet the rule does not apply to the equity of a purchaser arising from after discovered *mistake, fraud, or other like matter. And there having been a mutual mistake as to the quantity of land in the tract, W is not precluded by the confirmation of the sale from obtaining relief.

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This case was heard at Richmond, but was decided a Wytheville. James Hoy instituted his suit in equity in Stafford county, which was afterwards removed to the circuit court of Spottsylvania county against J. Horace Lacy and others. In his bill he stated, that in March, 1868, he had recovered a judgment against Lacy for $10,000, with interest at seven *per cent. per annum*, from the 20th of January, 1866. That Lacy owned land which he had conveyed by deeds of trust; one dated in February, 1861, to William A. Little, conveying a tract called Chatham, in Stafford county, to secure a debt of $10,000 to Robert Carter, and another dated the 28th of May, 1867, to John L. Marye, Jr., and William A. Little, conveying Chatham, and other lands lying in other parts of the country, to secure certain debts therein mentioned. And making Lacy, the trustees, and the beneficiaries in the deeds, parties, he prayed that the

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***Sale of Land—Contract of Hazard—Presumption.**—The rule laid down in the principal case to the effect that there is a presumption that a contract for the sale of land is not a contract of hazard, but that a sale by the acre was intended, is affirmed in many subsequent cases. See Grayson v. Buchanan, 88 Va. 254; Benson v. Humphreys, 75 Va. 198; Camp v. Norfleet, 83 Va. 380; Norfolk Trust Co. v. Foster, 78 Va. 419, citing the principal case and Keyton v. Brawford, 5 Leigh 39; Blessing v. Beatty, 1 Rob. 304; Triplett v. Allen, 26 Gratt. 721; Yost v. Geister, 7 Va. L. J. 624. In the following cases, however, while the rule as to the presumption in these cases was not questioned, it was held that the contract being for the sale of the tract as a whole was a contract of hazard and no relief could be affirmed. Trinkle v. Jackson, 86 Va. 238; Cunningham v. Millner, 82 Va. 530, citing the principal case and Jollife v. Hite, 1 Call 301; Hull v. Cunningham, 1 Munf. 330; Keyton v. Brawford, 5 Leigh 39; Russell v. Keeran, 8 Leigh 9. See Barton's Law Pr. (2nd Ed.) 524.

Same—Same—Criticism by West Virginia Court.—In Crislip v. Cain, 19 W. Va. 535, the court discusses at length the rules of law contained in the first and third headnotes and criticises the principal case and the other Virginia decisions which concur with it. The court in the West Virginia opinion devotes perhaps seventy-five pages to a review of the Virginia decisions on the subject. The conclusions reached as embodied in the reporter's headnotes are as follow: "Applying these principles to a written contract for a sale of land or to a deed conveying land, if it be a contract for a sale of land in gross, and the number of acres contained in the tract sold or conveyed is named, and on survey it turns out afterwards, that there is either a deficiency or excess in the number of acres in the tract, under some circumstances a court of equity might rescind the contract or annul the deed because of a considerable mistake of the parties as to the number of acres in the tract, though such mistake was mutual and innocent, and neither party was guilty of any fraud in the sense, in which fraud is above explained. Such rescission could not be made, unless the mistake was so material as to show, that it affected the substance of the contract, and that the minds of the parties had not really come together on the terms stated in the contract or deed. But in such a case, if there was no fraud in either party in the sense above explained, a court of equity could allow no abatement on account of a deficiency in the land, nor could it require the vendee to pay any increased price because of a surplus, the mutual and innocent mistake of the parties not authorizing a court of equity to make for them, as this would be doing, a new contract, such as the court might think it probable, they would have made, had they known the true quantity of the land, when the contract was made by them."

†**Mistake—Compensation—Method of Reckoning.**—The rule adopted by the principal case for reckoning compensation for a deficiency in the number of acres is based on the exceptional circumstances of the case, the general rule being that no deduction on account of buildings, etc., is made from the gross sum before the average value per acre is taken. Yost v. Mallicote, 77 Va. 610; Sergeant v. Linkous, 83 Va. 664; Camp v. Norfleet, 83 Va. 380.

‡**Judicial Sale—Confirmation—Subsequent Relief.**—In Insurance Co. v. Cottrell, 85 Va. 857, the court citing the principal case and Talley v. Starke, 6 Gratt. 339, says that "for fraud, misrepresentation, or injurious mistake, a sale whether confirmed or not will be set aside and the property again sent into the market." See also, Berlin v. Melhorn, 75 Va. 639; Thomas v. Davidson, 76 Va. 338; Hyman, Moses & Co. v. Smith, 13 W. Va. 773. In Long v. Weller, 29 Gratt. 353, it was held that where the mistake was not mutual, but, if a mistake at all, was a mistake due to the negligence of the purchasers, there could be no relief.

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said property might be sold, and the proceeds of sale applied to the satisfaction of the parties, including himself, according to their respective priorities.

A decree seem to have been made in the cause appointing the trustees, Marye and Little, commissioners to sell the property, under which they sold a part of the Chatham tract of land estimated at one hundred and thirty-five acres. This decree is not in the record; but by a decree made on the 22d of May, 1871, the report of the sale was confirmed; and the said trustees were directed to proceed to sell in like manner the balance of the real estate in the state of Virginia, either in the whole, or in separate parcels; ef-
700 fecting *said sales through the agency of efficent land agents,&c.

By an agreement dated the 26th of December, 1871, the trustees, Marye and Little, sold to Oliver Watson, of Williamsport, Pennsylvania, the Chatham estate, which is discribed in the agreement as consisting of two parcels, one of which the buildings were located, as containing four hundred and fifty-nine acres, and the other near to it, being woodland, and containing forty-four acres, and containing in both the said tracts five hundred and three acres, together with the fisheries, shores and landings connected with said farm; and the right and privilege of crossing the public bridge adjoining said farm, free of toll, for the family, servants, teams, &c. For which said Watson agreed to pay said parties of the first part, $25,000.

The modes and times of payment are set out, viz: $500 cash; $8,500 in certain bonds, on the 1st of February, 1872; $3,500 on the 10th of May, 1872; and the balance in annual payments extending to February, 1875; with interest on the last three payments, from the 15th of January, 1872. A deed to be made to him on his making the payment of May, 1872, and the three remaining payments to be secured by bond and mortgage or deed of trust. The metes and bounds of the two parcels of land are set out in the agreement.

This sale was reported to the court by the trustees and commissioners, Marye and Little; and by a decree made on the 16th of January, 1872, the sale was confirmed, and the said trustees were directed to convey the property to Watson on his complying with the terms of the sale. This Watson seems to have done promptly, and was put into possession of the property; but a difficulty having arisen as to the quantity of land in the tracts sold to him, he does
701 not seem to *have applied for the conveyance; though he continued to pay the purchase money, as it fell due, up to and inclusive of that due in February, 1874.

In September, 1874, Watson filed his petition in the cause, stating his purchase as being for five hundred and three acres of land; that he had made all the payments as they fell due; that upon a survey made by the commissioners it appears that there is a deficiency of thirty-four and half acres in the tract; and being willing to take that survey as correct, he prays the court to direct the commissioners in the settlement with him of his last payment, to be made in February, 1875, to allow him a *pro rata* abatement for said deficiency in the number of acres contained in the Chatham tract, to be ascertained by multiplying the number of said acres deficient by the price per acre which he agreed to pay for the said five hundred and three acres, and all the interest on that amount already paid by him, from January 15th, 1872, to January 1st, 1874, together with legal interest on said payment of interest by mistake, from the date of their respective payments.

The trustees, Little and Marye, filed their answer to the petition. They admitted that Watson had complied with the contract as to making the payments required by the same so far as they had matured; and that there was the deficiency of thirty-four and a half acres, as ascertained by the survey made, which they believed to be correct. But they denied that Watson was entitled to the abatement which he claimed to be made in the balance of the purchase money due by him, for the reasons they proceed to set out. At the time they made the sale they believed and had reason to believe that the house tract contained four hundred and fifty-nine acres, from an examination of
702 plats and *previous surveys. But the contract made by them with Watson was not a contract to sell so many acres of land at a stipulated price per acre. On the contrary, it was a sale to him of the real property known as the "Chatham farm," comprised within certain defined and expressed boundaries, at a lumping price of so many dollars. And they insist that from the expensive improvements upon the property, the fisheries attached to it, and the uses of the bridge, all of which the purchaser acquired and held, thirty-four and one-half acres of land was not such a failure of consideration as called for an abatement in the lumping price contracted for the property.

The trustees further insisted, that if the purchaser was entitled to any abatement because of the deficiency in the estimated area, he certainly was not entitled to any such measure of abatement as he claimed. They insisted that a fair value of the dwelling house and buildings, fishery and bridge privileges, should be ascertained and deducted from the lumping price of the property, and the remainder would represent the sum to be taken as the value of the land bought.

On the 4th of December 1874, the court directed a commissioner to enquire and report all facts and circumstances tending to show whether the alleged deficiency in the number of acres in the said tract of land influenced the price agreed to be paid for it by Watson, and to what extent, if any, and upon what basis compensation, if any, for such deficiency should be made.

In April 1875, the commissioner returned his report, and with it a number of exhibits, depositions and affidavits. Upon the question of the basis of compensation, if any, for

the deficiency, he says he has been
703 *unable to arrive at any conclusion satisfactory to himself, and submits it to the court for its instructions.

Whether the contract in this case was a contract in which the quantity of land entered into the consideration of the price paid for it, or whether it was a contract of hazard, is a simple question of fact upon the evidence, and the view which this court took of that evidence, will be seen from the opinion of JUDGE BURKS.

The case came on to be heard upon the petition on the 8th of May 1875, when the court held that Watson was not entitled to any abatement out of the purchase money contracted to be paid by him to the commissioners for the Chatham estate by reason of the deficiency in the number of acres in said estate, and that he was concluded by the confirmation of his said purchase from the commissioners of the court, by the decree theretofore rendered in the cause confirming the purchase, from asserting any claim for an abatement of said purchase money; and the petition was dismissed with costs. And thereupon Watson applied to this court for an appeal; which was allowed.

Braxton & Wallace, for the appellant.
William A. Little and *Marye & Fitzhugh*, for the appellees.

BURKS, J. The most important question arising in this case meets us at the threshold of our inquiry—whether the appellant, when he entered into the contract for the purchase of the landed estate called "Chatham," intentionally took upon himself the risk of the deficiency of thirty-four and one-half acres afterwards ascertained, and
704 on all sides admitted to *exist in the estimated quantity of the land purchased by him. If he assumed such risk, he must abide the consequences of his engagement. If he did not, then, according to the decisions of this court oft repeated and too numerous for citation, he is entitled to compensation for the loss arising from the deficiency.

Whether the contract of sale was one of hazard as to quantity—in other words, whether it was a contract for the sale of a certain *tract of land*, whatever number of acres it might contain, or of a *specific quantity*—depends upon the intention of the contracting parties, to be gathered from the terms of the contract and all the facts and circumstances connected with it.

While contracts of hazard in such cases are not invalid, courts of equity do not regard them with favor. The presumption is against them; and while such presumption may be repelled, it can only be effectually so done by clear and cogent proof. *Jolliffe* v. *Hite*, 1 Call. 301, 308; *Hundley* v. *Lyons*, 5 Munf. 342; *Nelson* v. *Carrington and others*, 4 Munf. 332, 340; *Keyton's adm'rs* v. *Brawfords*, 5 Leigh 39; *Russell* v. *Keeran*, 8 Leigh 9; *Blessing's adm'rs* v. *Beatty*, 1 Rob. Rep. 287, 303; *Caldwell* v. *Craig*, 21 Gratt. 136; *Triplett* v. *Allen*, 26 Gratt. 721.

"Contracts of hazard, such as these we are now considering," says JUDGE TUCKER in *Keytons* v. *Brawfords*, *supra*, "have never been discountenanced by our law. Where they are *clearly established* they are valid, and will be respected and enforced, if fair and reasonable. But, though such a contract of hazard is valid, it is not to be readily presumed, unless it is *clearly sustained* by the facts. The courts will not favor such a construction; but they will rather take it that a contract is by the acre, whenever it does not *clearly appear* that the land was sold *by the tract*, and not by the acre."

705 *And where the parties contract for the payment of a gross sum for a tract or parcel of land, upon an estimate of a given quantity, the presumption is that the quantity influences the price to be paid, and that the agreement is not one of hazard. *Blessing's adm'rs* v. *Beatty*, *supra*.

After a careful examination of the evidence in this case, I have come to the conclusion that the contract between the appellant and the commissioners of the court was of the character just described. The land purchased was in two parcels contiguous or nearly so, the one estimated as containing four hundred and fifty-nine acres, and the other forty-four acres, together five hundred and three acres. For these two parcels he contracted to pay the gross sum of $25,000, part in cash and stocks, and the residue in deferred installments, the last three bearing interest from the day he was to get possession of the land.

He was a resident of Williamsport, Pennsylvania, but, it seems, owned a tract of land in Virginia near the Chatham estate. He was on a visit to his Virginia farm when he heard that "Chatham" was in the hands of land agents in Fredericksburg for sale. The commissioners were empowered by the decree under which they acted to make sale through land agents subject to ratification by the court. Contemplating a purchase, and with a view to information concerning the land, he applied to the agents, who furnished him with a rough map or diagram of the land. This map gave the boundaries of the two parcels, and the quantity in each parcel was noted on it—one parcel was put down as containing four hundred and fifty-nine acres, and the other forty-four acres. And the two quantities were added together, making five hundred and three acres. The figures
706 "458" seem to *have been first set down as the quantity of the former parcel. They were partially erased yet remained visible, and the figures "459" substituted. The map on its face purported to be drawn from "recent surveys." Accompanied by Lacy (the owner of the land) and by one of the agents, he went upon the larger parcel and made what must have been a very imperfect examination of it: for, it seems, he did not remain on it longer than three hours. The information he obtained concerning it was chiefly from the map, the agent and Lacy. He could not have derived much from inspection; for it was proved that his eye-sight was so defective that "he could scarcely recognize an acquaintance

across the room" nor "one of his children at the distance of ten feet." He says, that Lacy gave him an estimate of the quantity in each of the fields in this parcel, which he noted in a memorandum preserved and made a part of the record, making the aggregate quantity precisely four hundred and fifty-nine acres. Lacy states, that he informed him that he did not know what quantity the tract contained, and that the land would be sold by the tract and not by the acre. It seems, however, that the appellant relied for the quantity chiefly upon the map and upon what, he says, was told him by the agents and the commissioners. He cannot be blamed for this: for Lacy had no authority to make, direct, or control the sale. The commissioners, only, and the agents employed by them had that power.

With the information thus obtained, he addressed a letter to the agents, inquiring whether they would take $25,000 (payable as hereinbefore indicated) "for the *Chatham farm* in Stafford county, containing *five hundred acres,* with fisheries, bridge privileges and all other rights pertaining
707 thereto." To this letter the *agents in a few days replied, accepting the offer. Thereupon a contract of sale was drawn up by the appellant, at Williamsport, Pa., signed by him and forwarded to the agents to be executed by them. It was accordingly so executed, and a copy furnished to the appellant. In this contract the land is described according to the map which had been furnished, as well in respect of boundaries as quantity. The larger parcel is described as "Chatham farm *containing four hundred and fifty-nine acres,*" and the other parcel, (as on the map), the "wood lot, containing forty-four acres, connected with and being a part of said Chatham farm, and containing in both the said tracts or lots of land *five hundred and three acres,* together with the fisheries," &c. About three weeks thereafter, the commissioners made a report of the sale to the court, filing the contract therewith. In this report they describe the land sold as "the balance of the Chatham farm," (a part had been previously sold to another purchaser) "viz: *five hundred and three acres, for the sum of* $25,000;" and then set out the terms of the sale. There were no exceptions to the report and it was at once confirmed: the decree of confirmation reciting the sale in these words: "The sale of 'Chatham,' situated in the county of Stafford, *containing five hundred and three acres,* with the fisheries, &c., *for the sum of* $25,000, upon the terms," &c., reciting the terms as contained in the contract. The decree further directed a conveyance to the appellant "upon his complying with the said terms of sale."

Thus it will be seen that from the very commencement to the conclusion of the negotiations, and down to and inclusive of the report of the sale and decree of confirmation, *both* of the contracting parties had treated the Chatham farm as containing five hun-
708 dred *and three acres. That it was estimated by both parties as of that quantity, and bought and sold as and for that quantity, can scarcely admit of a reasonable doubt.

Soon after the sale was confirmed, within a few weeks, and after the appellant had made his first payment for the land, wishing to have an accurate survey preparatory to the deed to which he would be entitled on making his second payment, soon to become due—a survey obviously being proper, because the rough diagram which had been furnished contained the boundaries of the land, but no courses nor distances—he procured a survey to be made by a friend in Pennsylvania, by which it was discovered that there was a large deficiency in the quantity. He at once made this known to the commissioners; and they, therefore, at their own expense, caused another survey to be made, which showed a deficiency of thirty-four and one-half acres. This last survey not being, it seems, satisfactory, the commissioners, after long delay and after much importunity by the appellant, had still another survey made by a different surveyor, which was found to correspond with the last, showing the same deficiency, and which was accepted by all parties as correct. In the meantime the commissioners, after discovery of the deficiency, had several times by letters promised the appellant that there should be some adjustment. One of them, writing 26th June 1873, after referring to his ineffectual efforts to get the surveyor to review his field notes, closes his letter by saying: "So soon as Col. B. reports the results of this review, *I will unite with the other commissioner in making a fair adjustment of the matter.*" Again, on the 25th May 1874, they both write thus: "When Col. B. reports the results of his re-survey and some definite
709 *result is reached as to the extent of deficiency, *we will co-operate in bringing the matter to the attention of the court, in order that the matter may be fairly and legally adjusted.* As previously stated, it is not our function as commissioners to make the adjustment; but *we will aid in having it done by the court.*"

These letters are a virtual admission by the commissioners that there had been an error, a mutual mistake, in the estimate of the quantity of land sold, and that the appellant was entitled to a "fair adjustment" of his claim to compensation for the deficiency.

The evidence not only shows that the contract was for the purchase of a specific quantity of land at a gross sum, but that the quantity must have influenced the price agreed to be paid. The detached parcel of forty-four acres appears to have been considered by both parties as of little value. The other tract was valuable, not only on account of the costly buildings upon it and the rights and privileges appurtenant to it, but also by reason of the intrinsic worth of the land itself, the greater portion of which is represented by witnesses as worth from $50 to $100 per acre, the other portion being esteemed by them as of comparatively little value. It does not appear distinctly in which portion the deficiency existed; although the appel-

lant, in one of his sworn statements read in evidence, says it was in the "tillable" portion. The respective portions were not separately valued in the sale and purchase; and the just inference from the whole proof is, that so great a difference as thirty-four and one-half acres between the estimated and actual quantity in the tract, if known at the time of sale, would have materially affected the price, if indeed it would not have defeated the sale altogether. In his testimony the appellant says, that had he
710 doubted the *accuracy of the quantity represented, he certainly would not have made the purchase at the price agreed upon, nor would he have purchased it had he known it would have fallen short as much in quantity as it did.

I am of opinion that, under this state of facts, the appellant was entitled to compensation for the deficiency in the estimated quantity. But it is contended by the counsel for the appellees, that the sale having been confirmed by the court without objection or exception by the appellant, he was thereby precluded from asserting his claim afterwards; and such seems, from the decree, to have been the opinion of the learned judge in the court below. I cannot agree to this. It is true that in Virginia the general rule would seem to be, that objections by purchasers to judicial sales *for defect of title* must be made before the sale is confirmed by the court, and that such objections afterwards made come too late. *Threlkelds* v. *Campbell*, 2 Gratt. 198; *Young's adm'r & others* v. *McClung & others*, 9 Gratt. 336, 358; *Daniel & others* v. *Leitch*, 13 Gratt. 195, 212, 213.

The English rule is different. The reason of the difference would seem to be, that in England the courts undertake to sell a good title, while in Virginia they sell such title only as the parties to the suit have. Hence, in such sales here the rule of *caveat emptor* applies. But even here the rule is subject to exceptions. "There are certainly some defects," says JUDGE MONCURE, in *Daniel & others* v. *Leitch, supra*, "to which objection may be made by a purchaser even after confirmation, here as well as in England—such, for example, as a defect arising from a want of jurisdiction, or want of parties, which would prevent a purchaser from getting the title intended to be sold and conveyed to him."

711 *But I apprehend the rule has no application to the equity of a purchaser arising from after discovered mistake, fraud, or other like matter. Courts of equity are always ready to relieve innocent injured parties in such cases, unless by reason of acquiescence, laches, or other special circumstances, relief would be inequitable. There are no such circumstances precluding relief in this case. In all cases like the one in judgment, equitable jurisdiction is based on the mutual mistake of the contracting parties, or the mistake of one of them induced by the culpable negligence of the other. No fraud is imputed here. It is a case of mutual mistake. The sale was reported and confirmed within three weeks after it was made. The mistake was discovered by the appellant soon thereafter and promptly made known, and no act was done or omitted by him which can be construed into acquiescence, waiver, or laches on his part. On the contrary, the commissioners in their answer to appellant's petition for relief in the court below, say, that the appellant "*prior* to the period when the deed was to be made and *continuously since*, has *raised the issue* as to the quantity of land he was entitled to claim under said contract."

The mistake can be rectified and compensation made to the appellant by allowing for the ascertained deficiency a proper abatement of the balance of purchase money still owing by him; and thus, while doing justice to him, no harm will be done to others. It would be singular indeed if this could not be done by a court of equity which by its agents is a party to a mistake it is called upon to relieve against. In England, it would seem, compensation would be allowed the purchaser under such circumstances after confirmation of the sale. 2 Dan. Ch. Prac. (ed. 1871), 1282, 1283. *Jones* v. *Tatum*,
712 19 Gratt. 720, was a case *of a judicial sale which had been reported and confirmed. After confirmation, the purchaser having made default in the payment of the last installment of purchase money, a rule was made against him to show cause why the land should not be resold to satisfy the balance of purchase money remaining unpaid. He answered the rule by affidavit, alleging defect in the title to the land, and also that there was a deficiency of *one acre* in the tract of ninety acres sold to him, and claiming an abatement of the purchase money for this deficiency. Although the abatement was not allowed, the refusal was not put by the president, who delivered the opinion of the court, on the ground that the purchaser was precluded from relief by the confirmation of the sale, although that objection seems to have been made in the argument at the bar, but on other and entirely different grounds; to wit: 1st, that the sale was in gross; and, 2d, that if it were otherwise, the alleged deficiency was not proved. The opinion seems to proceed upon the idea that if the purchaser had been otherwise entitled to the abatement claimed, the confirmation of the sale would not have been an impediment.

Being of opinion, for the reasons stated, that the appellant was entitled to a proper abatement of the balance of purchase money owing by him for the deficiency of thirty-four and one-half acres in the quantity of land bought by him, and, consequently, that the court below erred in dismissing his petition, it only remains to consider what should be allowed him by way of abatement. The rule of compensation or abatement is according to the average value per acre of the whole tract, unless particular circumstances require a departure from that rule. *Blessing's adm'rs* v. *Beatty*, 1 Rob. Rep. 305; *Hoback* v. *Kilgores*, 26
713 *Gratt. 442; *Triplett* v. *Allen*, Id. 721; *Nelson* v. *Matthews & others*, 2 Hen. & Mun. 164, 178; *Nelson* v. *Carrington &*

others, 4 Munf. 332, 340; *Hundley* v. *Lyons*, 5 Munf. 342.

There are particular circumstances in this case, as there were in *Hoback* v. *Kilgores*, *supra*, requiring such departure from the general rule.

The buildings, bridge privileges and fisheries, are valuable, and their value must have entered largely into the price agreed to be paid for the entire estate. These are retained by the purchaser; and therefore in fixing the amount of the abatement their relative value should be deducted from the contract price ($25,000) for the whole estate, and from the sum remaining after the deduction the average price per acre of the estimated quantity of all the land (five hundred and three acres) should be ascertained, and the thirty-four and one-half acres multiplied by such price per acre as will give the correct amount, which should be credited on the principal sum still owing by the appellant as of the date from which it bears interest. I am for reversing the decree of the court below and remanding the cause for further proceedings.

MONCURE, P., and CHRISTIAN and STAPLES, J's., concurred in the opinion of BURKS, J.

The decree was as follows:

This cause, which is pending in this court, at its place of session at Richmond, having been fully argued, but not determined at said place of session, this day came here the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid, and the
714 arguments of *counsel, is of opinion, for reasons stated in writing and filed with the record, that the appellant is entitled to compensation for the deficiency, ascertained to be thirty-four and one-half acres in the quantity of land in the "Chatham" farm, purchased by him from the commissioners of the said circuit court, and that such compensation should be allowed him by way of abatement on the balance of purchase money owing by him for said farm under his contract of purchase with said commissioners.

And the court is further of opinion, that such compensation should be fixed by ascertaining the relative value of the buildings on said farm, and the bridge-privileges and fisheries belonging thereto, and deducting such ascertained relative value from the contract price ($25,000) for the whole estate; and from the sum remaining after such deduction, the average price per acre of the estimated quantity of all the land (five hundred and three acres) should be ascertained, and the thirty-four and one-half acres (deficiency) multiplied by such price per acre will give the proper amount of the abatement; which amount should be credited to the appellant on the principal sum of the purchase money still owing by him; the credit to be given as of the date from which said principal sum bears interest: and to enable the said circuit court to make said abatement according to the principles herein declared, proper inquiries under the directions of said circuit court should be made by one of its commissioners.

And the court being further of opinion for the reasons hereinbefore referred to, that the decree aforesaid of the said circuit court is wholly erroneous: It is therefore decreed and ordered, that the said decree be reversed and annulled, and that the appellant
715 recover *against the appellees his costs by him expended in the prosecution of his appeal aforesaid here, and that in satisfaction of this decree for costs he be allowed to retain the amount of said costs and receive credit therefor on the balance of purchase money owing by him as aforesaid. And this cause is remanded to the circuit court of the county of Spotsylvania, for further proceedings to be had therein in conformity with the opinion and directions herein contained: which is ordered to be certified to the said circuit court.

And it is ordered that this decree be entered on the order book here, and be forthwith certified to the clerk of the court at the place of session where this cause is pending as aforesaid; who shall enter the same on his order book, and certify it to the clerk of the circuit court of Spotsylvania county.

DECREE AFFIRMED.

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716 *Shipe, Cloud & Co. v. Repass & als.

July Term, 1877, Wytheville.

Absent, ANDERSON and BURKS, Js.*—

1. **Vendor's Lien—Judgment Creditor's Lien—Priority.**—Where the vendor's lien is retained in a contract for the sale of land, though the contract is not recorded, the vendor's lien has priority to that of the judgment creditors of the vendee.
2. **Homestead Exemption—Fraudulent Conveyances.**†—Where a grantor in a conveyance of land had claimed homestead in bonds given for a part of the purchase money by the grantee, and the conveyance is afterwards set aside as fraudulent and void as to judgment creditors of the grantor, he may claim homestead as against the creditors, in the land or the proceeds of the sale thereof to the amount of said bonds.
3. **Judgment Creditors—Rights Acquired.**‡—Where statute enactments do not interfere, a

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*The case was argued before the election of JUDGE BURKS.

†**Homestead Exemption—Fraudulent Conveyance.**—The view taken by the principal case that where a fraudulent conveyance of property is subsequently annulled at the suit of the creditor, the grantor is not estopped to claim his right to homestead in the property as against the creditor, is affirmed in Hatcher v. Crews, 83 Va. 371; Marshall v. Sears, 79 Va. 49; Boynton v. McNeals, 31 Gratt. 456, and *note*. See also, Wray v. Davenport, 79 Va. 19; Wilkinson v. Merrill, 87 Va. 513; Calhoun v. Williams, 32 Gratt. 18, and *note*; Barton's Law Pr. (2nd Ed.) 816; Barton's Ch. Pr. (2nd Ed.) 548, 963; Mahoney v. James, 94 Va. 180.

‡**Rights Acquired by Judgment Creditors.**—The rule laid down in the third headnote limiting the rights that may be acquired by judgment

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judgment creditor can acquire no better right to the estate of a debtor than the debtor himself has when the judgment is recovered. He takes it subject to every liability under which the debtor held it, and subject to all the equities which exist at the time in favor of third parties; and a court of chancery will limit the lien of the judgment to the actual interest which the debtor has in the estate. See *Floyd, trustee,* v. *Harding, supra* 401; *Borst* v. *Nalle & als., supra* 423.

This was a suit in equity in the circuit court of Scott county, brought by Samuel Bevan & Co. and many others, as judgment creditors of James B. Hurt, to set aside a deed made by the said James B., conveying to his son, John B. Hurt, a tract of land in the county of Scott, on the ground that it was made to hinder, delay and defraud his 717 creditors. The bill *was afterwards amended, and Jacob Repass and N. R. Oglesby were made parties defendants.

Repass answered, and also filed a cross-bill, in which he claimed that in the contract of sale of the land by himself to James B. Hurt, and also in the deed he executed to Hurt, a vendor's lien for the purchase money was reserved; and that he had recovered a judgment against Hurt on account of that purchase money, for $1,868, with interest, which he claimed had priority to the claims of any other of the judgment creditors of Hurt.

A great mass of testimony was taken and filed in the cause; and James B. Hurt claimed a homestead exemption in the two bonds first due, given by John B. Hurt for the purchase money of the land. The cause came on to be heard at the December term of the court. 1874; when the court held that the deed from James B. Hurt to his son, John B. Hurt, was executed in fraud of the rights of the then existing creditors of said James B. Hurt, and was therefore void as to them, and that Repass was entitled to his vendor's lien for the purchase money unpaid in preference to the other judgment creditors. And the cause was referred to a commissioner to report upon the debts of the different judgment creditors and their priorities. In February the commissioner made his report; in which he divided the creditors into seven classes, putting Repass alone in the first class. It appears from the report that all the judgments, which amounted to thirty-two, except that of Repass, one of N. R. Ogleby for $707.83 and interest, and another for a small amount in favor of James F. Scott, were founded on debts of the firm of Joseph Hurt & Brother, of which James B. Hurt was a member; and that Joseph Hurt, who was the managing partner, had 718 *waived the homestead exemption in a number of cases, but without any authority from James B. Hurt. And the commissioner was of opinion, and so reported, that this waiver would not apply to the individual property of James B. Hurt. The whole amount of the debts reported was, of principal, $7,488.66, and of interest up to March 1st, 1875, $1,257.93—much more than the value of the property.

A number of the creditors excepted to the report on the grounds, 1st. That the commissioner reports the waiver of homestead by Joseph Hurt & Co. in the note referred to in the report, does not bind James B. Hurt; And 2nd. Because the report gives priority to the claim of Jacob Repass.

In relation to the claim of homestead by James B. Hurt, it appears that the deed from James B. Hurt to his son John B. was made on the 13th of January, 1872; and that the consideration named was $500 to be paid in two years from the 4th of December, 1871, with twelve *per cent.* interest; $500 in four years from that date, with same interest; and further annual payments of $500 and interest, in five, six, and seven years, and $1,500 in eight years, with same interest. And on the 13th of May, 1872, James B. Hurt executed a deed of homestead by which, among other property mentioned, he made the first two of the bonds of his son John B. given for the land, a part of his homestead exemption.

The cause came on to be heard at the March term of the court for 1875, when the court overruled the exceptions to the commissioner's report. And on the 3d of April, 1875, the cause came on again to be heard, when the court held that the deed from James B. Hurt to John B. Hurt, having been set aside, though for fraud of the parties 719 thereto upon the creditors of *said James B., his right to claim and convey a homestead therein to the extent of $1,000, was thereby revived, and had priority over all the judgments mentioned in the proceedings, except the judgment in favor of Jacob Repass and that of Ogleby, in which he had waived his right of exemption; and that the land in said deed embraced was subject to sale for the satisfaction of the several debts reported by the commissioner, in the order mentioned in his report, subject to the right of said Hurt to have for so much of his homestead, payment of $1,000, out of any residue of the proceeds of sale of the said land that might be left after satisfying the judgments of Repass and Oglesby, together with the costs of suit and sale so far as they are concerned. And commissioners were appointed to sell the land upon, &c. And thereupon Shipe, Cloud & Co., judgment creditors of James B. Hurt, applied to a judge of this court for an appeal from the decree; which was allowed. The facts in relation to the claim of Repass are stated in the opinion of JUDGE CHRISTIAN.

creditors is followed in Snyder v. Martin, 17 W. Va. 276; Pack v. Hansbarger, 17 W. Va. 313; Floyd v. Harding, 28 Gratt. 401, and *note*.

Sale of Land—Parol Contracts—Enforcement.—The principal case is very generally cited to sustain the position taken by the courts in regard to the enforcement of parol contracts for the sale of land followed by possession. See Floyd v. Harding, 28 Gratt. 401, and *note*; Burkholder v. Ludlam, 30 Gratt. 255, and *note*; Halsey v. Peters, 79 Va. 66; Young v. Devries, 31 Gratt. 304, and *note*; Snyder v. Martin, 17 W. Va. 276; Pack v. Hansbarger, 17 W. Va. 313.

The case was argued by *Terry & Pierce, Holbrook & English, Blair & Crockett,* and *Kent,* for the appellants, and by *Gilmore and Bolling,* for the appellee, Repass.

CHRISTIAN, J. The original bill in this case was filed by the judgment creditors of James B. Hurt, for the purpose of vacating an alleged fraudulent deed by which he conveyed a certain tract of land to his son John B. Hurt. The evidence conclusively proved that the said deed was fraudulent. It was so declared by the circuit court, and from its decree, in that respect, there is no appeal. So that much of the voluminous evidence in this record need not be considered by this court.

720 *The main controversy we have to determine arises between the judgment creditors of Jas. B. Hurt, and the appellee, Repass, and is a question of priority of liens between them, upon the land directed to be sold by the decree of the circuit court; Repass claiming a vendor's lien as superior to the liens acquired by the judgment creditors. This land had been purchased by Repass in the year 1859, and conveyed by him to Stuart, trustee, to secure the purchase money. Afterwards, Repass becoming embarrassed, filed his petition in bankruptcy, and was, upon regular proceedings, adjudicated a bankrupt, and Holbrook was appointed his assignee. In 1869, the land was sold by the assignee, with the assent of the trustee. At this sale, Repass became the purchaser, at the sum of $4,600, of which sum $875 was to be paid in cash. The cash payment, except the sum of $74.83, was paid; but Repass being in default to this extent, and also in default, as Stuart claimed, as to the bonds which were to be given for the deferred payments, Stuart, the trustee, again advertised and sold the land to Hounshell. Repass, after this sale, being still in possession of the land, refused to deliver possession to Hounshell, and filed his bill in equity in the circuit court of Wythe, in which he tendered the balance of the cash payment, with certain bonds, which he claimed were sufficient to meet the deferred payments, and praying for specific performance and confirmation of the sale made to him, by his assignee and Stuart, and for an injunction of all proceedings under the sale to Hounshell.

Pending this suit, Repass being still in possession, made a contract for the sale of this land to James B. Hurt, which was reduced to writing, but which was never recorded. In that contract of sale, it

721 was stipulated *that Repass should retain a lien upon the land for the security of the purchase money.

While Hounshell was claiming the land under his purchase from Stuart, and Repass was insisting upon the specific execution of his contract of sale made by the assignee in bankruptcy, with the assent of the trustee an adjustment of their conflicting claims was made, by which Hounshell and Repass both united in a deed conveying the land to Hurt; Stuart agreeing to accept the bonds of Hurt for the deferred payments, due from Repass. In this deed there is an interlineation in these words, "A lien is hereby reserved by said Repass to secure the performance of said Hurt's contract with him herein referred to." It is contended by the appellants, that this interlineation was not made before the delivery of this deed. Much conflicting evidence is contained in the record on this point; but I think the decided preponderance of this testimony is in favor of the fact, that the interlineation was made before signing and delivery of the deed. The evidence to sustain this fact is the more conclusive, because it is entirely consistent with the manifest intention of the parties as evidenced by their written contract of sale for the same land, which expressly reserved the vendor's lien. It is not reasonable to suppose that Repass, after making such a contract with Hurt, should have failed to retain the same lien when he came to convey the legal title. Nor is it a reasonable conjecture that Hurt, who had in terms contracted that the purchase money should be secured by a vendor's lien, should afterwards have refused to accept the deed, because it contained the provisions retaining the lien for which he had already solemnly stipulated.

The testimony of Repass, supported

722 as it is by that *of his attorney, Caldwell, and by all the circumstances of the case, I think is conclusive to shew, that the deed from Repass and Hounshell, retaining the vendor's lien (by interlineation), was delivered to Hurt and accepted by him. But whether it was or not, is really not material to the decision of the controversy between the judgment creditors of Hurt and Repass. If the deed retaining the vendor's lien was in fact never delivered by Repass and accepted by Hurt, the rights of the parties are then to be fixed by the contract of sale. If the deed be treated as a nullity, because of non-delivery and non-acceptance, still, the contract of sale remains of binding force, and that contract in terms reserves a lien upon the land as security for the purchase money.

The question we have to determine is, whether the judgment creditors of Hurt have acquired by their judgment, a superior lien to that of Repass, retained as a vendor's lien in the contract of sale referred to. It is true this contract of sale was never recorded. But the question is not to be determined by the provisions of the registry acts. It must depend upon principles outside of and independent of those acts. Whether the contract of sale was recorded or not, can make no difference. The lien of the judgment creditor operates only on the estate which belongs to the debtor.

The title of Hurt to this land, sought to be subjected to the judgments in this case, was subordinate to the lien of Repass, reserved in the contract of sale. Hurt could not have compelled a conveyance of the legal title to him, except upon condition that the balance of the purchase money, for which the land was security, was first paid. A judgment can confer upon the creditor no greater

723 or better estate than the debtor *had.

Whatever the debtor owns (except that which is exempted by statute), is subject to the lien of the judgment creditor; but the lien cannot cover that which the debtor does not own. As was said by JUDGE STAPLES, in *Floyd, trustee* v. *Harding,* (not yet reported), *supra* 401, "It has been over and over decided, that the judgment creditor can acquire no better right to the estate than the debtor himself has when the judgment is recovered. He takes it subject to every liability under which the debtor held it, and subject to all the equities which exist at the time, in favor of third parties, and a court of chancery will limit the lien of the judgment to the actual interest which the debtor has in the estate. The creditor is in no sense a purchaser—he has no equity whatever beyond what justly belongs to his debtor—his claim is to subject to his lien, such estate as the former owns, and no more. These principles have been time and again announced by the courts of England—by this court, and by the supreme court of the United States, and by the courts of many other states of the Union." See cases cited by JUDGE BALDWIN, in *Withers* v. *Carter,* 4 Gratt. 407, and cases cited by JUDGE STAPLES, in *Floyd, trustee* v. *Harding, supra* 401. In a still more recent case, *Borst* v. *Nalle, supra* 423, decided at the late Richmond term, JUDGE BURKS, delivering the unanimous opinion of this court, says: "Authorities might be multiplied without number to show that where statute enactments do not interfere, one creditor can never get by his judgment more than his debtor actually owns, and to this he will be, as he should be, confined by courts of equity." See the numerous cases cited by JUDGE BURKS in that case.

The principles settled by these cases must control and govern the case at bar. I **724** am, therefore, of opinion *that the decree of the circuit court, declaring that the vendor's lien, reserved by Repass, is superior and paramount to the lien of the judgment creditors, is not erroneous, and that in this respect the same be affirmed.

Another important and interesting question arises in this case, which is not so free from doubt as the question we have been considering, and upon which there is some conflict of authority in other states. It is a question of first impression in this state.

On the 13th May 1872, James B. Hurt, four months after he had conveyed the land in controversy to his son, John B. Hurt, filed and put on record his homestead deed, in which he claimed as part of his homestead $1,000 of the purchase money alleged to be due from his son for said land. This deed having been declared fraudulent and void as to creditors, the question we have to determine is, "Whether James B. Hurt can now claim against his creditors a homestead in this land, or rather (which is the same thing) in the purchase money which represents the land." It has been seen that the deed from James B. Hurt to his son was set aside by the circuit court as fraudulent and void as to the creditors of said James B. Hurt. From this decree there was no appeal. The effect of that decree was to set aside and vacate the deed as to the creditors of James B. Hurt, but as between the grantor and grantee it was a good and valid deed. Both the grantor and grantee in this case say, in their sworn answers, that the deed was *bona fide,* and made upon full consideration. Whether that was true or not, the title to the land passed out of James B. Hurt. It was gone from him forever. The title was then in John B. Hurt, subject to the satisfaction of the claims of the creditors of James B. Hurt. The **725** land itself, and of *course the proceeds of its sale, belonged to the creditors. If anything was left after satisfying the claims of James B. Hurt's creditors, that surplus was the property of John B. Hurt, the alleged vendee. In this James B. Hurt could not claim his homestead, for that would be to claim a homestead in the property of another. *A fortiori* if the land was not sufficient, as in this case, to satisfy the claims of creditors, the debtor could not claim his homestead in the proceeds, for that was not his property, but the property of the creditors, so adjudicated to be by the decree which declared the conveyance to be void as to creditors, and which subjected the land to the payment of their claims. This would seem to be clear on principle. Surely the debtor can only claim his exemption by homestead or otherwise in property which is his own, and not in that which is another's. The cases are somewhat conflicting as to whether the fraudulent sale of property deprives the debtor of his exemption. In Alabama, Mississippi, Minnesota, and perhaps some other states, it has been held that a fraudulent conveyance is no bar to claim of homestead. In Pennsylvania, New York and Indiana, the contrary doctrine has been held; and I think these latter decisions are based on principle, founded on a sound morality, and more in accordance with the spirit and intention of the exemption laws.

In Indiana it is held, that where a person conveys property, whether the sale is fraudulent or not, the grantor must be regarded as having no title—none against his grantee; and as against his creditors he can have no right if the sale is fraudulent. See Smyth on Homestead, section 557. *Mandlove* v. *Burton,* 1 Ind. R. 3. In this case the court says: "If he (the debtor and grantor) conveyed the property, though fraudulently, **726** *this conveyance divested him of all interest in it. If the grantee was privy to the fraud, his title is void as against the creditors of the grantor. If he was not privy to the fraud, and obtained the property for an adequate consideration, he will hold it against the grantor and his creditors. In either event, however, the question must arise between the grantor and those creditors. In no case can man avail himself of his own fraud."

In New York the rule adopted is to the same effect. Whenever there is a fraudulent conveyance or concealment of property in order to defraud his creditors, the debtor will be placed beyond the reach of the statute. *Brackett* v. *Watkins,* 21 Wend. R. 68.

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In Pennsylvania the rule has been uniform from its earliest decisions, under the law of 1849, to the present time, that if a debtor has fraudulently conveyed or concealed his property from his creditors, it will bar him of all claim to exemption. *McCarthy's appeal,* 68 Penn. St. R. 217; 38 Ib. 190; 51 Ib. 90, and other cases cited in Smyth on Homestead, § 552, page 399.

Whatever cases there may be (and certainly some may be found in other states) in conflict with these decisions, I prefer to follow them, because they are not only founded upon sound principles of law, but are based upon those sound principles of morality and equity which declare that in no case can a man avail himself of his own fraud.

It would seem strange, indeed, and to my mind, not to be tolerated for a moment, that a party who commits a fraud is to be placed, by a court of equity, in a better position than if his transactions with his creditors had been fair and *bona fide.*

Suppose that James B. Hurt had
727 conveyed this land *to a trustee for the benefit of these very judgment creditors, could there be a question in the mind of any one, that he could ever claim a homestead on land thus dedicated to his creditors, and the title to which had passed out of him forever? Suppose he had made a deed of gift of the land to his son, not being indebted. In both of these cases it will be conceded that his right of homestead was gone forever. But it is said, while this is conceded, that if he conveyed the same land for the purpose of perpetrating a fraud, he may have his homestead in it, or its proceeds.

Now, the deed which was vacated and annulled by the circuit court was still good between the parties. The title was in John B. Hurt, and had passed from James B. Hurt forever. John B. Hurt would be regarded in a court of equity as a trustee holding the legal title for the benefit of the creditors of James B. Hurt. The court would say to him, "The land is yours when you pay off the liens of the judgment creditors, and not till then." But all title to the land and its proceeds is as completely gone out of James B. Hurt as if he had conveyed the same in trust for the benefit of his creditors. He cannot claim a homestead in it, or its proceeds, because neither are any longer his property.

It is further urged that the homestead is for the benefit of the family of the party claiming it, and for this reason, and by express enactment, the court is required to give all our homestead laws a liberal construction. Admit it; but surely the claimant must confine his claim of homestead to that which belongs to him; and the utmost stretch of liberality and latitudinous construction can never vest him with rights in property which belongs to another.

But there is another view of the
728 question which, as *far as the judgment creditors are concerned, would seem to be conclusive. James B. Hurt claims his homestead in part in two bonds of five hundred dollars each, executed and delivered to him by his son, John B. Hurt. These bonds are nominally secured by a vendor's lien on the land conveyed by James B. Hurt. This deed is set aside as fraudulent and void. Of course, then, the vendor's lien contained in said void deed, is no lien at all. That is swept away, and is as if it never existed. Then it follows that James B. Hurt is entitled, as he claimed, to a homestead on the lands of John B. Hurt without the security of a lien upon the land, that security being contained in a deed declared fraudulent and void. Now there is no objection to this claim of homestead in the notes of his son, John B. Hurt; with that the creditors have nothing to do. They are only affected by the lien retained in the deed, and that deed is declared void. Being void, there is no lien. So that the claim of homestead, in the bonds of John B. Hurt, can stand without affecting the rights of creditors.

I am therefore of opinion, that so much of the decree of the circuit court of Wythe as declares that John B. Hurt is entitled to his claim of homestead exemption in the proceeds of the land which he fraudulently conveyed to his son, John B. Hurt, be reversed and annulled, and that the said decree, in all other respects, be affirmed.

But on this question of the right to claim a homestead, the majority of the court differ with me, and are of opinion that James B. Hurt has a right to claim his homestead in the proceeds of the land decreed to be sold by the circuit court, as against the creditors of James B. Hurt. The result, therefore, is that the decree must, in all respects, be affirmed.

729 *STAPLES, J. The only point of difference between JUDGE CHRISTIAN and myself, in the present case, is in regard to the claim of homestead. He maintains that where a debtor has made a fraudulent conveyance of his property he is estopped to claim a homestead in such property after the conveyance has been annulled as fraudulent and void as to creditors. I do not concur in this view, and will briefly state the reasons. This question is one of the first impression in this state. In other states it has been often considered and decided. In New York, Pennsylvania and Indiana, it is held that a fraudulent conveyance by the debtor will bar him of all claim to the homestead exemption, while in other states the contrary doctrine is maintained. In Smyth on Homestead and Exemption, section 469, it is said. "The *general rule* seems to be, the fraudulent conveyance of the homestead by a bankrupt does not estop him from claiming such homestead in the premises after the conveyance has been annulled and decreed as fraudulent and void as to creditors." In support of this position the author cites a number of cases decided in the United States courts. See also note, section 238, of the same work.

In the case of *Sears et als.* v. *Hanks et als.* 14 Ohio State R. 298, which seems to have been a well considered case, the court says: The rights of the plaintiff in this action are only those which belong to creditors seeking to set aside a voluntary conveyance of their

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debtor made in fraud of their rights, and to enforce their judgment liens against the property so conveyed. Their claim is not under or through the fraudulent conveyance, but adverse to it; and when at their suit it has been set aside and declared wholly void as against them, they cannot be allowed as creditors to set up this void
730 conveyance against which they are *claiming, for the purpose of enlarging their rights or remedies against their debtor, or for the purpose of estopping him from the assertion of the rights which he would otherwise have as against them. As between creditor and debtor the deed is simply void, and cannot therefore affect the rights of either.

In *Crummer* v. *Bennett et al.*, 68 North Carolina, R. 494, CHIEF JUSTICE PEARSON, delivering the opinion of the court, said: "The creditor treats the conveyance by his debtor as void and of no effect. Take that to be so, how can the creditor have any other claim against his debtor than he would have had if the conveyance had not been made. The only legal consequence of a deed with intent to defraud creditors is, that although valid as between the parties it is void as to creditors. * * As to the homestead the creditor has no concern—that matter will rest between the fraudulent donor and donee."

There is another authority which, in my judgment, is entitled to peculiar consideration upon this question. I mean the opinion of JUDGE DILLON, an able judge, who has given the subject a very careful examination. In *Cox* v. *Wilder*, 2 Dillon R. 45, he uses this language: "He (the assignee in bankruptcy) claims that the deed is void as to creditors; and on this ground alone he attacks it, and upon this ground alone has he any right to the property. He says it is void as to creditors because fraudulent; and for this reason asks to be invested with the title which is fraudulently conveyed. He cannot claim under it, and must claim against it. When it is decreed to be fraudulent and void at his instance, how can it be set up to defeat the right claimed. Such a position involves this inconsistency, that it asks that the same instrument be held void as to creditors, and then in their favor held valid. * * *
731 *This view does not make the estate any less than if the fraudulent conveyance had not been made, while the opposite view gives the creditor a profit out of the attempted fraud at the expense of the family, for whose benefit the exemption is mainly, if not wholly, provided." No one can deny that there is great force in the observations of the learned judge. The same view is taken in the states of Alabama and Mississippi: In *Vogler* v. *Montgomery*, reported in 13 Am. Law. Reg., N. S., 244; *McFarland* v. *Goodman*, 13 Am. Law Reg., 697; *In Re Detert*, reported 14 Am. Law Reg., page 166, and in other cases cited in Smyth on Homestead.

One of the grounds taken against the doctrine of these cases is, that while the deed is null and void as to creditors, it is valid between the parties. The debtor having by the deed conveyed his entire interest has nothing upon which his claim of homestead can operate.

It must be borne in mind, however, this is a controversy between the creditors on the one hand, and the debtor and fraudulent alienee on the other. What are the rights of the former in such a controversy?

Simply to have the deed annulled; to be placed precisely in the same position they occupied before. Can they claim more. If the debtor has a valid claim to the homestead as against them, before the execution of the deed, how is their condition improved by the deed? Their judgments are only a lien upon the property of the debtor. It is not competent for them, while selling that property, to insist it is not the debtor's property. The validity of the fraudulent conveyance as between the parties is no concern of the creditors. All that they can claim is, that as against them it can confer no
732 rights upon anyone. If anyone *can set up the estoppel it would seem to be the fraudulent grantee. But in this case he asserts no such claim. But the creditors, through him, seek to appropriate that the law does not allow them, nor the deed confer upon them. If the debtor makes a fraudulent conveyance of property in which he has a right of homestead under the constitution, what is it to the creditors, so far as the homestead is concerned. The injury to them is in the fraudulent conveyance of that to which there is no claim of homestead. When the conveyance is annulled, and they are restored to their own, they have obtained all that they can justly claim. They cannot be heard in one breath to say that the conveyance is a nullity as to them, and in the next to assert it confers upon them new rights because it is valid between the parties.

Much was said in the course of the argument with respect to the policy of denying the benefit of the homestead exemption to a shuffling and dishonest debtor, who attempts to defeat the just claims of creditors by a fraudulent alienation of his property. It must be remembered that the law does not confine its remedial action to such conveyances as are tainted with actual fraud. Fraud in law, constructive fraud, when there is no *mala fides*, is also a ground for the annulment of conveyances at the suit of creditors. If the deed is voluntary, or if it be upon insufficient consideration, it is fraudulent and void as to creditors, however fair may be the motives of the grantor. The books are full of cases in which such deeds have been vacated without the slightest imputation of actual fraud or bad faith in either of the parties. The grantor, often supposing himself to be possessed of adequate means to pay all his debts, does precisely what the homestead law attempts to do—makes
733 provision *for his family. It turns out that his remaining estate, from unforeseen causes, is inadequate to meet the demands of creditors; and the deed is declared to be fraudulent and void—not fraudulent in fact, but in law. Does the debtor forfeit all

claim to the homestead exemption, because he has innocently attempted to secure his family against want? I imagine not. The court is dealing in that case, not with a dishonest debtor, but with an unfortunate one. And the argument founded on the supposed public policy fails. The result of such reasoning is, that in every case the courts will be called upon to enquire into the motives of the debtor in making the conveyance; and if they are found to be fraudulent, a different effect will be given to the conveyance from what it would have when the motive is an honest one. And thus a deed, which, it is conceded, vests no title in the creditor, is to be construed as conferring upon him rights, or not, according to the motives with which it was executed.

It is a sufficient answer to all this, that the right to the homestead rests upon no such technical and unsatisfactory distinctions. The constitution does not recognize them. This argument, founded on the policy of punishing the debtor for an attempted fraud, finds no support or countenance in that instrument. If the comfort and protection of the debtor were alone involved, there might be some force in the argument. But no one can look into the provision of our constitution and the adjudicated cases of other states, and fail to see that the primary object is to provide for the family. As was said by the supreme court of Ohio in *Sears* v. *Hanks*, 14 Ohio R. 498, 501, "the humane policy of the homestead act seeks not the protection of the debtor; but its object is to protect his family from the inhumanity
734 which would deprive *its dependent members of a home. And in aid of this wise and humane policy the whole act should receive as liberal a construction as can be fairly given to it. We think its provisions protect the debtor's family as *against his creditor* in the actual enjoyment of a homestead, irrespective of the title or tenure by which it is held." See Smyth on Homestead and Exemption, section 532. In the constitution and laws of all the states, and in the decisions of all the courts, the idea is kept prominently in view, that the great purpose of the homestead exemption is not merely the benefit of the husband or parent, but the maintenance and security of the family against the imprudence, mismanagement and neglect of the former. Smyth on Homestead and Exemption, sections 1 to 14, inclusive. In the language of JUDGE DILLON, "if the law gave to a single man the right to his exemption, it would accord to the natural desire to punish fraud to visit a penalty upon him; but to announce a *forfeiture* upon him, where there is a family, subverts the policy on which the exemption is provided and allowed.

Upon these grounds, my opinion is, that when there is a fraudulent conveyance of property, which is subsequently annulled at the suit of the creditor, the grantor is not estopped as against the creditor to assert his right of homestead in the premises.

It is proper further to say that in the present case there is no satisfactory proof of the existence of actual fraud in the deed which is the subject of controversy. The decree of the circuit court declares that the deed was executed in fraud of the rights of *the then existing* creditors of James B. Hurt, and is therefore void as to them. This, I think, is a distinct intimation of fraud in law, which was sufficient to vacate the conveyance as to existing creditors; and
735 so understanding *it, I am satisfied the decree is unquestionably correct. There is however, another reason or element in this case which distinguishes it from others in which there is simply a fraudulent or voluntary conveyance. By the deed which is impeached as fraudulent, John B. Hurt stipulates to pay as the purchase money of the land, the sum of $4,000, payable in instalments of $500 each, except the last, which amounted to $1,500; all bearing twelve per cent This deed bears date the 13th January, 1872. On the 13th May, 1872, James B. Hurt, the grantor, filed his declaration and deed of homestead, and by it he claimed as exempt, two of the bonds of $500 each given him for the purchase money of the land. At that time none of the judgments in controversy had been recovered, so that there was no lien on the land, and no debt which would prevent the claim of homestead. As already stated, the deed of conveyance is set aside, not on the ground of actual fraud, but because the creditor is delayed by the long credits given to the purchaser. And now it is claimed that the grantor has forfeited his right to a homestead both in land and purchase money. In the land because the deed is valid between him and the grantee, and divests him of all title: In the purchase money, because the deed is set aside. The inconsistency of this position is apparent at a glance. John B. Hurt, the grantee, can only hold the land by paying the purchase money. So soon as the court divested him of the title, he was released from his obligation to pay. The consideration upon which that obligation was founded has failed. How then can he claim the land as against James B. Hurt. He has no longer the shadow of a title. The decree of the court vacates the purchase effectually, and restores all the parties to their former position. In this case the argument in
736 *favor of the creditor, founded on the supposed validity of the deed between the parties, again fails. As the right to homestead in the purchase money has failed by the action of the creditors, they certainly cannot object to the allowance of the homestead in the land. For the reasons stated, I am for affirming the decree of the circuit court in all respects.

All the judges who sat concurred in the opinion of CHRISTIAN, J., except so much as related to the effect of the deed upon the grantor's homestead. On that point MONCURE, P., concurred in the opinion of STAPLES, J.

DECREE AFFIRMED.

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737 *J. W. Lester & als. v. F. W. Lester & als.

July Term, 1877, Wytheville.

1. **Sale of Land—Parol Contracts—Enforcement.***—A parol contract between a father and his son, whereby the father agreed to give to the son a certain tract of land, on the consideration that the son would support the father and his wife for their lives, is a valid contract, and will be enforced at the suit of the children of the son after his death against other children of the father, who had fraudulently procured a deed for the land from the father, with the knowledge of the said contract.
2. **Same—Same—Same.**—The principles on which the specific execution of a parol contract on the ground of part performance will be enforced are: When the parol agreement is specific and definite in its terms; the acts of part performance refer to, result from or are done in pursuance of the agreement; and the agreement has been so far executed, that to refuse to complete its execution would operate a fraud upon the party, and place him in a situation which does not lie in compensation. And in this case all these conditions exist.

This was a suit in equity in the circuit court of Floyd county, brought by J. W. Lester and others, children of Abner Lester, Jr., deceased, against Fleming W. Lester and others. The object of the suit was to enforce a parol contract, by which the plaintiffs alleged in their bill, Abner Lester, the elder, agreed with his son, Abner Lester, Jr., that the said Abner Lester, Jr., should have a certain tract of land which had been patented to Abner Lester, the elder, in consideration that Abner Lester, Jr., should support the said Abner, the elder, and his wife, during their lives; and to set aside a deed, as having been fraudulently procured, by which Abner Lester, the elder, conveyed to 738 *his son, Fleming W. Lester, and his daughter, Elizabeth Thompson, the land referred to in said contract; and also to injoin a judgment in ejectment, which these last named parties had recovered against the plaintiffs for the possession of the land. The defendants demurred to the bill; and also answered, denying the allegations of the bill.

A large mass of testimony was taken by both the plantiffs and defendants; and the cause coming on to be finally heard, the court dissolved the injunction which had been granted, and dismissed the bill. And thereupon J. W. Lester and the other plaintiffs obtained an appeal to this court. The case is sufficiently stated in the opinion of ANDERSON, J.

J. W. Shelton and *J. S. Tipton*, for the appellants.

Taylor & Phlegar, for the appellees.

ANDERSON, J., delivered the opinion of the court.

The bill alleges a parol contract between a father and his son for the sale and purchase of a tract of land; part performance by the son, so as to take the case out of the statute of frauds, and the faithful performance of the contract on the part of the vendee. It charges that after the vendee and his heirs had held uninterrupted possession for near twenty years under the said contract, and had made valuable improvements on the place, the defendants, taking advantage of the advanced age and infirmities of the vendor, being in his eighty-eighth year, fraudulently procured of him a conveyance to them of the same land, and, soon after his death, which occurred in a few months after the execution of said conveyance, 739 instituted an *action of ejectment against them in the circuit court of Floyd county, to oust them from the possession of the said tract of land; and, they being unable to make their defence at law, recovered judgment against them; and the bill prays that said conveyance may be set aside as fraudulent, the specific execution of said contract by a conveyance to the plaintiffs, the heirs of the vendee, who has departed this life, of the title to said tract of land, and an injunction to the execution of the said judgment in ejectment.

The defendants demurred to the bill, and also answered, denying its material allegations.

If the demurrer cannot be sustained, then the decision must depend on the question whether the evidence supports the allegations of the bill. The demurrer raises the question whether the bill alleges a parol contract, and such part performance of it as will take it out of the statute of frauds, which a court of equity can enforce by decreeing its specific execution. There are two agreements alleged by the bill. It is alleged, first, that the father and son agreed to enter the land jointly, and to obtain a grant from the commonwealth for the same, in which they would be equally interested; and that this agreement was carried into effect and the grant obtained. There is some foundation for this allegation in the evidence. The proof tends to show that there had been an entry made previously of the same land, for the benefit of the son, as early as 1846 or '7; and that subsequently the father's entry, survey and grant, in his own name, were intended by him wholly for the son. But the allegation of the bill is not fully sustained as to this agreement; and it seems to be abandoned or not insisted on by the plaintiffs, who rely upon the other agreement set out in the bill, that for and in consideration 740 of the support and *maintenance of Abner Lester, the father and his wife as long as they lived, by Abner Lester, Jr., the immediate ancestor of the plaintiffs, he should have the said tract of land; that is, the interest of the said Abner, the elder, which united with whatever interest he, the younger,

*Sale of Land—Parol Contract—Enforcement.—See Floyd v. Harding, 28 Gratt. 401, and *note;* Campbell v. Fetterman, 20 W. Va. 398; Kennedy v. Ehley, 31 W. Va. 559, citing the principal case and Middleton v. Selby, 19 W. Va. 168; Conaway v. Sweeney, 24 Va. 643; McComas v. Easley, 21 Gratt. 28; Brown v. Brown, 77 Va. 619.

might have therein, would invest him with the fee simple title to the whole. The question raised by the demurrer is as to that contract. Is it such as a court of equity can specifically execute?

There is perhaps no higher moral obligation than that which rests upon children to support their aged or infirm parents, who are unable and are destitute of the means to support themselves. And that man or woman who would deny the obligation, and who would withhold any aid it was in their power to give in the support of those, when in need, from whom they derived their existence, and who tenderly watched over and protected and nurtured them when in helpless infancy and childhood and until they were old enough and able to provide for themselves, would be justly chargeable with base ingratitude and impiety, and would meet with condemnation and reproach in any civilized community.

But this is an obligation which rests alike upon all the children of parents who need their assistance. And it is entirely consistent with this principle for a parent to throw this burden upon one of his children who is willing to undertake it, and to relieve the others from that burden, and to compensate him for it by agreeing to give him his land, or a part of it, as he might consider it adequate. It is surely competent for a parent to enter into an agreement with one of his sons to give him all that he has, in consideration of his agreement to support his father and mother as long as they live. (In this case there is evidence tending 741 *to prove that he had previously advanced his only other son, who is defendant in this suit and plaintiff in the writ of ejectment, with one hundred and fifty acres of land.) And if the contract was fairly entered into, and is in writing, and the son performs his part of the agreement faithfully, there is no court of equity that would not enforce the agreement against the father, or his other children after his death who might set up a claim to the property. If the contract, when in writing, would be enforced as founded upon valuable consideration, it would in like manner be deemed a valuable consideration when the contract was by parol. And such a contract, when not in writing, stands upon the footing of other parol contracts for a valuable consideration.

With regard to parol contracts, whilst this court has ever regarded the statute of frauds as dictated by a wise and sound policy, and to be firmly enforced, yet it must be with that equitable construction which has been given to it, and which is coeval with the statute itself; to wit, that it was designed to *prevent* frauds, and should not be interpreted and enforced, so as to be made an *instrument* of fraud. The principles upon which courts of equity will enforce, specifically, parol contracts, upon the ground of part performance, are well settled, and have been repeatedly recognized by this court. When the parol agreement is certain and definite in its terms; and the acts in part performance refer to, result from, or are done in pursuance of the agreement; and the agreement has been so far executed, that to refuse to complete its execution would operate a fraud upon the party, and place him in a situation which does not lie in compensation, "when these three things concur," it was held by this court in *Wright* v. *Pucket*, 22 Gratt. 370, 742 JUDGE CHRISTIAN'S opinion *concurred in by the other judges, "a court of equity will decree specific execution."

The contract hereinbefore recited, as alleged in the bill is *certain* and *definite* in its terms. The acts of part performance are thus alleged in the bill. "At the time this agreement was made, which it is believed never was reduced to writing, the land was in woods, *and under this agreement, Abner Lester, Jr., was put in possession*; cut the first stick of timber on it; built a house, barn, stables, and such buildings and appurtenances as are usual; cleared out the land, cultivated it, planted out fruit trees, and in every respect used and enjoyed the land as his own, until the day of his death, which happened in the year 1862;" and the possession continued in his heirs until the present. The bill further alleges that Abner Lester, Jr., amply provided for and supported the said Abner, the elder, and his wife, as long as he lived. And that after the death of Abner, Jr., his children provided for and supported the said Abner, the elder, and his wife, their grand-parents, and took them to their house to live with them, that they might the better provide for their comfort, until they were inveigled away by the defendants, when they were very old, that they might carry out their fraudulent purpose of defeating the execution of the aforesaid contract of the old man with Abner, Jr., of which they were informed; which purpose they accomplished, a short time before the death of the old man, by fraudulently procuring him, in violation of his contract with the deceased son, and in fraud of the rights of the plaintiffs, to execute to them, a conveyance of the land in controversy, and of his interest in a suit, which they had caused to be brought against one of the plaintiffs, John W. Lester, for the use and occupation of the land in controversy, for one 743 year. *It manifestly appears, therefore, that according to the allegations of the bill, the three things concur, upon the concurrence of which this court held in *Wright* v. *Pucket, supra*, that a court of equity will decree specific execution. It follows that the demurrer was not well taken, and that it ought to have been overruled.

It appearing then that the plaintiffs, by their bill, have presented a good case for specific performance, and for the relief which they seek, if sustained by the proofs; it only remains to enquire, are the material allegations of the bill sustained by the evidence in the record. The judge then proceeds to comment on the testimony, and arrives at the following conclusions:

There seems to be no doubt from the evidence, that Abner Lester, the elder, contracted to let Abner, his son have the land, but also that he gave assurance to him when he was

about joining the army, evidently under the apprehension that he might not return, that the land was his, that his children should have it if he did not return, and that it would be a home for his family. And after the death of his son Abner, he renewed and confirmed the assurances to his children, that he had given it to their father, and that they by carrying out their father's contract of maintenance and support, should have the land. And after the death of their father, he and their grand-mother moved to his late residence and lived with them.

The evidence is also abundant to show the acts of part performance by the said Abner, Jr. That he entered and took possession of the land under his agreement with his father in the year 1853 or '4; that he cleared out and cultivated it, and that he built a dwelling-house, barn and stables upon it; that he supported his father and mother from 1853 or '4 until his death in 1862, and that after
744 his death his children *took them to live with them, and supported them well; that they were very able and willing, and offered to continue to support them, until they were persuaded by the defendants to leave them. There is the evidence of one or two witnesses, one of whom acknowledged himself an enemy of John W. Lester, who speak of some expression of dissatisfaction by the old man, and one of them of his sending a message to his son, F. W. Lester, to come and take him to his house. It would be strange if the defendants had been unable to create some dissatisfaction in the minds of the old people, and to make them think they were not treated as well as they might be. But the proof on the other hand is abundant that the old man was well pleased with his home with the children of his deceased son, and with their treatment of his wife and himself, and that he was very averse to leaving them, and that he complained of the pertinacity with which F. W. Lester had urged him to leave them and to live with him; that on one occasion said Fleming actually sent a man to convey him to his house, which was about eight miles distant, when he refused to go, and the man had to return without him; that he sent for him again, when he agreed to go only on a visit; that finally, however, in July 1867, the said Fleming W. Lester had him carried to his house; and there is much testimony to show that he was anxious to return to his home with his grandchildren; that he applied to different persons, and to Fleming himself, to have him taken back, or to lend him a horse to return, but without success; Fleming thought his horses were so poor and needed rest, that he could not let his father have one of them to return to his home, but kept the old man with him, and finally got him to execute the deed bearing date
745 August 11th, 1870, conveying to *the defendants the land in controversy and his interest in a suit which Fleming doubtless caused him to have brought against John W. Lester for the rent of the place.

The contract which has been established between the old man and his deceased son, it is shown, was known to the defendants. They were all informed of that contract, and of its faithful performance too by their brother during his life, and of the care which his children had for their aged grand-parents, and the support they had provided for them by their hard work during the remaining period of about three years of the war, when it was so hard, even for those who were most favorably circumstanced, to obtain the necessaries of life, and of their continued and plentiful support of them as long as they allowed them to remain with them. They also knew that the plaintiffs were able and willing to take care of them, and support them as long as they lived, and offered to do so in fulfilment of their father's contract. But that was not satisfactory to these defendants. Was it that they were desirous of providing for the greater comfort of their aged parents? What could have begotten this new-born solicitude in their behalf? Where were they, that they could not visit them and minister to them during the life-time of their brother Abner? And after their brother's death we do not hear of their visiting them, or lending a helping hand for their support and comfort during that period of greatest trial and suffering this country has ever known whilst the war lasted, not even after their parents and the family of their deceased brother was deprived of the aid and comfort of his eldest son, who was called into the army, which must have been very soon after the death of his father.

It is not until some time after the close
746 *of the war that we hear of their showing any solicitude in regard to their aged parents; and then it was, as the sequel shows, not that they might minister to their necessities, but that they might get them in a situation in which they would be under their control, and which would enable them to dispossess their deceased brother's children of their home, and to have it appropriated to themselves, having previously, in 1870, procured the old man to make them a deed.

It is a noticeable fact that, in 1866, Fleming Lester, on his own motion, was declared a lunatic, and that, in July 1870, he had himself discharged from the committee of lunacy; and in August, about one month after, this deed was made.

In July 1871 they instituted an action of ejectment against them, soon after the death of their grandfather, to expel them from their home.

I am of opinion that the failure of Abner Lester, the elder, to fulfil his contract with his son, and his conveyance of the land in controversy to the defendants, was a gross breach of faith and fraud upon the plaintiffs, and that the defendants are responsible for the fraud, and that said deed is fraudulent, and should be set aside and annulled, and there should be a decree of specific performance by the conveyance of the land in controversy to the plaintiffs, and that the judgment in ejectment against them should be perpetually injoined.

CHRISTIAN, J., dissented.

The decree was as follows:

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The court is of opinion, for reasons stated in writing and filed with the record, that Abner Lester, Jr., in his lifetime, purchased the land in dispute from his 747 *father, Abner Lester, Sr., for and in consideration of the support and maintenance of the said Abner, the elder, and his wife, during their lives; and in pursuance of said contract, the said Abner, the younger, was let into the possession of the land by his father, and held the exclusive, undivided and undisputed possession thereof until his death, for a period of eight or nine years, with the knowledge and acquiescence of his father, who occupied no part of it during that period, but lived at another place about a half mile distant from his son's place, and which was not a part or parcel thereof. That the said Abner, the younger, cleared out land upon the place in dispute, which, prior to his purchase aforesaid, was in forest, and without any sort of improvement—built a dwelling-house and other buildings upon it—planted orchards, and cultivated the land under his said contract, and furnished support and maintenance for his father and mother as long as he lived, and that after his death his children, their mother not having survived their father, continued in possession of the land and cultivated it, and took the said Abner, the elder, and his wife, who were then old and infirm, to live with them, and gave them the best support and maintenance they could for the period of about five years, which the said Abner Lester, the elder, accepted in fulfillment of their father's contract with him. That then the old man was carried away by his son Fleming to his place of residence, about eight miles distant, and was not able to return to his home with his grandchildren, the said Fleming withholding from him the means of returning, but in August 1870 caused him, he then being about eighty-eight years old, to execute to him a deed, conveying to him and his sister, Elizabeth Thompson, one of the appellees, in the 748 proportion of two-thirds to *himself, and one-third to his said sister, the most of the land which he had previously contracted to convey to his deceased son, Abner, of which they had notice. And the court being further of opinion that the appellants are entitled to the said land under the contract of Abner Lester, Jr., with the said Abner Lester, Sr.; and that the said deed of conveyance to Fleming Lester and Elizabeth Thompson, bearing date the 11th day of August 1870, and admitted to record in the clerk's office of the county court of Floyd county, as appears by the certificate of J. Godfry, deputy clerk, a copy of which is filed with the record, is fraudulent, it is therefore adjudged, ordered and decreed that the said deed be, and is hereby, set aside and annulled; and the appellees, Fleming W. Lester, Levi Thompson and Elizabeth his wife, and all other persons, are perpetually restrained and injoined from all proceedings whatsoever to execute and enforce the judgment of the county court of Floyd, rendered in their favor against John W. Lester on the 13th day of December 1871. And the court doth further decree the specific execution of the contract aforesaid between Abner Lester, Sr., and Abner Lester, Jr., for the tract of land granted by the commonwealth to Abner Lester, by patent bearing date the 1st day of November 1852, a copy of which is filed with the record, according to the metes and bounds thereof, by the said patent described, except fifty acres thereof, which it appears was sold to Thomas Franklin with the consent of the said Abner Lester, Jr. And it is ordered and decreed that the sheriff of Floyd county, who is hereby appointed a commissioner for the purpose, do convey the said tract of two hundred and sixty-six acres of land, by metes and bounds as hereinbefore described, except fifty acres, part and par-
749 sel thereof sold by the said *Abner Lester, Sr., to Thomas Franklin, to James L. Lester, Callahil Lester, J. E. Lester, Barbara Dickerson, Nancy E. Gray, Sarah Wainwright and Rachel W. Lester, children and heirs of Abner Lester, Jr., and to Thomas L. Michie, assignee in bankruptcy of John W. Lester, another of the heirs of Abner Lester, Jr., to hold in common with the beforenamed grantees. And it is further ordered that the appellees pay to the appellants their costs expended in the prosecution of their appeal here, together with their costs in the court below.

DECREE REVERSED.

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750 *Bartley v. McKinney.

July Term, 1877, Wytheville.

1. **Unlawful Detainer—Failure to File Pleas.***—In an action of unlawful detainer the defendant appears; but, though the case is continued for years, he does not file any plea. The cause is proceeded in precisely as if there was a plea filed—the jury are sworn to try the issue joined, and the defendant makes full defence. There having been a verdict and judgment in favor of the plaintiff, the defendant cannot set up the want of the plea and issue thereon in the appellate court.

2. **Release by Counsel—Correction of Judgment.**—In this case the jury by their verdict gave to the plaintiff the land claimed in her summons, which included a half acre which probably did not belong to her, and it was plainly laid down on the plat; and the judgment was according to the verdict. The defendant moved the court to set aside the verdict and judgment; and the plaintiff, by her counsel, in court released the said half acre. The court thereupon overruled the defendant's motion, set aside the judgment, but not the verdict, and rendered a judgment for the land claimed except the half acre—HELD: It was competent for the counsel to release the half acre of land for the plaintiff; and it was proper in the court to set aside the first judgment and enter a

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***Unlawful Detainer—Failure to File Plea.**—See Frazier v. Va. Military Inst., 81 Va. 63, citing Olinger v. Shepherd, 12 Gratt. 462; Barton's Law Pr. 1165, 1332.

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judgment for the land included in the verdict, except the said half acre.

3. **Practice—Evidence—Irrelevancy.**—In this case the plaintiff claimed under the will of her husband, which gave her in lieu of her dower all his real estate during her life, except certain portions bequeathed to his children. The defendant claimed under a son to whom testator gave a parcel of land. Evidence for the defendant, that the plaintiff had been in possession and enjoyed the benefits of one full half of the cleared lands of her late husband from the time of his death to the time of the trial, is irrelevant and inadmissible.

4. **Instructions—Evidence.***—Instructions asked for, which are not founded on the evidence in the case, are properly refused.

751 *5. **Witnesses—Interest.**—The testimony of a witness for the plaintiff is objected to by the defendant, because the witness had sold to and rented from the landlord of the defendant the land in dispute by deed under seal; and he cannot therefore disparage the title which the witness had so acknowledged.—HELD: Though that would be ground for not permitting him to deny the title of his landlord in an action against him for rent or possession, it certainly is not ground for his incompetency to deny that fact in a controversy between other parties, and in which he has no interest.

6. **Same—Presumption.**—A witness intended to state the facts according to the best of his knowledge or understanding and belief. It will be so presumed in the absence of evidence to the contrary.

7. **Deposition—Misnomer Effect.**—A deposition is taken to be read in a case in which Franklin Bartley is defendant, and that is the name given in the summons and to which he appeared; but the name in which the action is carried on is William F. Bartley. The person is obviously the same, and Franklin is part of the defendant's name. The deposition cannot be objected to on this ground.

8. **Appeal—Review—Contradictory Evidence.**—There having been oral evidence in the cause expressly proving that the land in controversy is part of the land devised to the plaintiff, and the jury having so found, though there may be documentary evidence tending to show it was not embraced in the tract of the plaintiff's husband, yet the exceptions of the defendant to the ruling of the court refusing a new trial, containing the evidence and not the facts proved, the court certifying its inability to certify the facts because of conflict of evidence, the appellate court cannot reverse the judgment, but must take it to be correct.

This was a proceeding by unlawful detainer in the circuit court of Scott county, by Nancy McKinney against William F. Bartley, to recover a tract of land. There was a verdict and judgment for the plaintiff; to which, on the application of Bartley, a writ of error and *supersedeas* was awarded by one of the judges of this court. The case is fully stated in the opinion of the court delivered by MONCURE, P.

W. H. Bolling, W. H. Burres and *Vance & Wood,* for the appellant.

752 **Hagan* and *Pridemore,* for the appellee.

MONCURE, P., delivered the opinion of the court.

This is a writ of error and *supersedeas* to a judgment of the circuit court of Scott county, rendered on the 24th day of August, 1875, in an action of unlawful detainer, which was pending in said court in the name of Nancy McKinney, plaintiff, against Franklin Bartley, defendant. The plaintiff claimed a tract of land described in her complaint by metes and bounds, and estimated to contain fifty-two acres, lying in said county. Both parties claimed title under James McKinney, who lived and died in that county, and whose will, bearing date on the 7th day of April, 1859, was duly recorded in the county court of said county in the same year. The second clause of his will was in these words: "2. I will and bequeath unto my beloved wife, Nancy McKinney, instead of her dower, all my real estate during her natural life, except certain portions of the same hereafter mentioned in this will and bequeathed to my children," &c. The fourth clause is in these words: "4. I will and bequeath to my beloved son, David McKinney, all that part of my real estate which he now occupies, except that part hereby willed to Louisa Young (by the third clause of the will) for his use and benefit during his natural life, and at his death to his children," &c. The plaintiff claimed the land in controversy as being a part of the land devised to her for her life by her husband, the said testator James McKinney, as aforesaid. The defendant claimed it as being part of the land devised to David McKinney for his life by his father, the said testator, as aforesaid; the defendant claiming to be tenant of the land in controversy for a year, or from year to year 753 of *H. S. Kane, the purchaser of the interest of said David McKinney in the land devised to him for life as aforesaid, at a sale made of said interest by the assignee in bankruptcy of the said David McKinney; the said Kane claiming that the land in controversy is a part of the land which was devised to the said David McKinney and purchased by said Kane as aforesaid. Whether it is a part of the land which was devised to said Nancy McKinney, or a part of the land which was devised to said David McKinney as aforesaid, is the only question on the merits, which is involved in this case. And whether it be one or the other, depends upon the question whether or not it be part of the testator's land which was occupied by said David McKinney at the time of his father's death or date of his will. If it is, then it is part of the land which was devised to the said David McKinney; if it is not, then it is part of the land which was divised to the said Nancy McKinney, as aforesaid.

*__Instructions—Evidence.__—In Kimball & Fink v. Borden, 95 Va. 207, the court says: "It has been repeatedly held by this court that it is error to give an instruction when there is no evidence tending to prove the facts upon which the instruction is based." Citing the principal case and Palsey v. English, 10 Gratt. 236; Rea v. Trotter, 26 Gratt. 585, 594; Borland v. Barrett, 76 Va. 128, 135; Norfolk & W. R. R. Co. v. Neely, 91 Va. 539, 542; Seaboard & Roanoke R. Co. v. Joyner, 92 Va. 354, 362; Michie v. Cochran, 93 Va. 641, 648.

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After the action had been for some years pending in the court below, verdict and judgment were at length rendered therein for the plaintiff, the said Nancy McKinney. On the petition of the defendant, the said Franklin Bartley, by the name of Wm. F. Bartley, a writ of error and *supersedeas* was awarded to him by a judge of this court; which is the case we now have to dispose of.

Several errors are assigned in this case, which we will proceed to consider in their order of assignment. The first is:

"1st. Because no plea has ever been filed by the defendant or his counsel in said case, and no issue joined between the parties; and consequently the verdict and judgment are erroneous. *Rowans* v. *Givens*, 10 Gratt. 250," &c.

754 *It does not appear from the record that any plea was actually filed or put in by the defendant in the case; though an "issue" is frequently mentioned in the record, and a jury was twice sworn to try "the issue," or "the issues joined" in the case, and verdict and judgment were rendered thereon. At the very court to which the summons was returned executed, to wit, June, 1872, the cause was continued on the motion of the plaintiff, and an order of survey was made on the motion of the defendant. At the next term of the court, to wit, July, 1872, the cause was continued on the motion of the defendant, and another order of survey was made on his motion. In August, 1872, the cause was continued generally, and in September, 1872, it was continued on the motion of the plaintiff. In December, 1872, the parties mutually agreed that nine jurors should try "the issue in the cause," and accordingly nine jurors were thereupon sworn to try "the issue joined." But after being for several days engaged in the trial, were unable to agree, and a juror was withdrawn, and the rest of the jury, from rendering their verdict were discharged. And thereupon, by agreement of the parties by their attorneys, announced in court, the cause (which down to that time had been pending in the county court) was sent to the circuit court of said county, to be there proceeded in to final determination. In the circuit court the cause was continued, once generally, once on the motion of the plaintiff, and five times on the motion of the defendant, until August, 1875, when a jury was sworn to try "the issue joined." And after being several days engaged in the trial, they at length found a verdict in these words: "We, the jury, find for the plaintiff the land mentioned in the within summons as therein described." And judgment was thereupon rendered,

755 *"that the plaintiff recover against the defendant the possession of the premises aforesaid, and her costs by her in this behalf expended; whereupon, on her motion, a writ of possession was awarded to her." And the defendant moved the court to set aside the said verdict and judgment, and the court took time to consider of said motion. Afterwards, to-wit, on the 24th day of August, 1875, the court having maturely considered the said motion, and the plaintiff by counsel in open court releasing to the defendant the parcel of about one half acre of the land in dispute described by the witness, James M. Young, in his testimony, the boundaries of which half acre are set out in the record; thereupon the court set aside the said judgment, but overruled the said motion to set aside the verdict, and rendered judgment that the plaintiff recover possession of all the premises in the summons described, except the said half acre, and that she recover her costs as aforesaid.

Thus it appears that if there was in fact no issue joined, and no plea in the case, as there doubtless was not, the case was proceeded in and tried as if there had been such plea and issue, and was so proceeded in with the consent and by the co-operation of the defendant himself, who, though he alone had the right to put in a plea, did not choose, but omitted to do so, and elected to proceed to trial without. He cannot, therefore, take advantage of his own wrong and make the objection, for the first time, in the appellate court. Had he made it in the court below, while the cause was pending there, it might, and no doubt would, at once have been removed. In fact he had a right to put in a plea, and could have done so of his own accord, and without the leave of the court, if he had desired to do so; but he did not.

756 *In fact the defendant has sustained no injury by what has been done in the court below in that respect; and the case was tried precisely in the same manner and with the same effect as if the plea of not guilty had been put in, and issue thereon had been joined in the case.

Formerly, we know, there was no provision for any plea in such a case, but it was a summary proceeding commenced by the warrant of a justice of the peace, and triable before three justices, and without pleadings. See 1 Rob. Pr., old edition, pp. 496-498, and authorities cited.

But now it is a proceeding of more formality. See Code of 1873, ch. 130, embodying the act of 1870, '71, Sess. Acts p. 173, ch. 130. Still there is but one plea provided for, which is the plea of "not guilty," which the defendant may put in or not at his election, and if he elect not to put it in, and chooses to go to trial, as the defendant did in this case, without putting it in, the effect is precisely the same under the law as if he had put it in. The law provides that "if the defendant appear and plead, his plea *shall be* "not guilty." Upon this issue, or upon the return of the first or any subsequent summons "executed," the court or justice as the case may be, shall try whether he unlawfully withholds the premises in controversy. When the summons is returnable to a court, a jury may be impaneled to try the case upon the application of either party, at any time before the trial. Id. § 2. The law further provides, that "if it appear that the plaintiff was forcibly or unlawfully turned out of possession, or that it was unlawfully detained from him, unless it also appear that the defendant has held or detained the possession for three years before the date

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of the summons, the verdict or judgment shall be for the plaintiff for the 757 *said premises, or such part thereof as may be found to have been so held or detained. When part only of the premises is found for the plaintiff, the verdict or judgment shall describe the part so found. In such cases the verdict or judgment shall be for the plaintiff. If the verdict be for the defendant as to the whole, judgment shall be for him." Id. § 3.

The case is very different from that of *Rowans* v. *Givens, supra,* relied on in the petition, and the cases cited in that case. If this were an ordinary case, it might be material to enquire whether, according to what is said by this court in *Southside R. R. Co.* v. *Daniel,* 20 Gratt. 344, cited in the argument, there would be any error of which the party could avail himself on the ground taken in the first assignment of error. What is said in the opinion of JUDGE STAPLES, which was concurred in by all the judges who sat in that case, in regard to "the spirit of the modern cases, and the disposition manifested by the courts to disregard mere technical objections, unless there be omitted something so essential to the action or defence that judgment according to law and the very right of the case cannot be given," Id., pp. 360 and 361, strongly applies to this case. But, without considering that question, we are of opinion that there is no error in the judgment on the ground taken in the first assignment of error.

The second assignment of error is:

2nd. "Because the verdict and first judgment rendered in the case were both rendered for one-half acre of land too much, as conceded by the plaintiff's counsel, upon which ground the motion of the defendant's counsel to set aside the verdict of the jury ought to have been sustained; and the court erred 758 in accepting *the oral act of counsel for plaintiff as a legal and proper release to defendant of the half acre of land recovered by plaintiff, and thereupon set aside the judgment first rendered, and rendered a second judgment *minus* the half acre of land, and overruled the motion of defendant's counsel to set aside the verdict rendered for the whole parcel of land sued for."

If the verdict and first judgment were for a half acre too much, that defect could of course be cured by a release of the half acre and taking a judgment, as was done in this case, for the balance of the land for which the verdict was rendered. The only question is, whether there has been an effectual release of the half acre. There can be no doubt upon that subject. For the plaintiff's counsel had a right to correct the verdict in that respect by a release of the half acre improperly recovered. There is no judgment against the defendant except for the balance of the land after deducting the half acre. The plaintiff has never objected to this act of her counsel, but, on the contrary, has affirmed it by claiming the benefit of the judgment which the defendant is now seeking to avoid. There is no uncertainty as to the half acre released, the boundaries thereof being set out in the judgment. If the plaintiff is satisfied with the release, the defendant is not prejudiced thereby, and surely cannot complain of it. We are of opinion that there is no error in the judgment in that respect.

The third assignment of error is:

"3d. Because the documentary evidence alone adduced by defendant in the cause, being the deed to his landlord from the assignee and his written leases, proved clearly and conclusively that the defendant and those under whom he claimed had held 759 and detained *the possession of the land in controversy more than three years before the date of the summons issued in the cause."

The fact is certainly not so. The deed from the assignee in bankruptcy of David McKinney merely conveys to Henry S. Kane the bankrupt's interest in the tract of land devised to him by his father, but does not set out the boundaries of that land—much less, does not affirm that the land in controversy is part of the land which was so devised. The question, whether the said land in controversy be parcel or not of the said land so devised, remains wholly unaffected by that deed. As to the lease which was made by said Kane to said David McKinney, for two years, of the land which was bought by the former at the sale made by the assignee in bankruptcy of the latter, as aforesaid, that lease is of the land devised to said David by his father, and no more describes or conveys the land in controversy than does the deed from the assignee aforesaid. And as to the leases subsequently made by Kane to Godsey dated 10th February 1871, and to the defendant Bartley, the 16th of April 1872, for a year each, if they were of the land in controversy, as they no doubt were, still neither of them was executed or bears date more than three years before the date of the summons issued in this cause, which was the 13th day of May 1872. Therefore we think the circuit court did not err on the ground stated in the third assignment of error.

The fourth assignment of error is:

"4th. The court erred in excluding from the jury that portion of the deposition and evidence of the witness, Robert S. Harris, that proved that the plaintiff as widow of James McKinney, dec'd, has been in possession of, and enjoyed the benefits of, 760 one full half of the *cleared lands of her late husband, James McKinney, dec'd, from the time of his death to the present time." This is the subject of the first bill of exceptions.

The court is of opinion that there is no error in the judgment of the circuit court on that ground. The evidence excluded was wholly irrelevant to the issue or matter in controversy and was inadmissible. There was therefore no error in excluding it.

The fifth assignment of error is:

"5th. The court erred in refusing to give the instructions asked for by defendant's counsel, numbered 1, 2, and 3, and to be found on pages 79 and 80 of the record, and in giving no instruction in lieu thereof." This is the subject of the third bill of exceptions.

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That bill of exception states that on the trial of the cause, after the parties had introduced all the evidence, as the same is set out in the defendant's bill of exceptions No. 4, the defendant by his counsel moved the court to give to the jury the instructions numbered 1, 2, and 3, in the words and figures following, to wit:

"No. 1. The court further instructs the jury, that if Nancy McKinney allowed her son David McKinney to appear as the owner of the land in controversy, and as having full power to dispose of the same, and innocent third parties were thus led into dealing with him as the owner thereof, that she will be estopped to deny the right of said David McKinney to dispose of the same."

There was no evidence before the jury tending to show that she allowed him to appear as the owner of the land in controversy and as having full power to dispose of the same, and that innocent third parties were thus led into dealing with him as the owner thereof. And if there was, certainly there was no evidence before them tend-
761 ing to show that there was any *intent on her part in any thing done or permitted by her, that innocent third parties should be led into dealing with him as the owner of the said land. Being his mother she may have permitted him, as her husband probably did before her, to use the land in controversy, or a part thereof, or the house thereon; but she did not, so far as the record shows or tends to show, give him any title to, or interest in, the land in controversy or any part thereof, which he could sell or otherwise dispose of, or which his assignee in bankruptcy could so sell or dispose of; even if such assignee had ever attempted or intended so to do, as he never did, so far as the record shows or tends to show.

"No. 2. The court also tells the jury that if they believe from the evidence that Nancy McKinney, at the time the land was being run out by her son, David McKinney, for the purpose of delivering possession of the lands in controversy to H. S. Kane, or his tenants, had notice of the purpose for which it was being surveyed, and stood silently by, allowing the same to be surveyed for the purpose of delivering the same, and that the lines were run so as to include the land in controversy with her knowledge, and delivered to said Kane and his agent or tenant; then the said Nancy McKinney is estopped to deny David McKinney's right to dispose of the said land, and the jury should find for the defendant."

There is no evidence in the record tending to show any such case as is supposed in the instruction, and the same was calculated to mislead the jury. There was no survey made before Kane became the purchaser at the sale made by the assignee of the bankrupt, David McKinney; and nothing which may have been done or said at the survey afterwards made, could possibly have had any in-
762 fluence on Kane in *making the purchase. The plaintiff, Mrs. McKinney, could therefore have had no motive in surrendering any of her rights to the said purchaser, or in pretending that any part of her share of her husband's land belonged to her bankrupt son, or to the purchaser at the sale made by his assignees. She was an old lady, over seventy-five years of age, had but a life-estate in the land, and probably did not understand the purpose for which the survey was being made. She had no motive to commit the fraud which is imputed to her; and the strongest and clearest evidence ought to be required to convict her of it. The testimony is perfectly consistent with her innocence; and the court was right in refusing to give an instruction founded on the supposition of her guilt upon the faith of such testimony. There is, therefore, no error in the judgment on account of the refusal of the court to give instruction number two.

"No. 3. The court instructs the jury that a partition of land, to be binding, must be consummated by the execution of a deed between the parties to the partition, or by some memorandum in writing; and unless there be such evidence of a partition before them, they cannot believe there is any partition of the lands devised to the widow of James McKinney, deceased, by his last will, between the heirs of the said James McKinney."

There was no ground whatever for this instruction, which was not at all appropriate to the case, and the circuit court therefore did not err in refusing to give it.

The sixth assignment of error is:

"6th. The court erred in overruling the motion of the defendant's counsel to exclude from the jury the deposition of David McKinney and W. S. R. McKinney, taken and offered in evidence by plaintiff's coun-
763 sel, *and permitted to be read to the jury." (See the depositions and exceptions taken to them by defendant's counsel, and endorsed on them.) This assignment of error is founded on a bill of exceptions taken by the defendant to the action of the court in overruling his motion to exclude said evidence from the jury.

The exception endorsed on the deposition of David McKinney is in these words: "This deposition is excepted to, because the witness sold to and rented from H. S. Kane, the landlord of the defendant, William F. Bartley, in so far as it tends to disparage the title he has acknowledged in solemn form, by sale and by writing, by an agreement under seal, November 13th, 1873, and because the witness merely gave his understanding, and not the facts." That endorsed on the deposition of W. S. R. McKinney is in these words: "That part of this deposition is excepted to, in which he testifies to what his father says, and to what he understands, without giving the source from which his understanding is derived; and said deposition is excepted to, because it is taken to be read in case in which Nancy McKinney is plaintiff, and Franklin Bartley is defendant, and the defendant in this suit is William F. Bartley, a wholly different name, and so far as it tends to disparage the title of his vendee, the defendant's landlord and also the

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former landlord of witness, November 13th, 1873."

We think the exceptions are not well founded. Those endorsed on the deposition of David McKinney are two-fold: 1st. Because the testimony tends to disparage the title which the witness had acknowledged in solemn form by an agreement under seal. That would be good ground for not permitting him to deny the title of his landlord in an action for rent or possession,
764 *but certainly not good ground for his incompetency to deny that fact in a controversy between other parties, and in which he has no interest. 2dly. Because the witness merely gives his understanding, and not the facts. It appears that he intended to state the facts according to the best of his knowledge or understanding and belief, and it will be so presumed in the absence of evidence to the contrary. The witness might have been cross-examined as to the nature of his understanding on the subject, but was not. Those endorsed on the deposition of W. S. R. McKinney are three-fold, two of which are similar to those endorsed on that of D. McKinney, and may be answered in the same way. The 3d is, because the deposition was taken to be read in a case in which Franklin Bartley is defendant, whereas, in this case, William F. Bartley is defendant. This is certainly not a good ground of exception. They are the same name in effect. William F. Bartley being no doubt William Franklin Bartley, and commonly called by his middle name, "Franklin." The action was commenced against Franklin Bartley, who did not plead misnomer, but appeared to the action, and afterwards his full name appeared in the record.

The seventh and last assignment of error is:

"7th. Because it is proved by the documentary evidence, to wit: the written purchase of H. S. Kane, of the Tomlinson tract of thirty-seven and three-quarter acres, and the plat and report of the surveyors, James P. Fugate and E. W. Stuart, that the Scott-McKinney house and lot in controversy are in the said Tomlinson tract, owned by H. S. Kane, the landlord of the defendant, and not in the McKinney tract of land claimed by the plaintiff, which house and lot
765 were erroneously *found for the plaintiff, and judgment erroneously rendered in her favor therefor."

There is oral evidence in the case, expressly proving that the land in controversy is part of the land which was devised to the plaintiff for her life by her husband. The jury found a verdict for the plaintiff, and found for her the land mentioned and described in the summons. The defendant moved to set aside the verdict and grant a new trial, because the verdict was contrary to the law and evidence of the case; but the plaintiff entering on the record a release of the piece of about one-half acre aforesaid, the court overruled the motion, and refused to set aside the verdict and grant a new trial, to which ruling of the court the defendant excepted; and in the bill of exception all the evidence given on the trial was set out, but not a certificate of the facts proved, the court certifying its inability to certify the facts because of a conflict in the evidence. Of course this court cannot reverse the judgment of the court upon the motion for a new trial, on the ground that the verdict is contrary to the law and evidence of the case, but must take that judgment to be correct.

Upon the whole, we are of opinion that there is no error in the judgment, and that it ought to be affirmed.

JUDGMENT AFFIRMED.

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766 *Elliott v. Horton.

July Term, 1877, Wytheville.

Absent, CHRISTIAN, J.

1. **Deeds—Mistakes—Correction.***—In an action of ejectment parol evidence is admissible to prove that the calls for course and distance in a deed are mistaken, and do not designate the true boundary of the land intended to be conveyed.

This was an action of ejectment in the circuit court of Lee county, brought, in February 1874, by William Elliott against William P. Horton, to recover a small strip of land lying between what were the recognized lands of the plaintiff and the defendant. Both parties claimed under the title of Jacob Fisher, who had owned a large tract of land which included the lands now held by both plaintiff and defendant. The deeds to both parties, on the dividing line between them, called for the same corners, courses and distances. By starting at an agreed corner and running according to the course in the deeds, the land would be embraced in the tract of the plaintiff; and he rested his claim upon the deeds. The defendant introduced parol evidence that a line had been marked by the previous owners of the land before the deeds were made, and that there were or had been marked trees on the line, according to which line the land in dispute was a part of his tract, and that he had always had it in his possession.

Both parties asked for instructions, some of which were given and others refused; and there was an exception
767 *by the plaintiff. The substance of the instructions given was: That the plaintiff was entitled to claim according to the calls of his deed, unless the defendant showed that the real line intended was different from that called for in the deed. What the evidence was is stated by JUDGE BURKS in his opinion.

***Deeds—Mistakes—Correction.**—The principal case is affirmed in Norfolk Trust Co. v. Foster, 78 Va. 413 and Hunter v. Hume, 88 Va. 30, citing the principal case and Herbert v. Wise, 3 Call 242; Shaw v. Clements, 1 Call 438; Preston v. Bowman, 6 Wheat. 582; Newman v. Pryor, 7 Wheat. 10; Baker v. Seekright, 1 H. & M. 177; Dogan v. Seekright, 4 H. & M. 125; Pasley v. English, 5 Gratt. 141. See Barton's Law Pr. (2nd Ed.) 627.

There was a verdict and judgment for the defendant, and a motion for a new trial, which was refused; and an exception by the plaintiff, who applied to a judge of this court for a writ of error and *supersedeas;* which was allowed.

P. Hagan, for the appellant.
W. H. Burres, for the appellee.

BURKS, J., delivered the opinion of the court.

This was an action of ejectment in the circuit court of Lee county, with verdict and judgment for the defendant on issue joined on the plea of "not guilty." A *supersedeas* to the judgment, awarded the plaintiff by one of the judges of this court, brings the case here for review.

At the trial both parties asked for instructions to the jury, some of which were given, and others refused, and the plaintiff excepted.

After verdict rendered, he then moved the court to set it aside and grant him a new trial, on the ground, 1st, that the verdict was contrary to the evidence; 2d, because of alleged misconduct of one of the jurors on the trial. This motion was overruled, he again excepted, and the bill of exceptions taken contains a certificate of the facts proved on the trial.

From this certificate, it appears that 768 both parties *claimed title under *mesne* conveyances from one Jacob Fisher, the owner of a large survey of land in Lee county. Parcels of this he had sold to different persons, to some of whom he had made conveyances, and to others he had not. A large portion remained unsold. On the 9th day of July 1840 he sold, and by deed of that date, through his attorney in fact, conveyed to one James Crabtree all the land included within the boundaries of the survey, except such portions as had theretofore been sold to other purchasers. The deed mentions the names of these purchasers, amongst them one Duke Covey and Benjamin Dickinson, and without further description excepts the lands sold to them from the operation of the conveyance to Crabtree. By deed of 16th of December 1849, Crabtree and Dickinson conveyed a portion of the Fisher survey to one Berry Wood, and Wood, by deed of 10th March 1851, conveyed the same to the plaintiff.

Afterwards, to wit: on the 18th day of April 1853, Fisher, by deed of that date by his attorneys, conveyed to the said Duke Covey a tract of land, estimated as containing three hundred acres, and no doubt the same land excepted in the previous conveyance to Crabtree. Amongst other evidences of this fact, it appears by the deed of conveyance to Crabtree, that the white oak, designated as a corner 2 i on the plat of survey filed in this cause, is described in said deed as *"a corner to Duke Covey."*

The defendant claims title through Covey, and the plaintiff through Crabtree. The two tracts of land, claimed by the parties respectively, are co-terminous on the eastern side of Trading creek, and the dispute is as to the true dividing line between the tracts on that side of the creek.

The beech and dogwood, designated 769 on the plat as *C 1, is admitted by both parties to be a corner, and so as to the white oak at 2 i. These two admitted corners are the *termini* of the disputed lines. The plaintiff claims that the true boundary is by a line commencing at the beech and dogwood C 1, running S. 70 W. to Trading creek, and thence with its meanderings to the corner white oak at 2 i. The defendant, on the other hand, claims that the bearing of the line commencing at the beech and dogwood, instead of being S. 70 W., as claimed by the plaintiff, should be S. 24 W., and with this course the line would run, as indicated by the dotted line on the plat, with a slight deflection, passing the head of a spring at g to Trading creek, and thence with the creek to the corner white oak aforesaid.

The land enclosed by these disputed lines is somewhat less than two acres, and is the whole subject of the controversy in this case. Its actual value is not disclosed by the record; but if it is anything like proportionate to the price which was paid by the parties for their respective tracts, as indicated by the deed, it must be very inconsiderable. It seems to me it would have been wise if the parties had, in some way, settled this apparently trifling matter between themselves without the cost and vexation of litigation.

The plaintiff, in support of his claim, rests wholly upon the title papers in the case, relying as well upon the descriptions in the conveyances under which the defendant claims, as upon these in the deeds under which he himself derives title; and it certainly does appear from these conveyances, that the descriptions contained in them are substantially the same. The deed from Crabtree and Dickinson to Wood, under whom the plaintiff claims, calls for the beech and dogwood, "thence S. 70 W. to the creek and down the same 115 poles to a white oak, a 770 corner to Duke *Covey." The deed from Fisher to Duke Covey, under whom the defendant claims, calls for the same beech and dogwood, and for a line thence "S. 70 W. till it strikes the creek, and meandering the same 115 poles to a white oak," &c. The two corners being admitted by both parties, if the course, S. 70 W., called for in the deeds, of the line commencing at the beech and corner and extending to the creek, be the true course, it would seem clear that the land in controversy belongs to the plaintiff. But it is contended by the defendant that this course and the line given are a mistaken description; and in support of his pretensions, he proved that about twenty-five or thirty years before the trial of this suit in the circuit court, (which took place in 1875), Covey and Crabtree went upon he land and surveyed it. They then marked the beech and dogwood corner and ran a line from that corner passing over the head of the spring and down the creek to the corner white oak before mentioned; and Covey, as they ran from the beech and dogwood to the spring, was seen to mark some of the trees. He further proved, that Berry Wood, under whom the plaintiff claims, about the time

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the deed was made to him by Crabtree and Dickinson and preparatory to making it, caused the land to be surveyed by one Miller. In making this survey, which was done in the absence of Covey, Miller and Wood by mistake located the beech and dogwood corner on the creek. The next day Wood informed Miller that he had seen Covey and learned from him the true location of the corner beech and dogwood; whereupon Miller then ran a line from the beech and dogwood S. 24 W. 92 poles to the corner white oak aforesaid, and corrected his field notes so as to make them correspond with the lastnamed line.

771 *It is quite plain to me that the survey by Crabtree and Covey was before the survey made by Miller; for the beech and dogwood were marked as a corner in the former survey, and this enabled Miller in his survey, on information derived from Covey, to locate this corner properly and to correct his field notes. It is equally clear that when these surveys were made neither Wood nor Covey had a deed for their respective tracts of land, and that the surveys were made with the view of fixing definitely the boundary line between the two tracts before the conveyances should be executed.

It was proved that no marked trees were found standing immediately on the line S. 24 W. from the beech and dogwood to the corner while oak. Some trees were found suitable to be marked as line trees, but most of the timber for a considerable distance on the line had been destroyed. A sugar tree, however, was found standing near the head of the spring aforesaid with two chops on it, marked suitably for a side line; but the witness who spoke of it did not know whether it was marked for a line tree or not. It was also proved that in the year 1867 or 1868 (which was some six or seven years before the institution of the plaintiff's suit) the plaintiff pointed out two stumps on the line between the beech and dogwood and the spring, which he said had been marked line trees standing on the line. and that he then claimed that his line ran from the beech and dogwood through the head of the spring. It was further proved that the plaintiff had never exercised any ownership over the land in dispute, and that the defendant's possession corresponded with his claim of title.

Upon these facts, certified by the judge presiding at the trial as proved by the 772 evidence, the jury by their *verdict found that the true dividing line between the lands of the parties was the one claimed by the defendant, commencing at the corner beech and dogwood, and thence with a line slightly deflected from the course S. 24 W. by the head of the spring to the creek, and with the creek to the corner white oak. I cannot say that this verdict was contrary to the evidence. Certainly the evidence was not plainly insufficient to warrant it; and if not, this court, under the rule established by numerous decisions, cannot interfere with it. The jury treated the call in the deeds for a line from the beech and dogwood S. 70 W. as a misdescription of the line which was actually run and marked by the owners of the respective tracts before the conveyances were made, upon a course nearly S. 24 W.; and they acted upon the maxim *falsa demonstratio non nocet.*

There is nothing in the objection made in the court below to the verdict, on the ground of the alleged misconduct of one of the jurors on the trial. No argument was made here upon this assignment of error, and it is regarded as properly abandoned. All the material statements of the *ex parte* affidavit of the plaintiff in error were contradicted and disproved by the counter affidavit of the juror.

The instructions given by the court to the jury were in accordance with the principles recognized by this court in *Herbert & wife* v. *Wise and others,* 3 Call 240; *Baker* v. *Seekright,* 1 Hen. & Mun. 177; *Dogan* v. *Seekright,* 4 Hen. & Mun. 125; *Pasley* v. *English & als.,* 5 Gratt. 141.

In *Herbert & wife* v. *Wise and others, supra,* JUDGE PENDLETON said: "To pursue the proper descriptions of our land boundaries, would render men's titles very precarious, not only from the variations of 773 the compass, *but that old surveys were often inaccurate, and mistakes often made in copying their descriptions into patents, leaving out lines, and putting north for south, and east for west, and in copying these descriptions into subsequent conveyances, whereas the marked trees upon the land remain invariable, according to which neighbors hold their distinct lands. On this ground our juries have, uniformly and wisely, never suffered such lines, when approved, to be departed from, because they do not agree exactly with descriptions in conveyances."

In *Baker v. Seekright, supra,* it was held that when a deed mentions the course and distance of a line, without any other description thereof, parol evidence is admissible to prove marked trees, not in the course or termination of that line to be the true intended line.

Adverting to this case, JUDGE ROANE, in *Dogan* v. *Seekright, supra,* says: "In that case parol evidence was admitted to establish a marked line, which did not correspond with that mentioned in the deed either as to course or distance. It was so admitted, on the ground that the description in the deed may have been mistaken, whereas the marked and reputed line being more stable and permanent ought to prevail, or at least be submitted without prejudice to the consideration of the jury."

I see no error in the instructions taken all together, which were given by the court, nor in the refusal of the court to give those which were rejected.

Upon the whole matter I am of opinion to affirm the judgment of the circuit court.

The judgment was as follows:

This day came again the parties by 774 their counsel, *and the court having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion for reasons stated in writing and filed with the

record, that there is no error in the said judgment; it is therefore considered, that the same be affirmed and that the defendant in error recover against the plaintiff in error his costs by him expended in the defence of his said writ of *supersedeas* here, and also thirty dollars damages: which is ordered to be certified to the clerk of the said circuit court of Lee county.

JUDGMENT AFFIRMED.

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775 ***Cecil v. Deyerle & als.**

Linkous & als. v. Shafer & als.

Garnand & als. v. Childress & als.

July Term, 1877, Wytheville.

1. **Statutes—War Interest—Constitutionality.**—The act of the general assembly, approved April 2, 1873, entitled "an act to amend and re-enact section 14, chapter 187, of the Code of 1860, in relation to interest," so far as the said act confers upon courts and juries, in the suits therein mentioned, power to remit interest as therein provided, on contracts entered into prior to April 10, 1865, which said courts and juries did not have under the laws in force at the time such contracts were entered into, is repugnant to the constitution of the United States and of this state, and is so far null and void.
2. **Same—Jurisdiction—Constitutionality.**—And so much of the said act as empowers the court to review judgments and decrees upon motion, and to abate interest as in said act provided, is repugnant to the constitution of the United States and this state, and therefore void. And this, though the evidence of debt on which the judgments are founded does not provide in terms for the payment of interest, but the judgments are for interest.

The only question involved in these cases is that decided in the cases of *Roberts' adm'r* v. *Cocke & als. and Murphy* v. *Gaskins' adm'r, supra* 207. The cases are stated in the opinion of the court delivered by MONCURE, P.

T. E. Sullivan, Taylor & Phlegar, for the appellants.

J. F. Johnson and *C. A. Ronald,* for the appellees.

MONCURE, P., delivered the opinion of the court.

776 *These three cases involve the question of the constitutionality of the provision of the act passed April 2, 1873, entitled "an act to amend and re-enact section fourteen of chapter one hundred and seventy-seven of the Code of 1860, in relation to interest," which is in these words: "provided, however, that in all suits for the recovery of money founded on contracts, express or implied, or on causes of action, or on liabilities which were entered into or existed, or where the original consideration accrued prior to the tenth day of April, eighteen hundred and sixty-five, it shall be lawful for the court or jury, by whom the suit may be tried, to remit the interest upon the original debt found to be due, or any part thereof, for the period commencing on the seventeenth day of April, eighteen hundred and sixty-one, and ending on the tenth day of April, eighteen hundred and sixty-five, or for any portion of said period. And on any judgment or decree heretofore rendered, which has not been paid, the defendant may on motion, after ten days' notice to the plaintiff, cause the same to be reviewed by the court in which it was rendered, and if it shall appear from the record that the judgment embraces interest, which accrued between April the seventeenth, eighteen hundred and sixty-one, and April tenth, eighteen hundred and sixty-five, it shall be lawful for the court to cause said judgment to be abated to the extent of the interest so embraced. This provision shall not be so construed as to give authority to any court to review such judgment for any other cause whatever," &c. Acts of Assembly 1872-'73. chap. 353, p. 344; Code of 1873, ch. 173, section 14.

The first of these cases, *Cecil* v. *Deyerle &c.,* is a writ of error to a judgment of the circuit court of Montgomery county,
777 rendered on the 14th day of May *1873, on a motion to the said court made by said Deyerle and C. T. Barnett, under the said act, to remit the interest for the time embraced between the period of the 17th day of April 1861, and the 10th day of April 1865. on a judgment obtained in said court on the 14th day of May 1867, in an action of debt then pending in said court, in which said Cecil was plaintiff, and said Deyerle and Barnett were defendants, whereby the said plaintiff recovered against the said defendants the sum of $814.76, with interest thereon from the 7th day of March 1861 till paid, and his costs by him about his suit in that behalf expended. The said Cecil opposed the said motion, on the ground that the said court could not re-open and review the said judgment under the authority of the said act, and that said act is in conflict with, and in violation of, the constitution of the state and of the United States; and the said parties to the said motion being heard by counsel, and it appearing to the court that the notice to abate the interest had been duly served on the defendant to the motion for more than ten days, and the court being of opinion that said act is not in violation of the constitution of this state or of the United States, and it further appearing by the record that the said judgment embraces interest which had accrued between the 17th day of April 1861, and the 10th day of April 1865, at the rate of *six per centum per annum,* the court ordered that the said interest, amounting to the sum of $191.88, be abated from said judgment. The said Cecil applied to a judge of this court for a writ of error to the said order, which was accordingly awarded, and is the first of the three cases now under consideration.

The second of them, *Linkous &c.* v. *Shafer &c.,* is a writ of error to a judgment of
778 the same court, rendered *on the 24th day of September, 1874, on a motion to the said court made by Peter Shafer,

See Roberts v. Cocke, 28 Gratt. 207, and *note.*

adm'r of George B. Bane, dec'd, against Burgess R. Linkous, under the said act, to review the judgment obtained in said court on the 17th day of April, 1866, by Frederick Broce for the benefit of said Linkous, against the said Shafer, adm'r, as aforesaid, for $246, with interest thereon from the 9th day of February, 1861, and costs, and to abate the interest which may have accrued thereon between the 17th day of April, 1861, and the 10th day of April, 1865, which amounts to $58.79. The said Linkous opposed the motion on the ground that the court could not review the said judgment under the authority of the said act, and that the said act is in conflict with, and in violation of, the constitution of this state, and of the United States. But the court being of opinion that said act is not in violation of the constitution of this state or of the United States, ordered that the said interest which accrued on the principal of said judgment between said dates, amounting to the sum of $58.79, be abated from said judgment. The said Linkous applied to a judge of this court for a writ of error to the said order, which was accordingly awarded, and is the second of the three cases now under consideration.

The third and last of them. *Garnand &c.* v. *Childress &c.*, is an appeal from a decree of the same court, rendered on the 24th day of September 1874, in the case of *George Garnand &c.* v. *Thomas D. Childress &c.* It appears from the record in the case that the petitioners for the said appeal, as set out by them in their petition, "are the judgment creditors of Thomas D. Childress, Stephen Childress and William M. Childress, some of which judgments are against them jointly, and others separately, the same being fully set forth in the rec-
779 ord. *All these judgments were rendered by the circuit and county courts for the county of Montgomery prior to the 2d day of April, 1873. Most of the judgments were rendered by default; in two or three, however, the defendants appeared and plead, and afterwards withdrew their defence and allowed judgment to be entered by default for the amount of principal and interest due on the debts therein named."—"For the purpose of enforcing their several judgment liens as against the lands held and owned by defendants, your petitioners and other judgment creditors, on the 15th day of December 1870, instituted in the name of George Garnand &c., a suit. This suit was brought in the circuit court of said county, and such steps were taken in said cause, that a decree was entered directing a commissioner to sell so much of the lands belonging to the defendants as would satisfy them their several judgments. Such sale was made; but before the funds were distributed between your petitioners, the said circuit court, acting in chancery, and upon the *ex parte* motion of the said Childresses, entered the decree herein complained of, by which decree your petitioners are each made to lose the interest that had accrued on each of their debts between the 17th day of April 1861, and the 10th day of April 1865." The said petitioners applied to a judge of this court for an appeal from the said decree, which was accordingly allowed, and is the third and last of the said three cases now under consideration. Among the errors assigned in the said petition are the following:

"1stly. That in so far as it alters, or attempts to alter, the contracts of the parties in the several judgments named in commissioner Hagan's report, or undertakes to alter, review or annul the judgments which had been rendered by the circuit and
780 county court between *the said parties, or undertakes to take from the petitioners their private property, and vest the same in the defendants, it is erroneous, inequitable and unjust; and that so far as the act of the General Assembly of Virginia, in force April 2d, 1873, chapter 353, purports to authorize such action on the part of any court, it violates the provisions of the constitution of the United States and of this state, and is therefore void."

"2dly. The courts having adjudicated the rights of these parties, and determined what amount of principal and interest should be recovered by the creditors as against the debtors before the passage of the act of 2d April 1873, the general assembly had no power to pass an act authorizing the courts which had rendered the judgments, or any other court to review said judgments, with the view and for the purpose of taking from the plaintiffs a part of their claims, and giving the same to the defendants."

"3dly. By the decree herein complained of, it will be perceived that the petitioners and the other judgment creditors named in the report have been deprived of $4,442.54 of money justly due them, and this large sum has been by the chancellor given to the debtors without the creditors' consent, and against their solemn protest."

When the judgments and decrees sought to be reversed in these three cases were rendered, there had been no decision of this court on the question of the constitutionality of the provision before mentioned of the act passed April 2, 1873, as aforesaid. But such a decision has since, and recently, been made in two cases not yet reported in a regular volume of the reports of the decisions of this court, because no volume of such decisions, coming down to so late a period as that at which those cases were decided,
781 has yet been *reported, but they will be reported in the next volume to be published, and they are already reported in that excellent periodical. *The Virginia Law Journal*, published by Messrs. George L. and Frank W. Christian in Richmond. See the No. of that work for March 1877, pp. 168-178. The cases referred to are *Roberts' adm'r* v. *Cocke &c.*, and *Murphy* v. *Gaskins' adm'r*. See *supra* 207.

In the former, *Roberts' adm'r* v. *Cocke &c.*, the plaintiff brought an action of debt in the court below upon a bond dated on the 12th day of December 1860 for "$762, with interest from date, payable nine months after date." The defendants filed three pleas: 1st, payment; 2d, a plea averring that the bond sued

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on was entered into prior to the 10th day of April 1865, and praying judgment that the interest on the bond from the 17th day of April 1861, till the 10th of April 1865, be remitted, in accordance with the act aforesaid (to wit: the act passed April 2, 1873); and 3d, a plea of the like tenor and with the like prayer as the 2d, with the further averment that "the confusion of the business relations of the country, incident upon the secession of the state of Virginia from the United States, and the war consequent thereupon between the Confederate States and the United States was so great and disorganizing, that the principal money in said writing obligatory specified, was not worth any interest between the periods aforesaid to the defendants, who were citizens of the county of Fauquier, which was occupied from time to time by the Federal troops." The plaintiff took issue on the plea of payment, and demurred severally to the other two pleas. The demurrer was overruled, and neither party demanding a jury, the whole matter of law and fact was submitted to the court; and the bond sued on being given in evidence, 782 *and being all the evidence, the court gave judgment for the plaintiff for the principal sum specified in the bond, with interest from the time it became payable until the 17th day of April 1861, and from the 10th day of April 1865, until payment and for costs, expressly remitting the interest between the dates aforesaid. In the second case, that of *Murphy* v. *Gaskins' adm'r*, the plaintiff, Frances A. Murphy, in the year 1869, brought an action of covenant in the circuit court of Fauquier county, upon an instrument under seal of the tenor following:

"Received Nov'r 26th, 1860, of Frances A. Murphy $500, to bear interest from date. I also agree to, and put a negro boy, Abraham, in pond (meaning in pawn) to secure the payment of the same. Whenever the $500 is paid to Mrs. Murphy, with legal interest, the said boy no longer belongs to the said Mrs. Murphy, but the title returns back to me. Given under my hand and seal this the 26th day of November 1860.

JOHN GASKINS, [Seal]."

The defendant pleaded to this action "covenants performed," and "covenants not broken," upon which pleas issues were made up, and neither party demanding a jury, the issues were tried by the court on the 4th day of April 1872, and judgment was rendered for the plaintiff for the $500 in the covenant specified, with interest from the date thereof, and for costs. On the 12th day of April 1873, the personal representative of John Gaskins, pursuant to notice, made a motion in the circuit court of Fauquier county for a review of the judgment aforesaid, and an abatement of the interest included therein between the 17th day of April 1861, and the 10th day of April 1865, and the court rendered judgment accordingly, abating said interest. 783 *Upon the hearing of the motion, the only evidence adduced was the record of the first judgment, including the covenant on which it was rendered.

The judgments of the court below in these two cases were brought up to this court by writs of error for revision and review, and upon such revision and review were considered and adjudged by this court to be erroneous, based as they are solely on the said act of the general assembly, passed on the 2nd day of April, 1873, and were accordingly reversed and annulled. The unanimous opinion of the court, consisting of three judges, was delivered by JUDGE BURKS; from whose opinion we have taken the statement of the cases.

The head notes to the report of these cases in the Virginia Law Journal, seem to be a correct synopsis of the opinion delivered therein. They are as follows:

1. "Where, during the late war, a creditor resided within the territory of one of the belligerent powers, and his debtor within that of the other of said powers, such debtor would, under the rules of public law, be entitled to an abatement of interest during the time the war lasted.

2. "But where the debtor and creditor resided within the same territory, the mere existence of war does not, alone, furnish any legal ground for the abatement of interest upon contracts during the time such war lasted.

3. "In contracts for the payment of a certain sum of money, interest on the principal sum is a legal incident of the debt, and the right to it is founded upon the presumed intention of the parties.

4. "Wherever there is a contract express or implied for the payment of legal interest, the obligation of the contract extends as well to the payment of the interest, 784 *as it does to the payment of the principal sum, and neither the courts nor the juries ever had the arbitrary power to dispense with the performance of such contracts, either in whole or in part.

5. "The laws which subsist at the time and place of the making of a contract and where it is to be performed, enter into and form a part of the contract, and that, whether such laws affect its validity, construction, discharge, or enforcement.

6. "While it is competent for the state to alter or change the remedy on a contract, this can only be done where the change does not impair substantial rights.

7. "The act of the general assembly, approved April 2, 1873, entitled 'an act to amend and re-enact sec. 14, ch. 187, of the Code of 1860, in relation to interest,' so far as said act confers upon courts and juries, in the suits therein mentioned, power to remit interest as therein provided, on contracts entered into prior to April 10, 1865, which said courts and juries did not have under the laws in force at the time such contracts were entered into, is repugnant to the constitution of the United States and of this state, and is so far null and void.

8. "And so much of the said act as empowers the courts to review judgments and decrees upon motion, and to abate interest as in said act provided, is repugnant to the constitution of the United States and of this state, and therefore void."

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The decision of the court in these two cases is conclusive of the three cases now under consideration, and requires the reversal of the judgments in the first two and the decree in the third, with costs to the plaintiffs in error and appellant both in this court and in the court below.

785 *The only apparent distinction between those two cases and the three now under consideration is, that in each of the original obligations in those two cases there is an express promise to pay interest from date, while there is no such express promise in any of the original bonds or notes in the three cases under consideration. But that is a distinction without a difference. On all the original bonds and notes, in all of the said cases, judgments had been rendered before the passage of the act of April 2nd, 1873, each of which judgments was expressly for running interest from a named day. No mere promise to pay interest can be of higher or stronger obligation than a judgment for interest. A judgment is a debt, and of higher dignity than a debt due by mere contract, whether simple or a specialty; and is moreover *res adjudicata*, which can only be reversed and annulled in the mode prescribed by law. The bonds and notes on which all of the said judgments were rendered were merged in the judgments respectively, and they all stood on the same footing of debts of record.

There is a passage in the opinion of the court in the two cases heretofore decided as aforesaid in these words: "We do not mean to say, however, that there may not be special cases attended with circumstances connected with, or growing out of the war, which would furnish legal cause for the abatement of interest. When such cases arise, they must be decided according to the law applicable to the peculiar facts and circumstances of each case. We can only lay down the general rule." It is sufficient here to say on that subject, that if there may be such special cases, neither of the three cases now under consideration is one of them, but all

786 of the said three cases fall within *the general rule, precisely as did the two cases heretofore decided by this court.

We have, in the foregoing opinion referred to, no other authorities than the recent decision of this court in the two cases aforesaid, that being a binding authority, and perfectly conclusive of all these cases. In the opinion of the court, delivered by JUDGE BURKS in those two cases, all the material authorities are cited, and many of them commented on, which renders any citation of them in this opinion unnecessary.

JUDGMENT AND DECREE REVERSED.

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787 *Carter's Adm'r &c. v. Kelly, Judge.

July Term, 1877, Wytheville.

Absent, ANDERSON, J.

Removal of Causes.—Where a warrant is brought before a justice upon a claim exceeding twenty dollars, and upon the application of the defendant before trial, it is removed to the county court, an appeal lies to the circuit court, from the judg- appeal lies to the circuit court, in the case.

The case is stated by JUDGE CHRISTIAN.

R. L. Ayres, for the petitioner.

CHRISTIAN, J., delivered the opinion of the court.

This case is before us upon a petition filed by Carter's adm'r, asking at the hands of this court, a writ of prohibition against the Hon. Jno. A. Kelly, judge of the circuit court of Scott county, "to restrain and prohibit him from taking cognizance or jurisdiction of, or of trying in any manner whatever," a certain civil action involving the sum of $43, in which the said Carter's adm'r was plaintiff, and one Harvey Gray was defendant, commenced by a warrant before a justice of the peace for Scott county, and removed before trial to the county court of said county, on motion of defendant. The case was heard in the county court, at the October term, 1875, and there was a verdict and judgment for the plaintiff. During the trial the defendant tendered several bills of exceptions, which were signed and sealed by the court, and made a part of the record.

788 *The defendant presented a copy of this record, with a petition for a *supersedeas* to the Hon. John A. Kelly, judge of the circuit court of Scott county, who awarded a *supersedeas* to the judgment of the county court. The plaintiff in the suit in the county court (the petitioner here), is now seeking from this court a writ of prohibition, to restrain the said circuit judge from trying the case in an appellate court, upon the ground that said circuit court cannot exercise its appellate jurisdiction in such a case.

The only question, therefore, we have to determine is, whether, in a case commenced before a justice of the peace and removed to the county court before trial, there exists under our laws the right of appeal to the circuit court. This question depends upon the true construction to be given to the statutes contained in the Code of 1873, and the sessions acts of 1874, regulating the jurisdiction of courts in matters of appeal.

The general law on the subject of appeals, writs of error and *supersedeas*, is contained in the first and second sections of ch. 178, which declare in what cases appeals may be of right, and in what cases petitions may be presented for appeal, &c.

The third section of the same chapter declares the cases in which petitions for appeals, writs of error and *supersedeas shall not be* presented, as follows:

"§ 3. No petition shall be presented for an appeal from, or writ of error and *supersedeas* to, any final judgment, decree or order, whether the commonwealth be a party or not, which shall have been rendered more than two years before the petition is presented; nor to any judgment of a county or a corporation court, *which is rendered on an appeal*

The principal case is discussed at length in dissenting opinion of RICHARDSON, J., in James v. Stokes, 77 Va. 238. See also, Barton's Law Pr. (2nd Ed.) 4, 38.

from a judgment of a justice; nor to a judgment, decree or order from any other court where the controversy is for a matter
789 less in value or *amount than five hundred dollars, exclusive of costs, unless there be drawn in question a freehold or franchise, or the title or bounds of land, or some matter not merely pecuniary * * * Now the *only* exception contained in this section limiting the right of appeal from decrees or judgments of the county court, is that which declares that there shall be no appeal or writ of error to a judgment of a county court, which is rendered on appeal from a judgment of a justice." To all other judgments of such court the right of appeal to the circuit court is secured by these sections; unless such right of appeal is taken away by the fourth section of the act passed April 2nd, 1874, relating to the jurisdiction of the county courts. That act, after enumerating in detail the subjects of jurisdiction of the county courts, contains the following provision: "And exclusive jurisdiction of causes removed from a justice in pursuance of section one, of chapter 147 of said Code, and of contested election cases for county and township officers, &c., * * * but with the right of appeal, in all such cases, to the circuit court whose decision shall be final."

The first section of ch. 147, referred to in this section, provides, that "in every case where the sum or thing in controversy exceeds the amount or value of twenty dollars, the justice shall upon application of the defendant at any time before trial, remove the cause to the court of the county or corporation wherein the same shall be brought, and the clerk of the said court shall docket the same, and it shall be proceeded in as if it were a motion in said court under the 6th section of ch. 163," &c.

It is urged by the counsel for the petitioner here, that the words in the second section of the act of April, 1874, "exclusive
790 jurisdiction of causes removed *from a justice," takes away the right of appeal to the circuit court. We cannot give this construction to the statute. That would be to declare that the general law regulating appeals which gives the right of appeal in all cases, from judgments of a county court, except the *single case* of a judgment rendered on an appeal from a judgment of a justice, was repealed by the words "exclusive jurisdiction," in this act. A statute can only be repealed by express words, or where the latter statute is so inconsistent with the former that both cannot stand together; so as to show a clear intention of the legislature to repeal it. While the words *exclusive jurisdiction*, are, generally, words of the broadest signification, it is manifest that in the connection in which these words are here used, and upon a comparison of the statutes, they mean exclusive *original* jurisdiction.

When a case is removed, under the statute, from a justice to the county court, it then stands in the same position in the county court, so far as the right of appeal is concerned, as if the case had been *originally brought* in the county court.

The court is therefore of opinion, that the circuit court of Scott had jurisdiction to award the *supersedeas* to the judgment of the county court in the case complained of, and to try and dispose of the same, as an appellate court.

The rule awarded against the HONORABLE JOHN A. KELLY, judge of said court, must, therefore be discharged.

PROHIBITION REFUSED.

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791 *Carroll v. Brown.

July Term, 1877, Wytheville.

Absent, ANDERSON, J.

1. Equity Jurisdiction — Setting aside Deeds.*—A court of equity has jurisdiction of a suit brought by the owner in possession, to set aside a deed which has been put upon record, whereby the complainant's land has been wrongfully conveyed to a purchaser at a tax sale.

In September, 1874, John W. Carroll filed his bill in the circuit court of Patrick county, against Nicholas Brown, to set aside a deed by which the clerk of the county court of Patrick conveyed to Brown one hundred and fifty acres of land sold for delinquent taxes. Brown demurred to the bill and also to an amended bill, and the court sustained the demurrer. And thereupon Carroll applied to a judge of this court for an appeal; which was allowed. The case is stated by JUDGE BURKS in his opinion.

J. E. Penn, for the appellant.

A. M. Lybrook, for the appellee.

BURKS, J., delivered the opinion of the court.

The appellant filed his bill in the circuit court of Patrick county against the appellee to set aside a deed made by the clerk of the county court of said county, conveying to the appellee land claimed by him as a
792 *purchaser at a sheriff's sale of land, returned delinquent for non-payment of taxes. The defendant filed a demurrer and answered to the bill. Upon argument the demurrer was sustained, and the defendant, on liberty granted for the purpose, filed an amended bill referring to and making the original bill a part thereof, to which the de-

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***Equity Jurisdiction.**—In Stearns v. Harman, 80 Va. 48, the court after expressly affirming the rule laid down in the principal case, held that under Code 1873, ch. 31, secs. 4, 5, the proper remedy is by an action of ejectment where the owner holds the legal title, but has not actual possession, and another asserts an adverse claim to the land but has not actual possession of it. See Otey v. Stewart, 91 Va. 714 and Va. Coal & Iron Co. v. Kelley, 93 Va. 332, citing the principal case and Hale v. Penn, 25 Gratt. 261; Yancey v. Hopkins, 1 Munf. 419. See also, Barton's Ch. Pr. (2nd Ed.) 67; Clayton v. Barr, 34 W. Va. 290, 12 S. E. 704; Smith v. O'Kyle, 43 W. Va. 177, 27 S. E. 353; Kane v. Va. Coal & Iron Co., 97 Va. 329.

fendant also demurred without answering. By decree of the 4th of November, 1875, this demurrer was also sustained, and the bill of the complainant dismissed. An appeal from this decree allowed the complainant, brings the case here.

The demurrer necessarily admits the truth of the facts stated in the bill, so far as they are relevant and well pleaded.

Whether the facts stated in the bill, thus admitted by the demurrer to be true, entitle the appellant to the relief prayed, is the only question to be now determined.

The two bills considered, as they may be, together, allege, in substance, that the complainant is the owner of two tracts of land in Patrick county, conveyed to him by one Thomas Boyles, by deed dated 2nd June, 1859, recorded in said county on the day of its date, which lands were derived by said Boyles by descent from Lucinda Barker—a copy of which deed is filed as a part of the bill; that a short time after the execution of the deed, the complainant took possession of said lands and has thence hitherto held and still holds such possession; that on the 24th of September, 1860, the sheriff of Patrick county exposed to sale, as delinquent for the nonpayment of taxes, several tracts of land, charged in the name of the said Lucinda Barker, amongst which was a tract containing three hundred and sixty acres, at the price of $9.30, as shewn by a copy of the sheriff's 793 official return of sales filed as a *part of the bill; that the defendant executed to the sheriff his receipt for the $9.30, the purchase money for the one hundred and fifty acres of land aforesaid, and, in the year 1874, caused the one hundred and fifty acres to be surveyed, and in the same year the clerk of the county court of Patrick, in accordance with the survey, executed to the defendant a deed for the land so surveyed. Certified copies of the report of the survey and the deed of the clerk are filed as parts of the bill; from which it appears, that the report of the survey was made by the surveyor of Patrick county, was duly certified, examined, and together with the deed duly recorded. The bill further alleges that in laying off the one hundred and fifty acres, the defendant caused the surveyor to locate and survey the same within the boundaries of the two tracts aforesaid belonging to the complainant; that if there was any such tract as the tract aforesaid of three hundred and sixty acres, it was a different tract from those conveyed as aforesaid to the complainant, and the defendant therefore had no right to have the survey and conveyance of said one hundred and fifty acres within the boundaries of complainant's said lands.

The bill further alleges, that the sale by the sheriff under which the defendant claims, was irregular and void, because as shewn by the official return of sales, it does not appear for what year or years the land sold was delinquent.

The prayer of the bill is, that the deed of the clerk to the defendant, Brown, and all proceedings in reference to the sale to him be declared null and void, and for general relief.

These facts, (for such the statements of the bill must be taken to be on demurrer), in my judgment, make a proper case for the exercise by a court of equity of its 794 *peculiar powers. The demurrer admits the complainant to be in possession of land which belongs to him, and he is entitled to the free, full and uninterrupted use and enjoyment of it, and without let or hindrance to make sale of it if he desire to sell at its market value. The defendant, under color of law, but without valid claim, has caused a part of this land to be surveyed by an officer of the state, and then conveyed to him by another public officer. The deed of conveyance thus procured he has caused to be recorded in the county in which the land lies, and has thus proclaimed to the world that he is entitled to one hundred and fifty acres of the complainant's land. Vain would be the attempt of the complainant to make sale of his land except at a sacrifice, if, indeed, he could sell at any price. Who would purchase it at its true value? Men do not generally wish to buy law-suits, and when they purchase land at a full price they expect a clear title. The complainant, to be sure, might point to his deed and his possession under it, but he stands confronted with the recorded deed of the defendant and his claim under it to more than half of the complainant's land. It is not to be doubted that this is a serious injury to the complainant's rights, and a grievance that calls for redress. What redress is he entitled to, and how and where is he to get it? His "remedy, if any," says the circuit judge in his decree "is at law, not in a court of equity." What remedy has he at law? He is in possession of the property, and cannot bring ejectment against the claimant to try the title, and the claimant is content to stand off for the present and not bring an action against him. Code of 1873, ch. 131, § 5.

If the defendant when he had the survey, and procured a deed for the one hun- 795 dred and fifty acres, knew *that it was the complainant's land, he committed a fraud. If he did not know it he made a mistake. Surely, in either case, the complainant is entitled to relief. The mischief springs from the defendant's recorded deed. As long as that stands the injury must continue. It is a cloud that overshadows the complainant's title, and materially impairs, if it does not wholly destroy, its market value. If the defendant will not release, a cancellation of the deed by judicial authority furnishes the only adequate relief. A court of law cannot give this relief, but a court of equity can and should give it.

Treating of the delivery up, cancellation or rescission of agreements, securities, deeds, or other instruments, JUDGE STORY says: "It is obvious that the jurisdiction, exercised in cases of this sort, is founded upon the administration of a protective or preventive justice. The party is relieved upon the principle, as it is technically called, *quia timet;* that is, for fear that such agreements, securities, deeds, or other instruments, may be vexatiously or injuriously used against him,

when the evidence to impeach them may be lost; or that they may now throw a cloud or suspicion over his title or interest." 1 Story Eq., § 694.

Again he says: "Whatever may have been the doubts or difficulties formerly entertained upon this subject, they seem by the modern decisions to be fairly put at rest; and the jurisdiction is now maintained in the fullest extent. And these decisions are founded on the true principles of equity jurisprudence, which is not merely remedial, but is also preventive of injustice. If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for a sinister purpose. If it is a negotiable instrument, 796 it may be *used for a fraudulent or improper purpose, to the injury of a third person. If it is a deed purporting to convey lands or other hereditaments, its existence in an uncancelled state necessarily has a tendency to throw a cloud over the title." Idem, § 700.

Other authorities to the same effect are abundant. A few only need be cited. See Kerr on Injunctions 597; *Bissell* v. *Kellogg*, 60 Barb. (N. Y.) 617, (cited 3 U. S. Digest, N. S. 136); *Lee* v. *Ruggles*, 62 Ill. 427, (5 U. S., Digest, N. S. 196); 2 Lead. Cas. in Eq. (ed. 1877), part 2, top p. 1355, notes to *Earl of Oxford's case*, and authorities there cited.

But I have not been able to find the law applicable to the case in judgment anywhere stated so well as in a recent work by JUDGE COOLEY. Speaking of quieting title to land after sale for taxes, he says: "If land has been actually sold and conveyed for a tax, the original owner remaining in possession may have the validity of the sale tested by a bill in equity, filed for the purpose of quieting his title. This is the general rule. Courts of law cannot give relief in such a case, as he cannot bring ejectment, being himself in possession; no other form of action is given by the common law for such a case. And where the case has proceeded to sale and conveyance, even though the defects in the title are apparent on the record, and the deed is not *prima facie* evidence of title, it may perhaps be possible to distinguish the case from one in which the void proceedings are only impending. While they are in progress, it may be assumed that the officers will pause in their illegal action before any sale is reached; but when the proceedings have reached that point, and a conveyance has been given, which, though void, may affect the market value of the land, there would seem to be no very conclusive reason why 797 equity should not *interfere and decree a cancellation of the void claim. If the tax purchaser has entered into possession of the land, the original owner has an adequate remedy by suit at law in ejectment; and to this he must resort. When neither party has actual possession, if the statute has authorized the action of ejectment to be brought on the constructive possession, which either may claim by virtue of the conveyances which he holds, the suit at law would appear to be the adequate remedy in such a case also." Cooley on Taxation 544, 545, and the cases there cited.

The decision of this court in *Hale* v. *Penn's heirs*, 25 Gratt. 261, as I understand it, fully accords with the doctrine laid down by JUDGE COOLEY, *supra*. It does not appear from the statement of that case made by the reporter, nor in the opinion of the court delivered by JUDGE ANDERSON, whether Penn's heirs, the complainants in the suit, were in the possession of the land which they sought to redeem; but it seems to be so implied. It must have been so, I take it; for, if Hale, the tax purchaser, had been *in possession* the complainants would have had a plain remedy at law in an action of ejectment against him, the deed under which he claimed not being *prima facie* evidence of title, and furnishing no impediment to the recovery in such action. In that case, as in this, the claimant purchased one parcel of land, and surveyed and got a deed for a different parcel. There seems to be this difference in the two cases: in the former, the defect of title, it would appear, was plainly shown by the official return of the sheriff on record; while in the present case, the invalidity of the title would have to be established in the main by evidence *dehors* the record. The equitable jurisdiction, therefore, exercised in *Hale* v. *Penn's heirs* must have been based on 798 *the assumption that the deed to the purchaser, although defective and void, cast a cloud upon the title of the owners to their prejudice, which they had a right to have removed. Hence this court, while affirming the decree of the court below which overruled the deed, amended it by directing a reconveyance of the title to the owners, "in order to preserve to them their unbroken record of title."

In a case decided by this court as early as 1810, it seems to have been held that if land be listed by the commissioner of the revenue to a wrong person, sold by the sheriff as the property of such person, and conveyed by deed to the purchaser, the proper resort of the rightful owner for relief is to a court of equity, by which the deed may be cancelled and a release or conveyance of the land decreed. *Yancey* v. *Hopkins*, 1 Munf. 419. It was further held in that case that an authority given by law to any officer, whereby the estates or interests of other persons may be forfeited or lost, must be strictly pursued in every instance.

Applying the principles of these authorities to this case, it is manifest the court below erred in sustaining the appellee's demurrer to the amended bill.

I am of opinion, for the reasons stated, that the decree of the circuit court of Patrick county should be reversed and annulled; and that the cause should be remanded to the said circuit court, with liberty to the appellee to file his answer to the amended bill, if so advised, to each party to take testimony in the cause, if desired, and that the cause be otherwise proceeded in to a final decree.

The decree was as follows:

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This day came again the parties by
799 their counsel, *and the court having maturely considered the transcript of the record of the decree aforesaid, and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said decree is wholly erroneous; it is therefore decreed and ordered, that the said decree be reversed and annulled, and that the appellant recover against the appellee his costs by him expended in the prosecution of his appeal aforesaid here; and this court proceeding to render such decree as the said circuit court ought to have rendered, it is further decreed and ordered, that the demurrer of the defendant to the complainant's amended bill be overruled, and that this cause be remanded to the said circuit court, with liberty granted to the defendant to file in the said court his answer to said amended bill, if he be so advised, and with directions that the cause be otherwise proceeded in to final decree: which is ordered to be certified to the said circuit court of Patrick county.

DECREE REVERSED.

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800 *Dyerle v. Stair.

July Term, 1877, Wytheville.
Absent, ANDERSON, J.

Bonds—Currency—Presumptions.—In an action on a bond given in September 1863, for $1,000, payable in two years, the court instructed the jury, that Confederate States treasury notes were the prevailing currency in circulation at the date of the bond, and that a presumption of fact would arise from that circumstance alone, that the said bond was intended to be payable in such notes; but such presumption may be rebutted by evidence; and the burden of proof rests on the plaintiff to show that the said bond was entered into in reference to Confederate money as a standard of value. HELD: The instruction is erroneous. A presumption of fact does not arise that a bond executed when Confederate notes was the prevailing currency, payable at a distant day, is payable in such notes. Whatever presumption there is, if any, was a matter exclusively for the jury.

This was an action of debt, in the circuit court of Roanoke county, brought in February 1874, by David Dyerle against Jeremiah Stair, upon a bond of which the following is a copy:

"Two years after date I bind myself and heirs, &c., to pay to David Dyerle or heirs one thousand dollars, for his interest in the Hausman place in Botetourt county.

Given under my hand and seal this 20th day of September 1863.

JEREMIAH STAIR, *Seal.*"

On the trial of the case the only ques-
801 tion seems to *have been, whether the understanding and agreement between the parties was, that the bond was to be paid in Confederate currency or in gold. And the only question in this court was upon an instruction given by the court at the instance of the defendant. The case is stated by JUDGE STAPLES in his opinion.

Taylor and *Phlegar*, for the appellant.

J. H. H. Figgatt, for the appellee.

STAPLES, J., delivered the opinion of the court.

This is an action of debt brought in the circuit court of Roanoke county, upon a bond executed by the appellee to the appellant in September, 1863, for one thousand dollars, and payable two years after date. Upon the trial in the court below both parties were examined as witnesses, the one insisting that according to his understanding the bond was to be paid in Confederate currency, and the other claiming it was to be paid in gold, and each stating such facts as in his opinion tended to sustain his construction of the contract.

After the evidence was concluded the court on the motion of the appellee, gave the jury the following instruction: The court instructs the jury that Confederate States treasury notes were the prevailing currency in circulation at the date of the bond in this case, and that a presumption of fact would arise from that circumstance alone, that the said bond was intended to be payable in such notes, but such presumption may be rebutted by evidence; and the burden of proof rests on the plaintiff to show that the said bond was not entered into in reference to Confeder-
802 ate *money as a standard value. To which the appellant excepted.

The sole matter we have to consider is, whether this instruction is correct. We are of opinion it is not. If a presumption of fact would ordinarily arise, that a bond payable on demand, given when Confederate treasury notes constituted the prevailing currency, was payable in such currency—as to which no opinion is intended to be expressed—such presumption would not attach where the debt is payable at a distant period. The reasons for this distinction are fully set forth in numerous decisions of this court, especially in the case of *Kraker* v. *Shields*, 20 Gratt. 377, 401, to which reference is made.

Here the bond is payable two years after date, which was September 1865, when Confederate currency had ceased to exist. The record does not disclose, and it is not for this court to say, what were the motives influencing the parties in thus postponing the period of payment. It is sufficient to say that upon an instrument so payable no presumption necessarily arises as that indicated in the instruction of the circuit court. Whatever presumption there is, if any, was a matter

Instructions.—In Storrs v. Feick, 24 W. Va. 613, the court says: "It has been repeatedly held that it is improper for the court, in instructing a jury, to single out certain facts and instruct the jury, that if they are true, they must find for either of the parties in accordance with such facts, when there are other facts or evidence in the case bearing on the subject," citing the principal case and Berry v. Ensel, 2 Gratt. 333; McMechen v. McMechen, 17 W. Va. 684; Dogan v. Seekright, 4 Hen. & M. 125.

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exclusively for the jury, and not for the court. The court ought to have told the jury that in forming their opinion they must take into consideration all the facts and circumstances of the case, including the fact that the bond was executed when Confederate money was the prevailing currency, as also the fact that the time of payment was at a remote period; and upon the whole case they must decide which was the true understanding and agreement of the parties with respect to the kind of currency in which the debt was payable.

803 *The court is therefore of opinion that the judgment of the circuit court is erroneous; and the same is therefore reversed and annulled, the verdict of the jury set aside, and a new trial awarded in conformity with the views herein expressed.

JUDGMENT REVERSED.

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804 *Shanks v. Edmondson & als.

July Term, 1877, Wytheville.

Absent, ANDERSON, J.

I. M, administratrix of her husband, after paying all debts of the estate, has in her hands a sum of money for distribution among herself and her three children. This money, with some that she borrowed, she invested in a tract of land, taking the title to herself. Her daughter, L, marries S, she being at the time an infant. After her marriage, M and the other two children and S execute a deed, by which it is recited that the parties have agreed that M shall have one-half the land for her share, S paying the money she had borrowed, and that she had purchased the interest of M and the other two children in the other half. M and these two children convey to S the last half of the land to be held by him to his own use. HELD:

1. **Election.**—L, whilst an infant, could not make an election to take the land so purchased in lieu of the money in the hands of the administratrix, to which she was entitled, and which had been invested in land.
2. **Same—Husband and Wife.**—A wife during coverture has no power to make such election. But the husband may, in behalf of himself and wife, make such election, where it plainly and distinctly appears that he acted for her, or for himself and wife conjointly.
3. **Husband and Wife—Choses in Action.**—Upon the marriage of L with S, she not having made an election to take the land, she had no interest in the land held by her mother, as real estate; but only a claim upon her mother as administratrix, for her proportion of the money which she was entitled to receive as one of the distributees of her father's estate. This was upon her marriage nothing more than a *chose in action*, which upon a reduction into possession belongs to her husband.
4. **Same—Same—Reduction into Possession.**—The adjustment made by M and her two children and S, was upon the part of S a reduction into possession of the *chose in action*. S being a party to the deed, the claim against M was thereby extinguished; and such extinguishment will be held to be a reduction into possession by S to such an extent as to clothe him with the absolute property as against any claim of his wife, either to have the land as hers, or to have settlement upon her.

805

5. **Case.**—For the principles applicable to such cases, see the opinion of the court by CHRISTIAN, J.

Husband and Wife—Land as Personalty.—See 1 Min. Inst. (4th Ed.) 326, citing the principal case and Pratt v. Taliaferro, 3 Leigh 419; Siter v. McClanachan, 2 Gratt. 280; Haxall v. Shippen, 10 Leigh 536; Lewis v. Caperton, 8 Gratt. 148; Dandridge v. Minge, 4 Rand. 397; Harcum v. Hudnall, 14 Gratt. 369. See also, Bartons' Ch. Pr. (2nd Ed.) 931.

The case is stated in the opinion of the court delivered by CHRISTIAN, J.

E. Pendleton, for the appellant.

Taylor & Phlegar and *G. H. Hansbrough*, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

This is an appeal from a decree of the circuit court of Roanoke county.

The suit was commenced by a bill in equity filed by Henry A. Edmondson and Henry E. Blair, trustees in certain deeds of trust executed by George W. Shanks, by which he conveyed to said trustee certain real and personal estate for the benefit of his creditors. Said deed specified certain debts and liabilities of said George W. Shanks as "embracing all then recollected" by the grantor, but provided that the said trustees should, "as any money should be received by them" (from the sales of property therein conveyed), "pay the same ratably and in equal proportion according to the amounts, in discharge of all debts and liabilities against the said George W. Shanks, whether the said debts or liabilities are or are not specifically mentioned in this deed, together with all interest that may lawfully be due on said debts and liabilities."

806 *The object of the bill filed by the trustees seems to be twofold: *First*, to have an account taken of all the debts and liabilities of the said George W. Shanks, and to convene all his creditors before a commissioner for that purpose. *Second*, to have removed what the trustees considered a cloud upon the title to a part of the real estate conveyed by Shanks, and which, in their opinion, would seriously affect the price, if sold under the uncertainty then existing as to the claim of his wife asserted against his creditors in respect to part of said real estate.

This claim of Lucy Shanks, the wife of George W. Shanks, is founded upon the following state of facts, proved in the record, and which presents the only question we have to determine: Some time before the year 1842, Andrew Lewis died intestate, seized and possessed of considerable real and personal estate. His wife, Maria Lewis, qualified as his administratrix. After the payment of intestate's debts, there remained in her hands, of his personal estate, a considerable sum of money for distribution among herself and his children, of whom there were three—Mary, who intermarried with Henry A. Ed-

mondson, Lucy, who intermarried with George W. Shanks, and William W. Lewis.

With this fund remaining in her hands as administratrix (together with a certain sum borrowed from William Walton) Mrs. Lewis purchased a tract of land lying in the county of Roanoke, containing eight hundred and seventy-four and a quarter acres, and took a conveyance of the title to herself. Some time afterwards, to wit, on the 17th day of January 1842, an "indenture made between Maria Lewis, William W. Lewis and Henry A. Edmondson and Mary his wife, of the one part, and George W. Shanks, of the
807 *other part," after reciting the fact that the land purchased by Mrs. Maria Lewis, and conveyed to her by Samuel Strickler, was so purchased by money belonging to the estate of her husband, and in her hands as his administratrix, together with a certain sum borrowed by her of William Walton, Sr., contained, among other recitals, the following:

"And whereas the said Maria Lewis, having legal title to the whole of the residue of the said tract of land, and the said Geo. W. Shanks and Lucy, his wife, Wm. W. Lewis and Henry A. Edmondson and Mary, his wife, having equitable interests therein, the said parties have made an arrangement by which the title to said land may be adjusted; and, whereas the said Maria Lewis has undertaken to settle with the said Wm. Walton, Sen'r, the amount due him for money loaned as above mentioned, for the purpose of purchasing the said land, in consideration whereof the other parties to this indenture are willing that the said Maria Lewis shall retain to her own use and behoof, the one undivided moiety or half part of said land; and, whereas the said George W. Shanks hath purchased of the said Maria Lewis her interest in the remaining undivided moiety of the said residue, whether vesting in her as widow of the said A. Lewis, dec'd, or otherwise, and hath purchased of the said Wm. W. Lewis and of the said Henry A. Edmondson and Mary, his wife, their respective interests, present and reversionary, legal and equitable, in the said remaining undivided moiety or half part of the said residue; now, in order to effectuate the intentions of the parties aforesaid, in consideration of the premises and of the sum of five dollars by the said George W. Shanks paid to the said Maria Lewis, Wm. W. Lewis, and Henry A. Edmondson and Mary his wife, before
808 the *sealing and delivery of these presents, this indenture witnesseth, that the said Maria Lewis, Wm. W. Lewis and Henry A. Edmondson and Mary, his wife, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said George W. Shanks, his heirs and assigns, the above described remaining undivided moiety or half part of the said residue of or half part the said tract of land, which residue remains after the sale of the said portion of one hundred and twenty-seven acres off from the original tract of eight hundred and seventy-four and a half acres above mentioned. To have and to hold the same to him, the said George W. Shanks, and his heirs and assigns, to the only proper use and behoof of him, the said George W. Shanks, and his heirs and assigns forever."

This deed was signed by Maria Lewis, William W. Lewis, Henry A. Edmondson, Mary A. Edmondson and George W. Shanks; but was not signed by Lucy, the wife of George W. Shanks. The land conveyed by this deed is the same land which was conveyed by Shanks to Blair and Edmondson, trustees, by deed bearing date 15th June, 1872, first above referred to.

To the bill filed by the trustees calling upon the court to adjudicate the rights arising between Mrs. Shanks and the creditors of her husband, she filed her answer, in which she alleges that the purchase of the land in the bill mentioned was made by Mrs. Maria Lewis in the year 1830, and she asserts that she was married to her husband, George W. Shanks, on the — day of January 1838, so that her interest had been converted and become real estate, and was real estate at the time of her marriage, and the only interest that her husband took in her portion of the real estate was a life estate, with re-
809 mainder in fee to this *respondent, and even if, as claimed by some of the creditors, this respondent's interest in the land was derived by the investment of personal assets in real estate, before it could be taken as her husband's absolute estate, it would have to be reached through a court of equity; and such a court would do it only upon terms of making an equitable settlement upon this respondent. But respondent insists, that at the time of her marriage her estate was real in her portion of the one-half of the Bellevue estate, in which she has a remainder in fee after the termination of her husband's life estate, and that all that this court will now sell is her husband's life estate. And further answering, respondent says that she is advised that even if her mother, Mrs. Maria Lewis, had invested her personal estate in real estate, and took the deed to herself, respondent claims that she held the land as an implied trustee for respondent. And respondent has the right to elect to take it as real or personal estate, and she has elected as far as she could, and still does desire and elect to hold it as real estate, and asks this court to protect her interests.

The circuit court of Roanoke held, by its decree of the 14th July 1874, that the said Lucy Shanks has no interest in the real estate conveyed by her husband to the complainants as trustees by deed of 15th June 1872, except a right of dower therein, contingent upon her surviving her said husband.

From this decree Mrs. Shanks obtained an appeal, awarded by one of the judges of this court.

The question we have to determine is, "what interest does Mrs. Lucy Shanks (the appellant) take in the land conveyed by her husband to Edmondson and Blair, trustees?" Has she only a contingent right of dower, as declared by the circuit court, or has she
810 title to one-third *of one moiety of

the land subject only to her husband's rights as tenant by the curtesy? This depends upon the nature and character of the estate she derived from her father, and whether it was real or personal estate at the time of her marriage. The conceded facts in the case show that Mrs. Maria Lewis, the mother of the appellant, was the administratrix of her husband, Andrew Lewis, and that as such administratrix she having in her hands, after payment of his debts, a considerable sum of money, invested the same in certain real estate in the county of Roanoke, taking from the vendor a deed, conveying the title to herself. This deed was made in the year 1830. Mrs. Shanks was married in the year 1838. In 1842, the deed above deferred to between Mrs. Lewis and her children and sons-in-law, was executed. Now, up to the time of this deed, the children of Mrs. Lewis had a claim upon her as administratrix of her husband (and their father, Andrew Lewis,) *for the money* which came into her hands as administratrix. She having invested *that money* in real estate, it was certainly competent for them, *if they elected so to do*, to accept the land in lieu of the money due them, and if they chose so to do, could have compelled a division of the land among them (if it was susceptible of such division), and each one have taken his or her portion of the land, and given an acquittance to the administratrix of all claim against her on account of the money collected and invested by her. If this had been done before the marriage of Mrs. Shanks, or even afterwards by her husband and wife conjointly, then Mrs. Shanks' interest, as well as that of all the children of Andrew Lewis, would have been an interest in *real estate*, and she could have held the same against her husband's
811 creditors. But no such *division of said land was made; but the recitals in the deed show that the parties to that deed regarded the land as representing *the money* which was in the hands of the administratrix. There is nothing to show in the record, nor is it claimed in argument here, that Mrs. Shanks, before marriage, and after infancy, made her election to take her interest in the land in which her mother, as administratrix of her father, had invested the money in her hands. It is neither alleged nor proved that there was any election on the part of Mrs. Shanks *before marriage*. Indeed no such election could have been made before marriage, because she was then an infant, having married before she arrived at twenty-one years of age. The recital in the deed that Shanks and wife had "an equitable interest" in said land, is plainly only a declaration that they had such an interest in equity as against the legal title of Maria Lewis as a court of equity would uphold upon the doctrine of resulting trusts, and hold the land bound for the *money* belonging to the estate of Andrew Lewis, and which she had invested. This recital cannot be held as proof of an electoin on the part of Mrs. Shanks, especially as she was then a married woman and incapable of making an election. See *Siter, Price & Co.* v. *McClanachan & als.*, 2 Gratt. 280, 296; *Pratt* v. *Taliaferro*, 3 Leigh 419. After marriage the election could only be made by the husband and wife conjointly. In this case the election was made *by the husband alone*. And he having complete dominion and control of the subject, his election would enure to his sole benefit, unless it be shown that such election was made for himself and wife jointly. 2 Gratt. 296.

In this case all inferences, which might be drawn from the recital of the deed.
812 are rebutted and explained *from the fact that in the deed relied on, the land is conveyed to George W. Shanks, "to have and to hold the same to him, his heirs and assigns, to the only proper use and behoof of them, the said George W. Shanks and his heirs and assigns forever." It thus appears that there was no election on the part of Shanks, the husband, to hold the land in behalf of himself and wife, but on the contrary, he had the title conveyed to himself; which excludes the idea of any election on behalf of himself and wife conjointly.

The legal principles governing this case are well settled, and clearly defined by the decisions of this court, as well as by the recognized rules of courts of equity, and may be briefly and succinctly stated as follows:

1. Where *money* belonging to another is invested in real estate, and the title is conveyed to the party using the money not his own, such real estate will be held, upon the doctrine of resulting trusts, to be in the hands of the grantee as a trustee for the party whose money has been appropriated.

2. Such party, whose money is so appropriated, may, at his election, either claim the money, and go against the land as security for its payment, or he may claim the land itself, if he elects so to do; and a court of equity will, upon such election being distinctly shown, by a person *sui juris*, decree to such person the land in the place of the money which purchased it.

3. *A wife during coverture* has no power to make such election. But the husband may, in behalf of himself and wife, make such election, when it appears that he acted for his wife, or for himself and wife conjointly.

4. The election to hold such real estate, either by a person *sui juris*, or by a mar-
813 ried woman, made by her *husband in her behalf, or conjointly with himself, must be plainly and distinctly proven, and cannot be left to mere inference, unless such inference is so strong from all the circumstances as to be equivalent to positive proof of a clear intention so to elect.

See *Siter, Price & Co.* v. *McClanachan*, 2 Gratt. 280; *Pratt* v. *Taliaferro*, 3 Leigh, 419; *Commonwealth* v. *Martin's ex'ors*, 5 Munf. 117, 128; *Harcum's adm'r & als.* v. *Hudnall*, 14 Gratt. 369, 378, 379; *Thornton* v. *Thornton*, 3 Rand. 179; *Craig* v. *Leslie*, 3 Wheat. R. 563, 578, 585, 586; 2 Story's Eq., § 1210, 1211; 1 Lead. Cas. in Eq., pt. 1st, vol. 1st, 335 to 342; Ib. § 793.

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Applying these principles to the case be-

fore us, it is clear: 1, That no election was made by Mrs. Shanks before marriage; and 2, That no election was made by George W. Shanks on behalf of himself and wife; but on the contrary, the fact that he took the deed to himself repels the presumption that might otherwise possibly arise from the recitals in the deed, and conclusively shows that he elected to take for himself that which the law gave him by virtue of his marital rights.

It is clear upon the facts in this case, that upon the marriage of Lucy Lewis with George W. Shanks, she having made no election, had no interest in the real estate held by her mother *as real estate*, but only a claim upon her mother as administratrix for her proportion of the money which she was entitled to receive as one of the distributees of her father's estate. This was upon her marriage nothing more than *a chose in action*, which, upon a reduction into possession, belonged to her husband. The adjustment made by the deed before referred to between Mrs. Maria Lewis and her children and son-
814 in-law was, upon the part of *George W. Shanks, a reduction into possession of the chose in action, which consisted of a claim on the part of his wife against her mother, as administratrix of her father, for a certain amount of money received by her as such administratrix, and in her hands for distribution. George W. Shanks being a party to that deed, the claim against Mrs. Lewis was thereby extinguished, and such extinguishment will be held to be a reduction into possession by Shanks, to such an extent as to clothe him with the absolute property as against any claim of his wife, and must be subjected to the claims of his creditors, and passed to his trustees, Edmondson and Blair, by the deed of the 15th day of June 1872.

The court is therefore of opinion, that the decree of the circuit court of Roanoke county, which declares "that Lucy Shanks has no interest in the real estate conveyed by her husband, George W. Shanks, by the deed dated the 15th June 1872 to the complainants as trustees, except a right of dower therein contingent upon her surviving her said husband" is not erroneous, and that the same be affirmed.

DECREE AFFIRMED.

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815 *Horton & als. v. Bond.

July Term, 1877, Wytheville.

Absent, ANDERSON, J.

1. **Bill to Subject Lands—Enquiring into Rents and Profits.***—Upon a bill by a judgment creditor to subject the lands of the principal debtor and his sureties to satisfy the judgment, before there can be a decree for a sale of the lands, it must be made to appear to the court that the rents and profits of the lands in five years will not discharge the judgment. This may be shown by the pleadings, by the admissions of the parties, by evidence taken, or by the report of a commissioner on an enquiry ordered.

2. **Same—Ascertaining Liens and Incumbrances.**†—Upon such a bill it appearing that there are incumbrances under a will upon the land of one of the sureties, and liens by deeds of trust on the lands of others, though the amount of the several liens by deed might be ascertained by the court, yet as the incumbrances under the will are uncertain, it is error to decree a sale of the lands before the incumbrances and liens and their priorities are ascertained by the report of a commissioner.

3. **Same—Legal Title—Defendant.**‡—In such a case as to a part of the land claimed by one of the sureties, the legal title is in K, who is not a party to the suit, and as to the other part of the land it has been conveyed to the surety and his daughter. Before a decree for the sale of the land, K should be made a defendant, and the title to both parts of the land ascertained and settled.

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*__Bill to Subject Lands—Inquiring into Rents and Profits.__—The rule laid down in the first headnote in regard to making it appear to the court that the rents and profits in land sought to be subjected to satisfy a judgment will not discharge the judgment in five years is followed by subsequent decisions. In Muse v. Friedenwald, 77 Va. 57, it was held that when the insufficiency is alleged and not denied, there need be no inquiry; but where not alleged, or if alleged, the allegation is denied, there must be enquiry before a sale can be decreed, citing the principal case and Ewart v. Saunders, 25 Gratt. 203. See also, Dillard v. Krise, 86 Va. 414. In Price v. Thrash, 30 Gratt. 515, it was held that while the circumstances made it error to decree a sale of the land without an enquiry into the rents and profits, yet the decree appealed from being interlocutory, the court of appeals will amend the decree in this respect and as amended affirm it. See Barton's Ch. Pr. (2nd Ed.) 290, 859.

†__Same—Ascertaining Liens and Incumbrances.__—In Bristol Iron Co. v. Caldwell, 95 Va. 49, the court says: "This principle was established at an early day in the leading case of Cole v. McRae, 6 Rand. 644, where it was held that such a decree was premature and erroneous, because a sale without previously ascertaining and determining the liens and incumbrances, and the order in which they are chargeable, has a tendency to sacrifice the property sold, by discouraging the creditors from bidding, as they probably would if their right to the satisfaction of their debts, etc., had been previously ascertained," citing the principal case and Shultz v. Hansbrough, 33 Gratt. 567. See also, Effinger v. Kennedy, 79 Va. 551, where it is left an open question whether this rule applies where the object of the suit is to enforce a vendor's lien. Hoge v. Junkin, 79 Va. 220; Shultz v. Hansbrough, 33 Gratt. 567, and *note*; Alexander v. Howe, 85 Va. 198. The principal case is distinguished in Thomas v. National Bank, 86 Va. 292; Brown v. Lawson, 86 Va. 285. See Barton's Ch. Pr. (2nd Ed.) 195, 1155; Hartman v. Evans, 38 W. Va. 669; Newlon v. Wade, 43 W. Va. 287.

‡__Same—Legal Title—Parties.__—In Fisher v. Dickenson, 84 Va. 329, the principal case is cited for the proposition that a trustee holding the legal title, is always a necessary party to any suit wherein the trust subject is in litigation, and it is error to enter a decree disposing of the trust subject in his absence as a party, citing also, Clough v. Thompson, 7 Gratt. 26. See also, Barton's Ch. Pr. (2nd Ed.) 197; 4 Min. Inst. (2nd Ed.) 1244, 1245, and cases cited.

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4. Same—Apportionment among Sureties.* —Upon such a bill, after the lands of the principal debtor are sold and applied *pro tanto* to the satisfaction of the judgment, the portion of the judgment which each surety should pay should be ascertained, and a separate decree should be made against each surety for his said portion, and upon his failure to pay it for a sale of his land. And if either of the sureties should fail to pay the decree against him, and his land when sold does not satisfy the decree, the amount of the deficiency should be apportioned among the other sureties, and there should be a like decree against each of them, and his land for his *portion of such deficiency; and so on until the judgment is satisfied, or all the lands of all the sureties are sold.

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In May 1872, Stephen Bond filed his bill in equity in the county court of Carroll county, against William R. Horton and nine other persons, in which he alleged that he had been appointed sheriff of the county, and that William R. Horton was his deputy, and the other defendants were the sureties of said Horton. That Horton having failed to account for monies collected by him, plaintiff had sued him and his sureties, and at the November term 1871 had recovered a judgment against them for $944.72, with interest from 20th of February 1870 till paid, and $26.41 costs. That on this judgment execution was issued, on which only $17.34 was made. He charged that John P. Vinson, one of the sureties, was the owner of one hundred and eighty acres of land devised to him by D. A. Vinson. That Frederick Alderman, another of the sureties, was the owner of a tract of eighty acres of land; that William R. Horton, the principal debtor, was the owner of a tract of one hundred and twenty acres, which he purchased of John Jenkins. That the legal title was in Jenkins, and a balance of the purchase money, some $250, was still due to Jenkins, but Jenkins was willing to convey the land when the balance of the purchase money was paid. He sets out deeds made by other of the sureties conveying land, some absolutely and some in trust to secure debts, and charges that they were fraudulent, intended to hinder and delay him in the recovery of his debts, or that the lands conveyed in trust were worth more than the debts due. He charges that the rents of the land would not be sufficient to pay his debt in five years; and he prays that the lands of William R. Horton, *Vinson and Frederick Alderman may be sold; that the other deeds may be declared fraudulent, and the lands sold; and for general relief.

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Several of the parties whose deeds were charged to fraudulent answered, denying the fraud; and two of them insisted that the rents of the lands would pay the plaintiff's debt within five years. Some of them also stated that certain of the debts secured by the trust, which they named, had been paid.

The condition of the title of John P. Vinson to the land held by him under the will of his father, Daniel A. Vinson, with the incumbrances upon it, are stated by JUDGE BURKS in his opinion. Of the land claimed by Hartwell Alderman, one of the sureties, one hundred and three acres, it was conveyed by a party who held the legal title, to Henry M. Key; and he conveyed fifty acres of it to Hartwell Alderman and Thursa Alderman, his daughter. Hartwell Alderman says in his answer, that it was by a mistake that the whole was conveyed to Key instead of fifty acres; that Key had never complied with the terms of the sale to him, and said Hartwell always claimed the land as his, though he had not obtained the legal title.

The cause came on to be heard on the 12th of October 1872, when the court made a decree directing the land of the defendant, William R. Horton, to be sold, and appointing a commissioner to make the sale. The sale was made, and after paying to Jenkins his debt, and the costs, there remained $58.39 to be credited on the plaintiff's judgment.

The cause came on again to be heard on the 21st of January 1873, when the court holding that a deed from Frederick Alderman conveying his land was fraudulent; that as to other deeds, though not fraudulent, some of the debts secured thereby, naming them, *had been paid; and holding further, that the personal property conveyed by some of the deeds having been left in the possession of the grantor, if any loss had accrued on that account it should be borne by the beneficiaries in the deed, made a decree appointing a commissioner, with directions to sell all of the real and personal

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*Same—Apportionment among Sureties. —The rules laid down in the fourth headnote for the apportionment of the deficiency among the co-sureties after exhausting the principal debtor's assets, is followed in Redd v. Ramey, 31 Gratt. 268; Dobyns v. Rawley, 76 Va. 539; Robertson v. Trigg, 32 Gratt. 76, and *note*; Gentry v. Allen, 32 Gratt. 254. For the application of the rules to devisees where the personal representative has distributed the estate before paying all the debts of the decedent, see Lewis v. Overby, 31 Gratt. 601. See Barton's Ch. Pr. (2nd Ed.) 229, 864, 1202; National Bank v. Bates, 20 W. Va. 222; Mayo v. Tomkies, 6 Munf. 521; Armstrong v. Poole, 30 W. Va. 671.

Same—Principal and Surety—Order of Liability.—The rule laid down in the opinion of the principal case on page 825, that the principal debtor's lands should be first subjected to the exoneration of the lands of the sureties, is frequently cited and followed in subsequent decisions. Updike v. Lane, 78 Va. 137; Stovall v. Border Grange Bank, 78 Va. 195; Paxton v. Rich, 85 Va. 378; Womack v. Paxton, 84 Va. 24; Muse v. Friedenwald, 77 Va. 63; Bell v. McConkey, 82 Va. 176. But this principle will not be applied to the extent of delaying the creditors indefinitely in the collection of his debt. Bell v. McConkey, 82 Va. 176; Edmunds v. Scott, 78 Va. 730. Nor does this rule prevent the creditors from proceeding at *law* against the principal and the sureties in the first instance and obtaining a judgment against them jointly. Nor will a court of equity intervene except under peculiar circumstances. Penn v. Ingles, 82 Va. 68. Nor does the rule apply to winding up the affairs of an insolvent corporation where it is sought to enforce the personal liability of stockholders. Martin v. South Salem Land Co., 97 Va. 349.

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estate mentioned and described in the several deeds and other exhibits filed in the cause, on which sales the several parties secured by the deeds of trust should have preference over the complainant as to the respective deeds by which they were secured, provided that the property so secured had not been wasted; but when wasted the loss should fall on such creditors, for the value of the same as ascertained by the commissioner; which sale was to be made on a credit, &c., &c. "And the said commissioner may sell any of said property, real or personal, in his discretion first; but of course not to sell more than will pay the complainant; and will not sell until after the expiration of thirty days from the date of this decree; which time the parties shall be allowed to pay off complainant's claim. And the said commissioner is ordered to report, &c.

In April 1873 the cause was, by operation of law, transferred to the circuit court of Carroll county.

On the 23d of April 1875, Henry Horton, John P. Vinson, Frederick Alderman and Hartwell Alderman, and their assignee in bankruptcy, George D. Smith, filed their petition for a rehearing of the decree of the county court of January 21st, 1873, for errors apparent on its face; and set out the following errors in the decree. See the opinion of BURKS, J.

The cause came on to be heard on the 15th of October 1875, when the court rejected and dismissed the petition, and affirmed the
819 previous decree. And thereupon *the petitioners applied to a judge of this court for an appeal; which was allowed.

Shelton and *Tompkins*, for the appellants.

Tipton and *Brown*, for the appellee.

BURKS, J., delivered the opinion of the court.

The appellee, Stephen Bond, filed his bill in the county court of Carroll, against William R. Horton (principal debtor), and the appellants (except George D. Smith, assignee) and others, his sureties, and their alienees, and others interested in the subject matter of the suit, to enforce a *lien* of a judgment recovered by said Bond against said principal and his sureties, and to that end, amongst other things, to set aside, as fraudulent, certain deeds of trust and other conveyances made by some of the sureties. At the first hearing of the cause, the said county court, by its decree, ordered a sale of the lands of the principal debtor, which sale was reported and confirmed; and on a further hearing, the court made another decree setting aside as fraudulent several of the deeds of the sureties assailed in the bill; and recognizing others as valid, held the equity of redemption thereof liable to the *lien* of said judgment and ordered a sale, out and out, of the lands of the sureties to satisfy the judgment and other *liens* of prior date deemed valid. Before the decree for sale was executed, the cause was removed, by operation of law, into the circuit court of Carroll, in which court the appellants filed their petition, praying a rehearing and a reversal of the last mentioned decree, assigning as errors apparent on the record the following:

820 *"The court should not have decreed sale when it appeared affirmatively in the cause that rents and profits would in five years discharge the judgment.

"It was error to decree sale until amounts and priorities of all *liens* on said real estate had been ascertained and reported.

"It was error to let the commissioner determine whose lands should be first sold and the amount to be made out of each of the defendants. Courts of chancery always decree against the party primarily liable, and the decree should have fixed the amount to be paid by each one of the defendants whose lands were liable, and permitted each one of said parties to protect his land from sale by paying the amount for which he was liable."

Upon a rehearing had on this petition, the circuit court by its decree held that there was no error in the decree of the county court complained of, and dismissed the petition. The appellants were allowed an appeal from this decree of the circuit court by one of the judges of this court.

The court is of opinion, that the said decree of the county court was premature and erroneous, in ordering a sale of the lands therein mentioned, when it had not been made to appear to said court that the rents and profits of said lands would not discharge the complainant's judgment in five years.

Before a court of equity can properly order a sale of the debtor's land to satisfy a judgment *lien*, it must be made to appear to the court that the rents and profits of the land in five years will not discharge said judgment.—Code of 1873, ch. 182, § 9. And this must be made to appear even against fraudulent alienees.—*Cronie* v. *Hart and others*, 18 Gratt. 739.

821 *The insufficiency of the rents and profits to satisfy the judgment within the statutory period may be shown by the pleadings, by the admissions of the parties, by evidence taken, or by the report of a commissioner on inquiry ordered. This fact preliminary to the exercise by the court of its jurisdiction to order a sale was in no way made to appear to the court in this case. On the contrary, while the bill alleges that the rents and profits in five years would not discharge the judgment, this allegation is expressly denied by the separate answers of two of the defendants, and was not admitted in the answers of any. No evidence was taken to show it, and no inquiry ordered.

In the case of *Ewart* v. *Saunders*, 25 Gratt. 203, in the opinion of the court delivered by JUDGE BOULDIN, it is said that the "statute prescribes no particular mode by which it shall be made to appear that the rents and profits will not pay the judgment in five years. When there is doubt about the fact, or an inquiry is demanded by either of the parties, the court will generally direct one of its commissioners to ascertain and report the annual rents and profits of the land. But

this is not a necessity in every case. If none of the parties ask such an inquiry, there may, in a proper case, be a decree for the sale of the property without it. Citing *McClung* v. *Beirne*, 10 Leigh 394; *Manns* v. *Flinn's adm'r*, Id. 93.

In that case, while the bill alleged that the rents and profits of the land would not pay the judgment in five years, this allegation was not responded to in the defendant's answer. The only defense set up in the answer was, that the debt was paid; and whether it was paid or not was the whole controversy in the court below. In this case the fact was put directly in issue by the bill and the answers of two of the defend-
822 ants, *and it was essential that it should be established in some way before a sale could properly be ordered. Moreover, if it was necessary that an inquiry should have been asked for in the court below, the appellants did ask for it in their petition for a rehearing. If this was the only error in this cause, the decree being interlocutory might, as held in *Ewart* v. *Saunders, supra*, be amended so as to secure an inquiry before sale, and as amended be affirmed. But this cannot be done, because the decree must be reversed for other errors hereinafter specified.

The court is further of opinion, that if it had been ascertained that a sale was necessary, the said decree of the county court was still premature and erroneous in ordering said sale before ascertaining, settling and determining what debts were chargeable on the lands, the amounts thereof, to whom payable, and the order in which they were so payable.

This principle was established at an early day in the leading case of *Cole's adm'r* v. *McRea*, 6 Rand. 644, where it was held that such a decree as that rendered by the said county court was premature and erroneous, because a sale, without previously ascertaining and determining the *liens* and incumbrances and the order in which they are chargeable, has a tendency to sacrifice the property sold by discouraging the creditors from bidding, as they probably would, if their right to satisfaction of their debts, &c., had been previously ascertained. This case has been followed by numerous decisions of this court to the same effect. *Smith & als.* v. *Flint & als.*, 6 Gratt. 40; *Buchanan* v. *Clark & als.*, 10 Gratt. 164; *Iaege* v. *Boisseaux*, 15 Gratt. 83; *Lipscombe* v. *Rogers & als.*, 20 Gratt. 658; *White* v. *Mech. Building Fund Association*, 22 Gratt. 233; *Moran* v. *Brent & als.*, 25 Gratt. 104.

823 *The county court by its decree did, perhaps, sufficiently ascertain the debts chargeable on the lands ordered to be sold, except the lands of the appellants, John P. Vinson. He derived his lands by devise from his father, Daniel A. Vinson. The lands so devised consisted of two parcels, the one containing one hundred acres, and the other eighty acres. These lands were devised to the said John P. Vinson, upon the express condition that he should support and take care of his mother during her natural life, and provide for her, at his own expense, all necessary food, clothing and medical attendance; and upon the further condition that he should pay to eight grandchildren, of the testator named, twenty dollars each as soon as they should attain the age of twenty-one years respectively; and it was further provided by the will, that if the said John P. Vinson should wholly fail to make payment of the sums aforesaid, the said grandchildren should have a certain portion, described by metes and bounds, of the lands so devised to the said John P. Vinson; and if the said John P. Vinson should pay to a part only of the said grandchildren the amounts bequeathed them, and should fail to pay to the others the sums bequeathed to them respectively, such others only were to have a proportionate share of the lands so conditionally devised to them, to wit: each one-eighth part.

Before sale of these lands, thus devised to the said John P. Vinson, it is obvious an inquiry should have been ordered and made to ascertain the ages of the widow of Daniel A. Vinson, and of the eight grandchildren, whether the charges on said land, under the will of Daniel A. Vinson, had been fully satisfied, and if not, to what extent, if at all. they had been so satisfied, so that it might be made to appear whether the
824 *said John P. Vinson had complied with the conditions, in whole or in part, under which the said lands were devised to him, and so whether he had a good title to said lands or not, and to what extent, if at all, the said lands were now encumbered by the charges under the will aforesaid.

Without ascertaining these facts, it is hardly possible that the lands of the said John P. Vinson could be sold except at a great sacrifice, if, indeed, they could be sold at any price.

It moreover appears by the answer of the appellant, Hartwell Alderman, to the complainant's bill, that while he claims to be the owner of the whole one hundred and three acres of land which he had conveyed in the trust deed to Wm. H. Sutherland, trustee, to secure the payment of the debts therein described, the legal title to at least one half of said land is outstanding in one Henry M. Key, who is not a party to the suit; and as to the other half, while he holds the legal title thereto jointly with himself and his daughter, Thurza Alderman, it is rather intimated than positively asserted in his answer that he is the sole beneficial owner thereof. A sale of this land, under this condition of the title, could not reasonably be expected to be made without sacrifice; and before it is sold by decree, the complainant should be required to amend his bill and make said Key a party defendant, with such statements in the bill and references to the title disclosed in the answer aforesaid of the said Hartwell Alderman as will enable the court on further hearing to remove any impediment to a fair sale of the land on account of the doubt and uncertainty as to the title. It would be improper and illegal for a trustee *in pais* to make sale of lands with clouds resting on the

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title; and if he attempted it, a court of
825 equity, on *a bill filed by the debtor or any other party having an interest, would restrain him. *A fortiori*, a court, having full possession of the subject in a pending suit, should not decree sale until every impediment to a fair sale is by its aid removed as far as practicable. *Rossett* v. *Fisher*, 11 Gratt. 492, 499, and cases there cited; to which may be added *Lane* v. *Tidball*, Va. Rep. (Gilmer) 130.

The court is further of opinion that if a sale was proper at all, the said decree of the county court is also erroneous in ordering a sale of all the lands of the sureties *uno flatu*, and in vesting the commissioner with discretionary power as to the order in which said lands should be sold. While it is true that the sureties as well as their principal are all bound by the complainant's judgment, and he has the undoubted right to resort for satisfaction to the property of each and all of them, yet, in equity, in a suit in which all the parties are alive and before the court, the court will respect the equities of the parties *inter sese*, and administer them upon the principles peculiar to the forum, as far as that can be done without too great delay and without prejudice to the rights of the creditor. The principal debtor's lands should be first subjected to the exoneration of the lands of the sureties. That has been done in this case by prior decree. The sureties, however, are not only sureties of the principal debtor for the whole debt; but, as amongst themselves, they are each surety for the other to the extent of the excess of the whole debt beyond his proportionate part thereof; and each, therefore, has an equity to have the lands of the other subjected, to the exoneration of his own, for such other's share of the debt. The court, therefore, in directing a sale, when ascertained to be proper, should have ap-
826 portioned the balance *of the complainant's judgment, after crediting the net amount of the sales of the principal's land, equally amongst the sureties, and have ordered a sale of the lands of each, or so much thereof as might be necessary to pay his proportionate part of the judgment; and if either should make default in the payment of his part, and his lands when sold should prove insufficient to pay such part, the lands of the others should be subjected proportionately for such part unpaid; and so on proportionately, upon further default of any party, until the lands of all have been sold, if the sale of all be necessary for the complete satisfaction of said judgment. See *Mayo* v. *Tomkies*, 6 Munf. 520; *Dickey* v. *Gentry's ex'or & als.*, not reported.

Upon examination it will be found that the decision in *Lacy* v. *Stamper & als.*, 27 Gratt. 42, cited by appellee's counsel, is not at all in conflict with what has been hereinbefore stated. In that case the bill was filed by a legatee against the personal representative of the executor of a decedent and the sureties of said executor, and against succeeding administrators *de bonis non* of said decedent and their sureties, for accounts and settlement of their several administrations; and the court held, *under the circumstances of the case*, that the legatee should not be required to proceed further than she had gone before resorting personally to the sureties. The president, in delivering the opinion of the court in that case, said, "We do not mean to decide that in no case will a creditor or legatee be compelled to exhaust his remedy against the personal representative and heirs of the executor before resorting to the sureties, *or to lay down any general rule on the subject;* but merely to say that there are cases in which he will not be so required (as authorites before cited plainly show),
827 *and this is one of them." The object of the bill in the present case is to enforce the *lien* of a judgment against the lands of *all* the parties, and *all* the parties being convened for that purpose by the bill, it is but equitable that each party should be required to bear his part of the common burden. The creditor has been already and may be further subjected to some delay in the pursuit of his remedy; but this delay is incident to his remedy, and cannot be avoided.

The court is further of opinion, for the reasons stated, that the said decree of the circuit court of Carroll county dismissing the petition of the appellants for rehearing of the decree aforesaid of the county court of Carroll, is erroneous and should be reversed and annulled; and that the said decree of the said county court, in so far as the same is hereinbefore declared to be erroneous, should also be reversed and annulled, and the residue thereof be affirmed; and that this cause be remanded to the said circuit court to be further proceeded in to final decree in conformity with this opinion and the principles herein declared.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said circuit court of Carrol county erred in its said decree in dismissing the petition of the appellants filed for a rehearing and reversal of the decree of the county court of said county, rendered in this cause on the 21st day of January 1873, and in not reversing said
828 decree of *the said county court for the following errors apparent on the record:

1. The said decree of the county court was premature, and is erroneous in ordering a sale of the lands of the defendants therein mentioned, without the fact being made to appear to the said court that the rents and profits of said lands would not discharge the complainant's judgment in five years. Before any sale could have been properly ordered, that fact should have been made to appear in some way, and as it did not in any way appear, an inquiry should have been ordered and made to ascertain the annual rental value of said lands.

2. The said decree of the county court

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was also premature, and is therefore further erroneous in ordering a sale of said lands, if a sale had been shown to be proper, before it had been ascertained and determined by the decree of the court, on account ordered and taken, what were the unsatisfied *liens* and incumbrances on said lands respectively, the several amounts thereof, by whom held, and the order in which they are chargeable on said lands. The *liens* and incumbrances on the lands of the several defendants, except John P. Vinson (one of the appellants here), seem to be sufficiently, although not very accurately, ascertained by the said decree of the county court. As to the lands of the said John P. Vinson, an enquiry should have been ordered to ascertain the respective ages of the widow of Daniel A. Vinson, deceased, and the eight grandchildren named in his will; a copy of which is filed as an exhibit in the cause, and further to ascertain the amounts charged upon said lands of said John P. Vinson by the will of said decedent in favor of the said grandchildren, whether said amounts have all, or any of them, 829 become payable, *and if any of them remain unpaid, which and to whom payable; and as this inquiry as to the lands of said John P. Vinson, and the charges thereon was necessary before sale in ordering it, the court, for greater certainty, should have also ordered at the same time an account of all the *liens* and incumbrances on the lands of the other defendants, and the priorities, if any, amongst them.

3. It appears by the answer of the appellant, Hartwell Alderman, to the complainant's bill, that while he claims to be the owner of the whole one hundred and three acres of land mentioned in his said answer, and which were ordered by the said decree of the county court to be sold, yet that the legal title to a portion of said land is outstanding in one Henry M. Key, who is not a party to this cause, and as to the other portion the legal title is in said Alderman and his daughter, Thurza Alderman. With this doubt and uncertainty resting upon the title to said land, it was error in the said county court by its said decree to order a sale of the land until the cloud resting on the title had been removed. Before any sale should have been ordered, the complainant should have been required to amend his bill and make the said Henry M. Key a party in the cause, the bill as amended to contain such allegations and statements and references to the title of said Hartwell Alderman disclosed by his answer aforesaid as would enable the court, on further hearing, to remove any impediment to a fair sale of said land arising out of the doubt and uncertainty resting on the title.

4. The said decree of the county court was further erroneous, even if it had been shown that a sale was proper, in ordering a sale of all the lands of the defendants without regard to the relative liabilities 830 of *the parties, and in investing the commissioner appointed to make the sale with discretionary power as to the order in which he should sell said lands. The parties being sureties, the court by its decree should have apportioned the complainant's judgment, after crediting thereon the net amount of the sale of the lands of the principal (William R. Horton) equally amongst the sureties, and have ordered a sale of the lands of each, or so much thereof as may be necessary to pay his proportionate part of the judgment; and if either should make default in the payment of his part, and his lands when sold should prove insufficient to pay such part, the lands of the others should be subjected proportionately for such part unpaid, and so on proportionately upon further default of any party occurring, until the lands of all be sold, if the sale of all be necessary to the complete satisfaction of the judgment.

The court is of opinion, for the reasons stated in writing and filed with the record, that the said decree of the circuit court of Carrol county is wholly erroneous. It is therefore decreed and orderd that said decree of said circuit court be reversed and annulled, and that the appellants recover against the appellee their costs by them expended in the prosecution of their appeal aforesaid here. And this court now proceeding to render such decree as the said circuit court ought to have rendered, it is further decreed and ordered that the decree aforesaid of the said county court of Carroll, rendered on the 21st day of January 1873, in so far as the same is hereinbefore declared to be erroneous, be reversed and annulled, and the residue thereof be affirmed. And this cause is remanded to the said circuit court, with directions to cause the inquiries and accounts hereinbefore 831 indicated as proper *to be made and taken, to require the complainant to amend his bill and make Henry W. Key a party defendant in the cause, such allegations, statements and references to be set forth in the amended bill as hereinbefore indicated as proper, and that the cause be otherwise proceeded in to a final decree in conformity with the opinion and principles herein declared.

DECREE REVERSED.

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832 *Small's Adm'r v. Lumpkin's Ex'x & als.

July Term, 1877, Wytheville.

Absent, MONCURE, P., and ANDERSON, J.

1. International Law—Status of Belligerents.—In a foreign or international war, from the time it is declared or recognized, all the people in the territory and subject to the dominion of each belligerent, without regard to their feelings, dispositions, or natural relations, become, in legal contemplation, and so continue until the close of hostilities, the enemies of all the people resident in the territory of the other belligerent; and all negotiation, trading, intercourse or communication between them, unless licensed by the government, is unlawful.

Cited and approved in Davidson v. Pope, 82 Va. 749; Boyd v. Townes, 79 Va. 121 and Brewis v. Lawson, 76 Va. 46.

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2. **Same—War—Effect on Contracts.**—Such a war, as between the citizens and subjects of the respective belligerents, *ipso facto* dissolves all commercial partnerships, and all contracts wholly executory and requiring for their continued existence, commercial intercourse or communication; and while it does not abrogate, yet it suspends all other existing contracts and obligations, and the remedies thereon, and renders all contracts, with rare exceptions, entered into pending hostilities, illegal and void.

3. **Same—Same—Same—Civil War.**—These principles of public law regulating conduct in foreign wars, are applicable to the late civil war between the United States and the Confederate States.

4. **Same—Same—Limited Agencies.**—Limited agencies in the enemy country may lawfully continue, provided they can be and are exercised without intercourse or communication between the citizens or subjects of the contending powers: such as agencies to collect and preserve, but not to transmit money or property.

5. **Same—Same—Same.**—Such agencies, however, to be lawful, must, it seems, be created before the war begins; for there is no power, it is said, to appoint any agent for any purpose, after hostilities have actually commenced.

6. **Bonds—Payment.**—L, who lived in Richmond, Va., in September, 1858, executed to S, who lived in Baltimore, his bond for $4,500. S died in March, 1861, leaving an estate of $60,000, and a wife 833 and two children, minors. *There were three representatives on his estate of whom his widow was one, and she also qualified as guardian of her children. S's estate was fully administered except the bond of L which was left with the widow, and all his debts were paid. In 1861, C, the oldest son of S, came to Virginia and joined the Confederate army. Whilst still a minor he, with the concurrence of his mother, collected from L money on his bond, which was paid in Confederate money at par, and after C came of age he collected of L the balance due upon the bond, and executed a paper by which, setting out all the moneys he had received, he recognized them all as valid payments, and undertook that the bond should be charged to him as part of his interest in his father's estate; and after his return to Baltimore in 1865, the widow's accounts as guardian of her children were settled by the commissioner, this bond brought into them, and full acquittances given her. In 1870 the estate of S was committed in Virginia, and the administrator filed a bill to recover the amount of the bond from the executrix and devisees of L, who had died in 1866—HELD: There being no debts of S to be paid, the bond must be considered as satisfied.

This case was argued in Richmond, at the March term of the court, and decided at Wytheville. It was a suit in equity in the nature of a creditor's bill, in the chancery court of Richmond, brought in November 1870, by the administrator *de bonis non* of Thomas B. Small, against the executrix and devisees of Robert F. Lumpkin, deceased, to subject the real estate of said Lumpkin to satisfy a debt of $4,500, with interest from the 1st day of June 1858.

Thomas B. Small was a resident of Baltimore, and died there in March 1861. Lumpkin lived in Richmond, and died there in 1866. By bond bearing date the 7th of September 1858, Lumpkin bound himself, &c., twelve months after date, to pay to Thomas B. Small $4,500, with interest from the 1st of June 1858. And the only question in the case was, whether Lumpkin had made a valid payment of this debt to Charles W. Small, a son of Thomas B. Small, who 834 *came to Virginia in 1861, and remained in the South during the late civil war. The facts on that question are sufficiently stated by JUDGE BURKS in his opinion.

A commissioner was directed to take, among others, an account of the debts due from the estate of Lumpkin. And he made a report disallowing the debts claimed by the plaintiff, and reporting very few debts, and for small amounts, due from the estate. To this report the plaintiff excepted.

The cause came on to be heard on the 22d of February 1872; when the court overruled the exception and confirmed the report. And the plaintiff obtained an appeal to this court.

Johnson & Royall, for the appellant.

J. A. Meredith and *E. Y. Cannon*, for the appellees.

BURKS, J. In a foreign or international war, from the time it is declared or recognized, all the people in the territory and subject to the dominion of each belligerent, without regard to their feelings, dispositions or natural relations, become, in legal contemplation, and so continue to the close of hostilities, the enemies of all the people resident in the territory of the other belligerent; and all negotiation, trading, intercourse or communication between them, unless licensed by the government, is unlawful. Such a war, as between the citizens or subjects of the respective belligerents, ipso facto dissolves all commercial partnerships and all contracts wholly executory and requiring for their continued existence commercial intercourse or communication; and while it does not abrogate, yet it suspends all other existing contracts and obligations and the remedies theron, and renders all 835 contracts, with rare *exceptions, entered into pending hostilities, illegal and void.

These familiar principles of public law, regulating conduct in foreign wars, have been applied by the courts of this country, state and federal, to the late war between the United States and the Confederate States. *Griswold* v. *Waddington*, 16 John R. 438; *Prize Cases*, 2 Black's U. S. R. 635; *Mrs. Alexander's Cotton*, 2 Wall. U. S. R. 404; The *William Bagaley*, 5 Wall U. S. R. 377; *Hanger* v. *Abbott*, 6 Wall. U. S. R. 532; *Matthews* v. *McStea*, 91 U. S. Rep. (1 Otto) 7; *Billgerry* v. *Branch & Sons*, 19 Gratt. 393; *Walker* v. *Beauchler*, 27 Gratt. 511.

Limited agencies in the enemy's country may lawfully continue, provided they can be and are exercised without intercourse or communication between the citizens or subjects

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of the contending powers—such as agencies to collect and preserve, but not to transmit money or property. *Buchanan* v. *Curry*, 19 John. R. 136; *Ward* v. *Smith*, 7 Wall. U. S. R. 447; *Manhattan Life Ins. Co.* v. *Warwick*, 20 Gratt. 614; *Hale* v. *Wall*, 22 Gratt. 424; *Mutual Benefit Life Ins. Co.* v. *Atwood's adm'x*, 24 Gratt. 497; *The N. York Life Ins. Co.* v. *Hendren*, Id. 536.

Such agencies, however, to be lawful, must, it seems, be created before the war begins, for there is no power it is said to appoint any agent for any purpose after hostilities have actually commenced, and that to this effect are all the authorities. United *States* v. *Grossmayer*, 9 Wall. U. S. R. 72; *United States* v. *Lapine*, 17 Wall. U. S. R. 602.

Relying upon the principles recognized by these authorities, the counsel for the appellant contends that the decree complained of in this case is erroneous and should be reversed.

836 *The bill of the appellant was filed against the personal representative and heirs at law of Robert Lumpkin, to recover the amount of a bond alleged to have been given by Lumpkin in his lifetime to the appellant's testator, Thomas B. Small. The defendants answered that the debt was paid. The chancellor was satisfied that the defense was made good by the proofs, and decreed accordingly; and in this, I think, he committed no error. Lumpkin was a citizen of Virginia, and died in 1866. Small, a citizen of Virginia, and died in 1866. Small, a citizen left a wife and two sons (minors), entitled under the laws of Maryland to his estate. After the payment of his debts, which were inconsiderable, and two pecuniary legacies given by his will, the estate was worth upwards of sixty thousand dollars. The widow and two other persons qualified in Baltimore as representatives of the estate with the will of the testator annexed. She also, qualified there as guardian of the children. The administration of the estate, except the Lumpkin debt, seems to have been conducted exclusively by her co-administrators. The Lumpkin bond was left with her and committed to her sole management.

Some time during the year 1861, the exact date not distinctly appearing, C. W. Small (the elder of the two sons) came to Virginia and enlisted as a soldier in the Confederate army, and continued in that service until the end of the war. While in Virginia, and during the war, he undertook to collect, and did collect, of Lumpkin the amount of his bond. The greater part was collected while he was under age. He became of age on the 30th day of December 1863; and on the 6th day of January 1864 he collected the remnant of the debt, amounting to $1,875.26.

837 The collections were all made in Confederate currency, taken at its *par value. When he made the last collection he executed his covenant to Lumpkin, reciting all the payments made to him, ratifying the collections made while he was a minor, and directing his guardian to charge him with what he had collected as a part of his distributive share of his father's estate, acknowledging the receipt thereof as if the same had been paid to him by the representatives of the estate on account of his interest therein.

When these payments were made, Lumpkin (the debtor) was residing in Virginia, and Mrs. Small, the guardian of her son and representative of her husband's estate, was a resident of Maryland.

In the light of the authorities before cited, it may be conceded, for the purposes of this case, that under the harsh rules of war, the mother and son are to be considered as bearing to each other the unnatural relation of alien enemies; that the occasional correspondence beween them, which is proved to have taken place during the conflict of arms then raging, was forbidden and unlawful; and that, pending hostilities, she could confer no valid power upon him, as her agent, to make the collections which he did make. With this concession, however, if by no means follows that the payments made by Lumpkin to C. W. Small were unlawful, and that the obligation of Lumpkin to Small's estate was not discharged.

Lumpkin and C. W. Small were both Confederates, both within the territory and under the domain of the same belligerent power. They, at least, were not alien enemies to each other, and it was therefore perfectly competent for them to deal and contract as between themselves. They did so deal and contract. Let it be, that the communication addressed by Mrs. Small to Lumpkin was no valid authority for

838 him to *make payment to her son as her agent. At time this letter was addressed by Mrs. Small to Lumpkin, another was written to C. W. Small by John R. Larus, his half-brother, and *the agent of Mrs. Small*, advising C. W. Small to make collection of Lumpkin, if possible, in something else than depreciated currency, and warning him over and over again, that if he collected in such currency, it was his "*own* lookout," it must be on "*his own* account." After these cautions, repeated in varied language, he concludes that part of his letter which relates to this subject, in these emphatic words: "I think I have written plain enough, and *the whole matter* is thus *left entirely to yourself*, to take just as much as you choose, even if it is the *whole amount, remembering*, of course, that it is *on your own account, at its par or nominal value.*"

"The *whole matter* being thus left *entirely* to himself," C. W. Small undertook to act *for himself* and to deal "on *his own* account." He did so act and so deal. After attaining full age, he had the right so to act and so to deal, independently of any authority from his mother or her agent; and accordingly when he received the last payment from Lumpkin, in his own name and on his own behalf he ratified all previous payments, dealings and transactions, and *personally* undertook that what he had received should stand as a *payment* to him of so much on account of his *distributive share* of his father's estate, in like manner as if it had been

paid to him by his father's personal representative.

The war being over he returned to Maryland, and there with his mother and brother, the only parties interested in the estate in the absence of Lumpkin, and without his agency or influence, the whole matter of the Lumpkin debt was satisfactorily arranged
839 and *adjusted amongst them. Mrs. Small caused her accounts, as guardian of her two children, to be regularly and formally stated, settled and recorded. The Lumpkin debt was embraced in the settlement, and each of the wards gave her a full acquittance under seal, which was also duly recorded. This settlement appears to have been completed and final. The parties were all severally *sui juris*, acted with their eyes open, the facts fresh in their recollection, and with a full knowledge of their rights.

This settlement is conclusive against the parties to it, and binding upon the appellant. His administration here is but ancillary to the principal administration in Maryland. There the whole estate has been long since fully administered. The legacies under the will, and the debts against the estate, have all been fully paid, and the residue of the estate turned over to Mrs. Small and her children, who alone were entitled to it. It is not pretended that there are any creditors or other domestic claimants against the estate here. If therefore the appellant were permitted to recover the amount of the debt claimed of Lumpkin's estate, it would be for distribution to Mrs. Small and her two sons. It has already been distributed amongst them, as shown by their own recorded admissions. It ought not to be collected and distributed a second time.

It is worthy of notice, that the Smalls had their final settlement amongst themselves as long ago as July 1865. The bill in this case was not filed until more than five years afterwards, and four years after Lumpkin's death.

I am for aimrming the decree of the Chancellor.

DECREE AFFIRMED.

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840 *Kent's Adm'r v. Kent's Adm'r.

July Term, 1877, Wytheville.

Absent, ANDERSON, J.

1. **Statute—Unconstitutionality.**—The act of assembly, approved April 2d, 1873, entitled "an act to amend and re-enact section 14, of chapter 187, of the Code of 1860, (section 14, ch. 173, Code of 1873) in relation to interest; so far as said act confers upon courts and jurors, in the cases therein mentioned, power to remit interest as therein provided, on contracts made prior to April 10th, 1865; which said courts and juries did not have under the laws in force, at the time such contracts were made; is repugnant to the constitution of the state and the United States, and is, therefore, null and void.
2. On a bond dated June 6th, 1845, payable *on demand*, in which there is nothing said about interest; on which judgment was rendered March 12th, 1874, and in which judgment the circuit court simply by virtue of the act of April 2nd, 1873, above recited, there being no evidence on the question of interest before it, abated the interest from April 17th, 1861, to April 10th, 1865—HELD:

Bonds—Interest.—The bond is payable *presently*, and bears interest from its *date till paid;* that there is an *implied* contract to pay said interest; and that said act allowing the abatement within the periods mentioned, impairs that contract, and is therefore null and void.

See also *Roberts' adm'r* v. *Cocke*, and *Murphy* v. *Gaskin's adm'r, &c., supra*, 207, and *Cecil* v. *Deyerle, Linkous* v. *Shafer* and *Garnand* v. *Childress, &c.*

See Roberts v. Cocke, 28 Gratt. 840, and *note*.

The case is stated by JUDGE MONCURE in his opinion.

J. H. Gilmore and *Isaac Hudson*, for the appellant.

Walker & Baskerville and *R. C. Kent*, for the appellee.

841 *MONCURE, J., delivered the opinion of the court.

This is a writ of error to a judgment of the circuit court of Wythe county, rendered on the 12th day of March 1874, in an action of debt in said county, in which J. A. Welsh, administrator *de bonis non* of James R. Kent, was plaintiff, and D. C. Kent, administrator of Gordon C. Kent, was defendant. The action was brought on the 9th of March 1869, on a writing obligatory in these words:

"$5,600. I, Gordon C. Kent, do for value received, promise for myself, my heirs, &c., to pay to James R. Kent, his heirs or assigns, five thousand six hundred dollars on demand. Given under my hand and seal this 6th day of June 1845.

GORDON C. KENT, [Seal.]"

After the case had been several times continued, and the deaths of several of the parties suggested, and the case revived in the names of other persons, the defendant, on the 18th day of October 1871, pleaded payment and filed an account of set-offs, to which account the plaintiff by his attorney pleaded the act of limitations, and thereupon the cause was again continued. On the 21st of May 1872 it was again continued. On the 10th of March 1874, issue being joined on the pleas theretofore entered, by consent of the parties by their attorneys, the cause was submitted to the court without a jury, and the court having heard the evidence, and not being as yet advised of its judgment, took time to consider thereof. On the 12th of March 1874, the court having considered the question of law and fact arising in the cause, was of opinion that the plaintiff was entitled to a judgment for $5,600, with
842 *legal interest thereon (except from the 17th day of April 1861, to the 10th day of April 1865), from the 6th day of June 1845 till paid, subject to the following credits: $328 paid 9th August 1848; $120 paid 9th August 1848; $650 paid August 1858; $250 paid August 1858; $51.25 paid March 1864; and $6.11 paid 1859; and accordingly ren-

dered judgment that the plaintiff recover against the defendant the said sum of $5,600, with interest thereon as aforesaid, deducting the abatement from 17th April 1861 to 10th April 1865 as aforesaid, and the costs by the plaintiff about his suit in that behalf expended, execution to be levied, &c., and subject to the credits as aforesaid. There is annexed to the judgment, and no doubt as part thereof, the following—

"MEMORANDUM.—On the motion of the plaintiff by counsel, the court certifies that the interest in this case is remitted for the period, commencing on the 17th day of April 1861, and ending on the 10th day of April 1865, by virtue of the authority vested in the court by the fourteenth section of chapter 173 of the Code of Virginia for 1873, and by virtue of that authority alone, there being no evidence upon the question of interest before the court, and the court acting alone, as above stated, under the section of the chapter of the Code aforesaid, being furnished with the date of the contract from the bond issued in the case."

To the said judgment the plaintiff applied for a writ of error to a judge of this court, which was accordingly awarded. The only assignment of error in the judgment is, that the obligor was bound by his contract to pay interest from the date of the obligation until payment; and that the act of the 843 legislature, *under which there was in this case an abatement of interest, is, so far as this obligation is concerned, a law impairing the obligation of a contract, and therefore void.

The only question involved in this case is, whether the provision in section 14, chapter 173, of the Code, page 1120, which declares, "that in all suits for the recovery of money, founded on contracts express or implied, or on causes of action, or on liabilities which were entered into or existed, or where the original consideration accrued prior to the 10th day of April 1865, it shall be lawful for the court or jury before whom the suit may be tried, to remit the interest upon the original debt found to be due, or any part thereof, for the period commencing on the 17th day of April 1861, and ending on the 10th day of April 1865, or for any portion of said period," &c., in its application to such a case as this, is unconstitutional and void?

A similar question came under the consideration of, and was decided by, this court in the cases of *Roberts' adm'or* v. *Cocke &c.*, and *Murphy* v. *Gaskins' adm'or*, reported in the last March number of the *Virginia Law Journal*, page 168, *supra* 207; and in the three cases decided a few days ago, and of course not yet reported anywhere, of *Cecil* v. *Deyerle &c., Linkous &c.* v. *Shafer &c., and Garnand &c.* v. *Childress &c.* In the opinion of the court delivered by JUDGE BURKS in the first two of the above named cases, all the important principles and all the material authorities on the subject of interest on contracts, and on the constitutionality of retrospective laws affecting that subject, are stated and referred to. And it will therefore be necessary to do little if any thing more in this case than to refer to the cases, and especially the opinion aforesaid.

But while what is said in that opin- 844 ion completely *covers this case, there is yet some difference between those cases and this, which is necessary to be stated, and which makes it proper to say something more in this case than merely to refer to them.

In all of those cases there was, either an express promise to pay running interest on the face of the contract; or, where judgment has been obtained on the contract, which was generally and almost altogether the case, the judgment was expressly for running interest. So that the express promise to pay the interest may be as much said to be a part of the contract as the express promise to pay the principal; and a law remitting the one as much a law impairing the obligation of a contract, and therefore as null and void, as a law remitting the other.

In this case there is no express contract to pay interest on the face of the contract; which is a bond dated the 6th of June 1845, for $5,600, payable on demand, on which credits are endorsed for payments made in 1848, 1858, 1859 and 1864. Nor was there any judgment recovered upon the bond until long after the passage of the act approved April 2, 1873, which is the same with the 14th section of chapter 173 of the Code aforesaid. Though an action of debt upon the said bond was at the time of the passage of that act, and had been a long time before, pending, in which action afterwards, to-wit: on the 12th of March 1874, judgment was rendered as aforesaid, for the said principal sum of $5,600, with legal interest thereon from the 6th day of June 1845, the date of the bond, till paid, subject to an abatement of said interest from the 17th of April 1861 to the 10th of April 1865, and subject to the credits aforesaid; the court certifying that the interest was remitted for the period afore- said, by virtue of the authority vested 845 in the court by *the 14th section of chapter 173 of the Code, and by virtue of that authority alone; there being no evidence on the question of interest before the court.

Now the question in this case, is, whether there was an implied contract to pay interest on the principal of the bond in question from its date; it being payable on demand, and being presently due and payable from its date, according to the general construction of such a bond; and there being not a particle of evidence in the case to repel such an implication?

The constitution both of the United States, and of this state, protects the obligation of a contract against being impaired; which means an implied as well as an express contract; each of which is alike binding.

There was no *express* contract to pay interest in this case, from the date of the bond. Was there an *implied* contract to do so? That is the question, and the only question, on which this case depends.

According to principles stated in the opinion of the court delivered by JUDGE BURKS

as aforesaid, there can be no doubt but that there was such an implied contract.

"It has always been lawful in Virginia," as stated in that opinion, "for parties to contract for the payment of interest for the use or forbearance of money within the limits prescribed by statute; and in the absence of any express agreement for the payment of interest, in obligations for the payment of a certain sum of money on demand, or on a given day; interest on the principal sum from the time it becomes payable is 'a legal incident of the debt, and the right to it is founded on the presumed intention of the parties.' *Chapman's adm'rs* v. *Shepherd's adm'r, &c.*, 24 Gratt. 377."

846 *"Wherever there is a contract express or implied," as further stated in the said opinion, "for the payment of legal interest, the obligation of the contract extends as well to the payment of the interest, as it does to the payment of the principal sum, and neither the courts nor the juries ever had the arbitrary power to dispense with the performance of such contracts, either in whole or in part."

"Such being the law binding upon parties to contracts, and upon the courts and juries, prior to the 10th day of April, 1865, was it competent for the legislature to change the law, and by giving it a retrospective action to deprive a party to contract of the benefit to which he is entitled under it? It will not be pretended that the legislature could, by a statute acting either directly upon the contract, or indirectly, through the remedy, release the principal sum or any part of it; and this because the law binds the debtor to the performance of his undertaking, which is the payment of such principal sum; and for the same reason it would seem equally clear, that the interest, when a part of the contract, and its payment as much a part of the undertaking of the debtor as the payment of the principal, cannot, by legislative action, direct or indirect, be remitted, released or discharged."

The foregoing are sound principles of law, and apply to this case, and are conclusive of it.

A bond payable on demand (as the one in this case is), or on a certain day, bears interest from the time it is payable, according to the well-settled law of this state, unless there be some contract, express or implied, between the parties, or some extraordinary or peculiar circumstances showing that
847 such interest was *not to be paid; and the burden of proving such contract or circumstances devolves on the party who seeks to avoid such payment. In the absence of such proof, the obligation for the payment of interest is as much a matter of contract in the case as the obligation for the payment of principal. If money be deposited by one person in the hands of another for a temporary purpose, as for safe-keeping, with the understanding that no interest is to be paid on it during the continuance of the deposit; the holder would, of course, not be bound for interest, at least until he is in default, and from the time of such default, even though the deposit be witnessed by a bond payable on demand in the common form, although, in such a case, it is usually expressed in the bond that it is not to bear interest. But if a bond payable on demand, or on a certain day be given for money loaned, or had and received, or paid, laid out and expended, or work and labor done, or goods sold and delivered, &c., there is an implied contract on the part of the obligor, to pay legal interest on the principal from the time it is payable until it is paid. To pass a law remitting the interest on any part of it in such a case, is to pass a law impairing the obligation of a contract, and to violate the constitution of the United States and of this state, and the law is therefore to that extent null and void.

A bond for a sum certain, payable on demand, is *prima facie* a bond of that description. A judgment by default upon it will be for interest as well as principal; and courts and juries having to render judgment on such a bond, are bound to give judgment for interest as well as principal, in the absence of evidence showing that such interest is not due; and if they do not their judgments will be set aside or reversed.

848 *The existence of war, in the country of the obligor, will not of itself destroy or impair his liability for interest to an obligee belonging to and living in the same country, and on the same side of the belligerent lines.

The court is therefore of opinion, that the said act passed April 2, 1873, and the fourteenth section of chapter 173 of the Code of 1873, p. 1120, so far as they are in conflict with the foregoing opinion are unconstitutional and void; that so much of the said judgment as remits, abates, or deducts interest on the said principal sum of $5,600, from 17th April 1861, to 10th April 1865 as aforesaid, is erroneous, and ought to be reversed and annulled with costs, and the residue thereof affirmed.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the circuit court erred in remitting and abating the interest on the principal of the debt in the proceedings mentioned, $5,600, from the 17th day of April 1861 to the 10th day of April 1865; the court being of opinion that the 14th section of chapter 173 of the Code of Virginia for 1873, by virtue alone of the authority vested in the said circuit court by which said section the said court acted in remitting and abating the said interest, conferred no authority to do so, and is unconstitutional, null and void for that purpose.

Therefore it is considered, that so much of the said judgment as remits and abates the said interest during the said period is erroneous, and be reversed and annulled, and the residue thereof be affirmed; and that the plaintiff in error recover against the
849 defendant in *error, his costs by him expended in the prosecution of his writ of error aforesaid here, to be levied of the goods and chattels of the said intestate. Gordon C. Kent, in the hands of the admin-

istrator, the said D. C. Kent, to be administered.

Which is ordered to be certified to the said circuit court of Wythe county.

JUDGMENT REVERSED.

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850 *Barger v. Buckland & als.

July Term, 1877, Wytheville.

Absent, ANDERSON and BURKS, Js.

I. **Appeal—Interest in Case.**—Pending a suit by judgment creditors against their debtor and others, to set aside a deed of trust or subject the surplus to payment of their debts, the debtor is declared a bankrupt on his own petitioner, and in the suit he claims his exemption and homestead out of the surplus of the purchase money of the land, after satisfying the debt secured by the deed of trust. The circuit court dismisses the debtor's application, and makes a decree distributing the fund. The bankrupt has such an interest in the case as entitles him to take an appeal.

II. **Trustee—Power of Court.**—In such a case the trustee in the deed did not sign it and it does not appear that he accepted or acted under it; and he lives out of the state, and is not a party to the suit. The court may decree a sale of the land and appoint a commissioner to make the sale.

III. **Conflict of Laws—Jurisdiction.***—A part of the tract of the land lies in Virgnia and a part in West Virginia. The court may decree a sale of the whole tract.

IV. **Statute—Effect—Lien.**—The bond executed under the act of May 28, 1870, entitled "an act to prevent the sacrifice of personal property at forced sales," Session Acts 1869-'70, ch. 120, p. 162, is a lien on the land of the obligors who are alive, from the return of the bond to the clerk's office; and the surety in the bond paying it off is entitled to be substituted to the lien of the bond upon the land of the principal obligor.

V. **Bill—Decree—Certainty.**—Where the bill and proceedings specifies the land, a decree for the sale of the land in the bill and proceedings mentioned, or so much as may satisfy the purposes of the decree, is sufficiently certain. That is certain which may be made certain, applied to the case.

VI. Judgment creditors seek to subject land of their debtor which has been conveyed in trust to secure a debt; and in their bill they charge that the deed was intended by the grantor to defraud his creditors, and the trustee and creditor in the deed were cognizant of the fraudulent *intent at the time. The creditor answers and denies the fraud and proves his debt.—HELD:

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1. **Creditors—Liens—Right to Surplus.**—It was proper to proceed in the cause and decree satisfaction of the plaintiff's debts out of the surplus of the purchase money of the land after the satisfaction of the debt secured by the deed.
2. **Decree between Defendants.**—It is a proper case for a decree between defendants, and, the debt of the trust creditor having been established, for a decree in his favor for the debt.
3. **Deed of Trust—Enquiry.**—Though the deed of trust conveys other land lying in West Virginia and personal property, it not being alleged that the creditor has received anything from that source, and no motion made by any of the parties for an enquiry on the subject, which, if made, would no doubt and should have been ordered, the decree will not be reversed for the failure to make the enquiry.
4. **Fraud—Proofs.**—As the proofs did not sustain the charge of fraud in the deed and the guilty knowledge of the trust creditor, he is entitled to a decree in the cause for his debt.

VII. **Equity Practice — Consolidation of Causes.***—There are three suits by judgment creditors to subject the land of their debtor which he had conveyed in trust to secure a debt, and the debtor, the trustee and trust creditor are made defendants in each of them. The process is properly served on all the parties in two of the cases, and on the trustee and creditor in the third. The court made an order that the causes shall be consolidated and heard together, and that is done; and the debtor appears and makes defense in all the causes without objecting that the process was not properly served in the third case. He thereby waived the objection on that ground, if he had any.

VIII. **Same—Same—Costs.**—Though the causes were heard together, each plaintiff is entitled to a decree for his separate costs.

IX. **Decree for Sale—Certainly.**—The decree directs the commissioner to sell the land in the bill and proceedings mentioned, or so much thereof as may be necessary to satisfy the purposes of the decree. The commissioners report that they sold the tract of land in the bill mentioned, known as the home tract. This tract is described in the bills as lying partly in Tazewell county and partly in Mercer county, West Virginia; but how much in each is differently stated in the different bills; and it is doubtful whether the commissioners sold the whole or only that in Tazewe.. *county.—HELD: The report leaving it in doubt how much or what they sold, the sale should be set aside.

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X. **Chancery Practice—Petition.**—A defendant gives a written notice to the plaintiffs that he will move the court to set aside a decree made in the cause as a decree by default; and he sets out in his notice, which is signed by his counsel, the grounds he relies on for setting the decree aside. If the decree was not a decree by default, it was

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***Conflict of Laws—Jurisdiction.**—In Wimer v. Wimer, 82 Va. 901, the court says: "It is undoubtedly well settled that in cases of fraud, trust or contract, courts of equity will, whenever jurisdiction over the parties has been acquired, administer full relief without regard to the nature or situation of the property in which tne controversy had its origin, and even where the relief sought consists in a decree for the conveyance of property which lies beyond the control of the court, provided it can be reached by the exercise of its powers over the person, and the relief asked is of such a nature as the court is capable of administering." Citing the principal case and Penn v. Lord Baltimore, and *notes*, 2 Lead. Cas. Eq. 1806 *et seq.*; Farley v. Shippen, Wythie's R. 254; 2 Story's Eq., sec. 1290 *et seq.*; Dickinson v. Hoomes, 8 Gratt. 353. See also, Poindexter v. Burwell, 82 Va. 513; Barton's Ch. Pr. (2nd Ed.) 548, 862, 863.

***Equity Practice — Consolidation of Causes.**—In Patterson v. Eakin, 87 Va. 49, the principal case is cited for the proposition that in its discretion a court of equity may order causes pending therein to be consolidated and heard together. See Barton's Ch. Pr. (2nd Ed.) 547.

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an interlocutory decree, and his notice may be treated as a petition for a rehearing of the decree, and acted on by the court as such a petition.

XI. In a suit by judgment creditors to subject their debtor's land to the payment of their debts, pending the cause the debtor is declared a bankrupt, and he applies for a homestead under the constitution and law of Virginia and the acts of bankruptcy of the United States.—HELD:

1. **Assignee in Bankruptcy—Parties.**—That the assignee in bankruptcy of the defendant deotor should be made a party to the suit.

2. **Homestead.**—The court should proceed to adjudicate upon the right of the debtor to his homestead.

In 1872 three suits in equity were instituted in the county court of Tazewell county; one by Austin Mullins, one by D. W. Marrs, and one by Jacob W. Buckland, all of them against Jacob Barger, Evan H. Brown, and C. D. and H. W. Straley, seeking to subject the land of Barger, which had been conveyed to Brown to secure a debt to the Straleys to satisfy the claims of the plaintiff against Barger.

Mullins in his bill stated, that on the 28th of June, 1870, John Barger, Sr., for the benefit of John Barger, Jr., recovered a judgment against Jacob Barger for $131.18, with interest from the 29th of March, 1859, subject to a credit for $57.05, paid January 2d, 1867, and costs, $6.81. That in August, 1870, an execution was issued upon this judgment, under which the sheriff sold property of Jacob Barger, which was bought by Barger; and in pursuance of the act of assembly to prevent the sacrifice of property, the said
853 *Barger gave a twelve months bond for the amount of the sale, with complainant as his security; which bond was dated the 16th of December, 1870, and was returned to the clerk's office; and which complainant is advised, has the force of a judgment. That this bond not having been paid, after it fell due a judgment was obtained thereon, and an execution issued against Barger and complainant; which was paid by complainant.

Complainant further states, that on the 16th of December, 1871, a deed was admitted to record in the clerk's office of Tazewell county, by which Barger conveyed all his real and personal estate to Evan H. Brown, in trust to secure certain debts therein alleged to be due C. D. and H. W. Straley. He claims that as the recordation of the said deed was subsequent to the return of the said twelve months' bond to the clerk's office, that bond having the force of a judgment, is entitled to priority over the debt secured by the said deed; and that complainant having paid off that bond he is entitled to be substituted to the lien created by said bond. He charges that the said Barger is the fee simple owner of a tract of land on which he resides, supposed to contain about three hundred and eighty acres, lying on the Brushy Fork of Bluestone, and supposed to be in the county of Tazewell, although a small portion may be in Mercer county, West Virginia. He prays that the said land may be subjected to said lien, and sold for the payment thereof, and for general relief.

Marrs sets out a judgment which he had recovered against Barger on the 6th of March 1872, and which was immediately docketed. He states the deed to Brown, and sets out the real and personal property embraced in it. He states the real estate as four
854 *hundred and five acres, lying in McDowell county, West Virginia, on Tug and Elk Horn, adjoining the lands of Otis Perdue and others; also two tracts of land on Brush Fork, a branch of Bluestone, both containing by survey three hundred and eighty acres, and the same on which said Barger now lives; part of the said two tracts lying in Tazewell county, Virginia, and the balance in Mercer county, West Virginia; all this to secure a debt of $857.38. He charges that this deed was executed by Barger with intent to delay, hinder and defraud the complainant and other creditors of said Barger, and that Brown and the Straleys knew the fraudulent intent of said Barger. That the property embraced in it was worth at least $8.000, and it conveys everything owned by said Barger, and even embraces his property exempt by law from execution.

Complainant further states that about two hundred acres of said land lies in Tazewell county, on which his judgment is a lien. He prays that he may have a decree for his debt; that the property embraced in said deed of trust, or so much as is necessary, that is situated in Tazewell county, be subjected to its payment, and for general relief.

Jacob W. Buckland, who sues for the benefit of Russell B. Tabor, sets up a judgment recovered against Barger in the county court of Tazewell, on the 29th of May 1872, which had been docketed. He sets out the deed to Brown, and the property described therein as it is set out in the bill of Marrs, and the amount of the debt purporting to be secured thereby at $857.38. He charges that it was made by said Barger wholly without consideration, and with intent to hinder, delay and defraud the complainant and the other creditors of Barger, and that Brown and the Straleys were cognizant of the intent.

855 *He charges that his judgment is a lien upon that portion of Barger's lands (about two hundred acres) which lie in the county of Tazewell; and he prays that the property embraced in said deed of trust, or so much thereof as may be necessary, and that situated in this county, may be subjected to sale for the payment of his said judgment; and for general relief.

The process in the first two of the cases were served on Barger and Brown, and the Straleys were returned as absent defendants. In the third case the return of service as to Barger is—"Executed on Jacob Barger by leaving a copy of this summons at his residence with George W. Barger, a white person over the age of sixteen, and explaining its contents to him; Jacob Barger not being found at home." The return as to the other defendants was as in the other cases.

On the 28th of November 1872 the county court made a decree to consolidate the three

causes and hear them together. And the non-resident defendants having been regularly proceeded against in the manner prescribed by law, the bill was taken for confessed as to all the defendants; and the cause then coming on to be heard, the court held that the plaintiff, Mullins, should be substituted to the lien of John Barger, mentioned in Mullin's bill, and paid by him; and that this lien was prior and superior to the trust deed to secure the Straleys; but the said trust deed, if *bona fide* and valid, was superior to the liens of Marrs and Buckland. And it was referred to a commissioner of the court to ascertain and report to the court whether or not the debts secured by the said deed of trust were *bona fide* and valid, and the consideration and amount thereof; and also to report the annual rent or value of the lands of Jacob Barger sought to be subjected.

856 *At the February term 1872 of the court, Jacob W. Buckland, by leave of the court, filed his petition in the cause. In it he states, that on the 30th of October 1872, R. A. Hale recovered a judgment in the county court of Tazewell against Jacob Barger and the petitioner for the sum of $185, with twelve *per cent.* interest thereon from the 29th of October 1870, and costs. That petitioner was the surety of Barger, and an execution having issued upon the judgment to prevent a sale of his property he had been compelled to pay it. He claims to be substituted to all the rights of Hzle, and that he is entitled to recover the amount from Barger. He sets out the real estate conveyed by Bargen to Brown as it is described in the bill he had filed, and charges fraud in the deed as in that bill. And he asks to be admitted as a party plaintiff in the said suits.

The process to answer the petition was served on Barger and Brown; and the Straleys filed their answer to the bills, which was agreed to be taken as embracing the petition. They say in their answer, it is not true that the trust deed executed by Barger to secure them was made on no valuable consideration, or for the purpose of hindering, delaying or defrauding the creditors of Barger. It was executed to secure the payment of a note executed the 8th of December 1871 for $857.38, with interest from date at twelve *per cent.* for money loaned to them by Barger. They state several payments on this note by Barger, leaving due on the 18th of April 1863 $467.08.

They state further, that on the 5th day of April 1861 Barger executed to respondents his note for $625, due twelve months after date with interest from date, and executed to Hercules Scott as trustee, a deed convey-
in to him —— acres of land lying in
857 Mercer and *Tazewell counties, to secure the payment of said last mentioned note. And they file the deed with their answer. They say this note was executed for money loaned, and cash paper loaned by them to Barger. And they state credits upon this note, leaving a balance due April 3d, 1873, of $419.63. They deny all fraud, and admit the priority of the claim of Mullins to the deed of December 14th, 1871, but not to the deed of April 5th, 1861. The description of the land conveyed in this last mentioned deed is given in the opinion of the court delivered by MONCURE, P.

In May 1873 the commissioner returned his report. He reports that the debts of the Straleys secured by the deeds of trust are *bona fide* and valid, and were given for the loan of money to the amount of the face of the notes. The amount due on the debt secured by the deed of December 8th, 1871, on the 16th of May 1873, was $460.52; that secured by the deed of April 5th, 1861, was at the same date $417.26. The rent of Barger's land he reports at $100 a year.

The cause same on to be heard on the 29th of May 1873; when the court confirmed the report of the commissioner, and, fixing the order of priorities among the different creditors, made a decree in their favor for the several amounts due them, including their costs at law, and also each one his costs in this case. And the court considering the lands of the said Barger in the proceeding in these causes mentioned are liable to the payment of the sums above decreed, but it being admitted that the title to said land is vested in Hercules Scott, trustee in the first deed of trust, and that the said Scott is a non-resident of this state and cannot be compelled to act under said trust deed, it is further "decreed that unless the defendant Barger shall pay the amount
858 above decreed on or before *the 30th of June next," commissioners named "shall proceed to sell the land in the bill and proceedings mentioned, or so much thereof as may suffice, to the highest bidder," &c., &c., for so much cash as will defray costs of suit and expenses of sale, and for the residue of purchase money, on a credit of six, twelve and eighteen months, with interest from the day of sale.

The commissioners reported, that after advertising, &c., they sold the tract of land in the bill mentioned, known as the home tract, at public outcry, to C. D. and H. W. Straley, for the sum of $1,700, that being the highest bid offered, and they had complied with the terms of sale.

After signing their report they add: Your commissioners would further report, that they find from the commissioners' books that the aforesaid lands, so sold as aforesaid, were assessed at the last assessment made for that purpose of taxation at $1,189.50. See extract made from commissioners' books herewith filed, marked S. H. The land sold for more than its assessed value.

The abstract from the commissioners' books states the quantity of land at one hundred and eighty-three acres.

Barger excepted to the report of the commissioners: 1st. That they only advertised the lands of said Barger in Tazewell county, and sold the lands lying in Tazewell and Mercer counties, West Virginia. 2d. The decree did not authorize the commissioners to sell the land in Mercer county. 3d. The land sold, as a whole, did not bring half its value, or one half of what would be or is a

fair cash value of said land. And he filed affidavits of two persons, who stated
859 they *knew the lands, one of whom valued them at $3,000, and the other at $4,000.

Under the operation of the act of April 2d, 1873, these causes were removed to the circuit court of Tazewell county, and came on to be heard on the 5th day of September 1873; when the court overruled the exceptions of Barger to the commissioners' report and confirmed it, and disposed of the cash received in payment of the expenses and costs.

At the September term of the court for 1874, Barger upon notice to the parties, moved the court to review and reverse as erroneous the decrees by default of May 29th, 1873, and of September 5th, 1873. And in his notice he sets out the grounds upon which he proposed to found his motion. These are substantially the same relied upon in the petition for appeal, and which are stated in JUDGE MONCURE'S opinion.

The plaintiffs in the suits filed a plea in answer to the motion, in which they state that Barger had, on the 1st of September, 1873, been adjudged a bankrupt upon his own petition; and that the commissioners acting under the authority of the decree of 29th May, 1873, in these causes, were, by an order of restraint from the said Federal court, enjoined from proceeding in any further manner upon the duties imposed on them by the court under which they acted. By reason whereof the defendants say that the said Barger has been and is divested of all right, title and interest in and to the matters and things set forth in said notice, and has wholly incapacitated himself from maintaining the same.

On the hearing of the motion, the court, after referring to the order of the United States court prohibiting any further proceedings in these causes in this court, on consideration thereof declined to hear
860 the *said motion until the said Barger should dismiss the said restraining order. And time was given him until the next term of the court to have the said restraining order dismissed.

The order referred to in the plea of the defendants to the said motion was made upon the petition of Barger, filed in the United States court, which, after setting out that he had been declared a bankrupt, and also setting out the debts secured by the deeds of trust on his land, and his judgment creditors, the suits brought by them for the sale of the land, and the sale at the price of $1,700, and claiming that the proceedings of any other court affecting his rights or property, after filing his petition in bankruptcy, were illegal and void, he insists upon his rights both under the state and bankrupt laws, to claim his homestead exemption. He states that the fund arising from the sale of his land is undistributed, and he prays that C. D. and H. W. Straley, the purchasers, be enjoined from paying the purchase money, and that the judgment creditors be enjoined and prohibited from taking steps in the state court towards a distribution of the fund; and that the surplus of the $1,700 purchase money, after satisfying the deeds of trust, be set aside as his homestead, and for general relief.

In October, 1873, upon the motion of Jacob Barger the restraining order hereinbefore referred to was dissolved, and leave was given to the creditors of Barger and to Barger (or his assignee John Walsh for him) to litigate in the circuit court of Tazewell, and such other state court as may have jurisdiction, including the court of appeals of Virginia, the matters in controversy between said Barger and his creditors, and their respective rights as to the liabilities and property of said Barger.

861 *The cause came on to be finally heard on the 17th of May 1875, upon the papers formerly read, and the motion of Barger to reverse the decrees of the 29th of May 1873, and of the 5th of September 1873, and the plea of the defendants to said motion, and the record of the said bankruptcy proceedings. Upon consideration whereof, the court was of opinion that the decree of the 5th of September 1873 was not a decree by default, it appearing that said Barger appeared at that time in said cause and made defence, and hence that said cause could not be corrected in that court upon the said motion of said Barger; and it was decreed that the motion be dismissed with costs. And it appearing to the court that the bonds executed for the purchase money of the land, sold under the decree of the court, had matured, and then amounted to $1,707.63, the court after stating the amount due at that date to each of the said parties, showing that all of them might be paid out of the fund, leaving a balance of $56.50, directed the commissioners to assign to each of said creditors the amount due him. And it further appearing that C. D. and H. W. Sraley had not had possession of the land since their purchase, they were directed to be credited upon their bonds with the said balance of $56.50; and a writ of possession was directed to issue, and a commissioner was appointed to convey to the said Straleys all the right, title and interest of the defendants, Jacob Barger and Evan H. Brown, in and to the said land, with covenants of special warranty, &c. Jacob Barger thereupon applied to a judge of this court for an appeal; which was allowed.

Sheffey and *Williams*, for the appellant.
Graham and *French*, for the appellees.

862 *MONCURE P., delivered the opinion of the court.

The court is of opinion that the appellant has a right to prosecute this appeal; for although pending the suit, in which the decrees appealed from were rendered, he became a bankrupt, whereby his estate generally was vested in his assignee in bankruptcy; yet he still had, and continues to have, such an interest in his estate, on account of his claims to exemptions and homestead of the same, as entitles him to prosecute this appeal, which therefore ought not to be dismissed on the ground of his want of such an interest.

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The court is further of opinion that there is no error in the decree of the 29th day of May 1873, "because it decrees sale of land, the legal title to which is outstanding in Hercules Scott, who was no party to any of the suits, and was not in any way brought before the court." The said legal title became vested in Hercules Scott, if at all, under and by virtue of a deed of trust bearing date the 5th day of April 1861, which was about that time duly recorded in the clerk's offices of Mercer and Tazewell counties, both of which were then in Virginia, and which adjoin each other. The land conveyed by the said deed is therein described as "a certain tract or parcel of land lying partly in Tazewell county, and the remaining part in Mercer county, the tract containing about three hundred and eighty acres, being the land whereon I no reside, containing all the land I own on the waters of the Brush Fork of Bluestone, the same composed of two surveys, be the same more or less, in trust to secure C. D. and H. W. Straley in the sum of $625, for which there is a bond this day executed, bearing date the 5th April 1861, and due twelve months after date, with interest from date." Since the date of that
863 deed Mercer county has become *a part of West Virginia, while Tazewell county, in which the mansion house on the said tract of land is situate, and in which the appellant always has resided, and yet resides, still remains in Virginia. The deed was executed only by Jacob Barger, the appellant. Hercules Scott did not execute the deed, and it does not appear that he ever acted under it, or accepted it, or its terms, or had any knowledge of its execution by the grantor. All the other parties having any interest in, or title to the land, resided and continued to reside in Virginia, except the said Scott and the Straleys, who, it seems, resided in West Virginia. The Straleys have filed their answer, and thus submitted themselves and their interest in the said land to the jurisdiction of the court in which the decrees appealed from were rendered. Under these circumstances, the circuit court of Tazewell county had jurisdiction to make the said decree of the 29th of May, 1873, notwithstanding the said Hercules Scott was not a party to the suits in which it was rendered. *Penn* v. *Lord Baltimore*, 1 Vez. Sr. R. 444; *Massie* v. *Watts*, 6 Cranch 148; *Dickinson* v. *Hoomes' adm'r &c.*, 8 Gratt. 353, 410-428, and cases therein cited.

The court is further of opinion, that there is no error in the said decree, "because it decrees substitution in favor of Austin Mullins to the lien of a debt which was a liability incurred prior to the 10th day of April 1865, and then, without any waiver on the part of Jacob Barger, orders sale of the land on six, twelve and eighteen months, instead of one, two and three years credit. Code of 1873, ch. 174, § 3." The liability of Austin Mullins as surety for Jacob Barger was incurred by a bond bearing date the 16th day of December 1870, payable twelve months after date, and executed in pursuance of an act ap-
864 proved May 28, *1870, entitled "an act to prevent the sacrifice of personal property at forced sales"—Acts of Assembly, 1869-'70, chapter 120, page 162; which bond by said act was required to be returned in the same manner as a forthcoming bond is required to be returned, and was declared, from and after its return, to have, as against the obligors therein then living, the force of a judgment. The surety in this bond, Mullins, was entitled by substitution to the lien thereby created under the said act; which lien certainly was to secure a debt contracted, or liability incurred, after the 10th day of April 1865. Id., ch. 277, p. 426; Code, ch. 174, § 3, p. 1123.

In fact, all the judgments on account of which the land was decreed to be sold in these cases, were obtained after that day; and the deed of trust in the proceedings mentioned, of the 14th day of December 1871, from said Barger to Evan H. Brown, conveying the said land and other property to secure a debt therein mentioned, due by said Barger to C. D. and H. W. Straley, to satisfy which, as well as the said judgment, the said sales was decreed to be made, expressly authorized a sale under the said deed to be made for *cash*. It was not error, therefore, to decree a sale of the said land on a credit of six, twelve and eighteen months; as was done in the said decree of the 29th day of May 1873.

The court is further of opinion, that there is no error in the said decree, "because it decrees a sale of the land in the bill mentioned, which was three hundred and eighty acres, lying partly in Virginia and partly in West Virginia, thus going beyond the power and jurisdiction of the court."

The reasons and authorities against this third assignment of error are the same
865 as those already *stated and cited in regard to the first assignment of error.

The court is further of opinion, that there is no error in the said decree, "because it did not specify in exact terms the land to be sold, but used such vague and indefinite terms with regard to it, that it was within the power or caprice of the commissioners to sell all the lands mentioned in the Brown trust deed."

The decree was for the sale of the land in the bill and proceedings mentioned, or so much thereof as might suffice to satisfy the purposes of the decree. The land is described with sufficient certainty in the bills, and the decree could be made certain by reference to the bills. "That is certain which may be made certain," applies to the case.

The court is further of opinion that there is no error in the said decree, "because it did not dismiss the Marrs and Buckland bills and the Buckland petition, when the charges of fraud so freely made therein were ascertained and decreed to be false."

The judgment creditors of Barger had a right to subject to the liens of their judgments respectively such real estate, or such interest in such real estate, as was liable thereto. If he had conveyed any of his real estate by a deed fraudulent as to his creditors, they had a right to impeach such deed for fraud, and, if proved to be fraudulent, to have

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it set aside and the land entirely subjected to the payment of the debts due by him to them. Or, if the deed supposed and charged by the judgment creditors to be fraudulent as to them should turn out on investigation and enquiry to be fair and *bona fide* and intended to secure an honest debtor, and anything should remain after satisfying such debt, they would have a right to subject such residue to the payment of the 866 debts due to them, and *to do so in the same suit brought by them to impeach and set aside the deed, without the necessity of dismissing that suit and bringing another. They may bring one suit in equity with a double aspect, and claim, in the alternative, to subject the whole estate conveyed by the supposed fraudulent deed, if it turn out to be fraudulent, or the surplus which may remain after satisfying any incumbrance on the estate which may turn out to be valid against creditors. This is common practice, both convenient and economical, well sustained by authority.

The court is further of opinion that there is no error in the said decree, "because it decrees large debts against Jacob Barger in Favor of C. D. and H. W. Straley, his co-defendants, when, first, there was nothing in the pleadings to justify such a decree between co-defendants; second, they had not been required to account for the thousands of dollars worth of property conveyed to their trustees for their benefit; and, third, they have been freely charged in two of the bills and the Buckland petition with guilty knowledge and participation in the frauds alleged against Jacob Barger."

First. There was enough in the pleadings to justify such a decree between co-defendants.

The claims in the bills are of judgment liens upon the land conveyed by the judgment debtor to secure a debt alleged by him to be due to his co-defendant, but alleged by the judgment creditors to be a fraudulent contrivance as to them, or not to be due, or not to be due in so large an amount as to absorb the whole value of the land. In such a case it is manifest that there would be amply enough in the pleadings to warrant any decree between co-defendants which justice might require. Such a decree would, in effect, be a part of the relief to 867 which the judgment creditors *would be entitled against their debtor. They would have a right to have the prior lien in favor of the co-defendant discharged, in order that the residue may be applied to the payment of their judgments.

Second. It is not alleged that they (the Straleys) have ever received any of the property conveyed to their trustees, or either of them for their benefit. No such allegation has been made, either by Barger or any of the other parties. No motion has been made by any party for any enquiry on the subject. If such an enquiry had been asked for, it would no doubt, as it should, have been, ordered. Probably it was not asked for, because it was known that none of the property had come to the hands of the trust creditors or their trustees, and because it was desired to avoid unnecessary expense. It may be asked for hereafter if desired. The deeds of trust were not executed by the trustees nor the trust creditors.

Third. As the proofs did not sustain the charges made in two of the bills, and the Buckland petition against the trust creditors of guilty knowledge and participation in the frauds alleged against Jacob Barger, they were entitled to decrees against him for the debts due them by lien and secured by the deeds of trust, in order that the surplus might be ascertained and paid to the judgment creditors.

The court is of opinion that there is no error in the said decree for the grounds assigned on the seventh, eighth, ninth and tenth assignments of error as follows, to wit:

"7th. Because it permitted the parties to an angry controversy based upon charges of fraud, plaintiffs and defendants, to combine together against the other defendant for the purpose of dividing his property among them. If the charges of fraud 868 were true, then *the Straleys were *particeps criminis*, and entitled to no favor from the court. If they were false, then the plaintiffs who made them deserved no countenance in a forum of conscience."

This has been already answered.

"8th. Because it decreed in favor of J. W. Buckland for Tabor, without requiring process to be properly executed on Jacob Barger in that cause."

Whether properly executed on him in that cause or not, it was properly executed on him in the other causes which came on to be heard together with that cause. He appeared and made defence to all the causes, without objecting that process had not been properly executed on him in that cause. He therefore waived the objection on that ground, if he had any.

"9th. Because the court had no right to sell to pay inferior debts, lands conveyed in trust, without either setting aside the deeds and divesting the trustees of the title, or else compelling a full settlement of the trusts, and requiring all the property conveyed in trust to be brought before it or accounted for."

This has already been sufficiently answered.

"10th. The causes having been consolidated, and two of them having been brought in the same court with knowledge of the pendency of the first therein, it was error to decree separate costs against the defendant, Barger, in each case, especially when the charges of fraud were not sustained."

The plaintiffs in the several suits had a right to bring them severally and to recover several costs; and it is doubtful whether they could have been consolidated without their consent. *Claiborne* v. *Cross &c.*, 7 Leigh 331. The case is different from that of *Stephenson* v. *Taverners*, 9 Gratt. 398, which was a creditors' suit for the administration of assets, in which all the 869 *creditors ought to come in and prove

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their claims under a decree for an account in a suit brought by one or more of the creditors, either for himself of themselves alone, or in behalf also of all other creditors who might choose to come in and prove their claims before the commissioner. Even in such a case the creditors may commence their suits severally, but must unite in taking one account under the first decree which is made for that purpose in any of the suits. Id., and the authorities cited. But even in such cases as are now under consideration, they should at least be heard together, if not consolidated, and that is what was done in these cases. It does not appear that more costs were decreed in them in favor of the plaintiffs than were proper.

But the court is further of opinion, that in the decree made in these causes on the 5th day of September 1873, the circuit court erred in overruling the exceptions of the defendant Barger to the report of the commissioners appointed to sell the land in the bills mentioned, and in confirming the said report, and in appropriating any part of the proceeds of said sale.

There is too much uncertainty as to what land was sold, or intended to be sold, by the commissioners, to warrant the confirmation of the sale and their report. They report that "they sold the tract of land in the bill mentioned, known as the home tract, at public outcry, to C. D. and H. W. Straley, on the 29th day of July 1873, that being court day, for the sum of $1,700, that being the highest bid offered, &c." Now, "that the tract of land in the bill mentioned, known as the home tract," is further described in the different bills as lying partly in Tazewell county, Virginia, and partly in Mercer coun-
870 ty, West Virginia, but how *much in each is differently stated in the different bills. Did the commissioners sell and intend to sell the whole tract, or only so much as is situated in Tazewell county? From their report, it is doubtful. They therein say, that "they sold the tract in the bill mentioned known as the home tract;" which seems to embrace the whole tract lying in both counties, described in the deed as containing three hundred and eighty acres. But in an *addendum* to their report they further say, "that they find from the commissioner's book, that the aforesaid lands so sold as aforesaid, was assessed at the last assessment made for the purposes of taxation, at $1,189.50. See abstract from commissioner's books herewith filed, marked S. H. The land sold for more than its assessed value." From the abstract referred to, the quantity of the land assessed is described as one hundred and eighty-three acres; which of course was only that part of the tract situated in Tazewell county, and that would seem therefore to be the only land intended to be sold. If the whole tract of three hundred and eighty acres was intended to be sold, the sale was no doubt at a sacrifice. If only the one hundred and eighty-three acres lying in Tazewell county, the sale may have been at a fair price. In this state of uncertainty the court erred in confirming the report of the sale.

The court is further of opinion, that the final decree made in these causes on the 17th day of May 1875 is erroneous, for reasons already stated and for others. Whether the decree rendered in the said causes on the 5th day of September 1873 was a decree by default or not, the circuit court erred in dismissing the defendant Barger's motion for relief against that decree, which was erroneous for reasons before stated, if no other; and his motion might be regarded as a pe-
871 tition *for rehearing, and the relief sought obtained in that way, if it could not be obtained under the Code, chapter 177, section 5, page 1135. The said court also erred in not directing the assignee in bankruptcy of the defendant Barger to be made a defendant in these suits; and in not proceeding to adjudicate upon the question of the right of the said Barger to homestead under the constitution and law of the state of Virginia and the acts of bankruptcy of the United States. That claim had been asserted by him before the court of bankruptcy of the United States; but that court had referred it to the said circuit court in these cases. And the said circuit court erred in not taking cognizance of and adjudicating in regard to the same. But this court does not now express any opinion upon the question in regard to said claim, as it would be premature to do so.

The court is therefore of opinion that so much of the decrees appealed from as is in conflict with the principles above declared and opinion above expressed ought to be reversed and annulled, and the residue affirmed, and the cause remanded to the said circuit court, in order that the said assignee in bankruptcy may be made a defendant to the said suits, and that further proceedings may be had therein to a final decree in coformity with the said principles and opinion.

DECREE REVERSED.

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872 *Pulaski County v. Stuart, Buchanan & Co.

July Term, 1877, Wytheville.

Absent, ANDERSON, J.

1. **De Facto Government—Contracts.***—The state government of Virginia, which existed at Richmond during the war, and the Confederate government, of which it formed a part, were at *least* governments *de facto*, and contracts arising thereunder are valid, and will be enforced unless prohibited by the constitution of the state. (Acc. *Dinwiddie Co.* v. *Stuart, B. & Co., supra* 526).
2. **Statute — Constitutionality.** — A contract made under the act of May 9th, 1862, to furnish salt to a county, does not come within the prohibition of the constitution, and must be enforced. (Acc. *Din. Co.* v. *Stuart, B. & Co., supra* 526.)
3. **Courts of General Jurisdiction—Judgments—Collateral Attack.**†—Where a court

*See Dinwiddie Co. v. Stuart, Buchanan & Co., and *note*, 28 Gratt. 526.

†**Courts of General Jurisdiction—Judgments—Collateral Attack.**—In regard to the collateral attack of the judgments of a court of gen-

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of general jurisdiction acts within the scope of the general powers, its judgment will be presumed to be in accordance with its jurisdiction, and cannot be collaterally impeached.

4. **Same—Same—Same—Special Powers.**—Where a court of general jurisdiction has conferred upon it special powers by special statute, and such special powers are exercised *judicially*, its judgment cannot be collaterally impeached.

5. **Same—Ministerial Duties.**—Where a court of general jurisdiction has conferred upon it special powers by special statutes, which are only exercised *ministerially*, and not *judicially*, no presumption of jurisdiction will attend its judgments, and the facts essential to the exercise of the special jurisdiction must appear on the face of the record.

On the 14th day of August, 1874, Stuart, Buchanan & Co. presented to the board of supervisors of Pulaski county, a claim for salt furnished to the county in 1862. This claim was rejected by the board of supervisors; and Stuart, Buchanan & Co. thereupon took an appeal to the county court. Upon the hearing of the case in the
873 county court, that court reversed the *decision of the board of supervisors, and rendered a judgment in favor of Stuart, Buchanan & Co. for the sum of $650, with interest from the 1st of January, 1866. From this judgment the county appealed to the circuit court, where it was affirmed; and the county then applied to a judge of this court for a *supersedeas;* which was awarded.

It appears that at its June term 1862, the county court of Pulaski made an order appointing John Baskerville the agent of the county to contract with the proprietors of the salt works, in Smythe county, for such quantity of salt as the proprietors may be willing to permit, for the use of the citizens of the county, not to exceed twelve thousand bushels. Under this authority Baskerville contracted with Stuart, Buchanan & Co. for twenty-two hundred bushels of salt, at the price of one dollar per bushel, or $3.50 for the ordinary sacks of salt put up by them. Under this contract Stuart, Buchanan & Co. delivered two hundred sacks, or six hundred bushels. And in payment for it Baskerville delivered three bonds of the county of Pulaski. It does not appear that when the order was made appointing Baskerville the agent to buy the salt, a majority of the acting justices of the county were present, or that they had been summoned to attend; nor is there any order of the county court authorizing the issue of the bonds. They profess to be issued on behalf of the county, by "William J. Wall, a member of the finance committee," and are signed by him in his own name with *F. C.* annexed, and made payable to John B. Baskerville; who assigns them to Stuart, Buchanan & Co. "Countersigned by Lynch A. Currin, clerk of the county court of Pulaski county."

874 *Pollock* and *Larue*, for the appellant.

Pierce, Walker and *Baskerville*, for the appellees.

CHRISTIAN, J. This is one of the numerous cases which have arisen since the close of the late civil war, upon contracts entered into by the county courts of this commonwealth under the act passed March 9th, 1862, "authorizing the county courts to purchase and distribute salt amongst the people, and provide payment for the same."

The main question which arose in the other cases, to wit, that said act was void, because contrary to that provision of the constitution (article 10, section 10) which declares that "no county, city or corporation, shall levy or collect any tax for the payment of any debt contracted for the purpose of aiding any rebellion against this state or the United States," need not be further considered in this case, as it has been definitely settled by the decision of this court in the case of *Dinwiddie County* v. *Stuart, Buchanan & Co.*, decided at the last Richmond term, and not yet reported. *Supra* 526. In this case it was held that said act was not in violation of said provision of the constitution, and that all contracts made in pursuance of its provisions were valid and could now be enforced against the counties. Upon this point, therefore, the decision in that case is conclusive of this.

In the case before us there are several other errors assigned to the judgment of the circuit court. It is necessary to notice only one, as the decision of the question therein raised will be conclusive of this case. That assignment of error is, that the circuit court erred in giving judgment against
875 the county of Pulaski, *because the record of the county court did not show that when the purchase of salt was ordered by said court "a majority of the justices of said county were present, or that the justices had been summoned to attend to act upon the matter," as provided by the first section of the act of May 9th, 1862.

This same question was raised incidentally in the Dinwiddie case (*supra*). In that case, the judge delivering the opinion of the majority (and in this part of the opinion the whole court it is understood concurred) said: "I am further of opinion that the paper exhibited in the record as the bond of the county of Dinwiddie is invalid as a bond. Such invalidity, however, does not arise from any want of legal form. In form and legal effect it is a bond. It is an obligation on the part of the county of Dinwiddie to pay a sum certain to Stuart, Buchanan & Co., it is sealed with the seal of the court; the seal is acknowledged in the body of the instrument as follows: "Being a bond created by order of the county court of Dinwiddie, made, &c., in pursuance of an act of the general assembly of Virginia," &c. This is equivalent to

eral jurisdiction, see Woodhouse v. Fillbates, 77 Va. 321, citing the principal case and Lancaster v. Wilson, 27 Gratt. 629; Cox v. Thomas, 9 Gratt. 323. See also, Lawson v. Moorman, 85 Va. 886, and Gresham v. Ewell, 85 Va. 5, citing the principal case and Pennybacker v. Switzer, 75 Va. 671; Woodhouse v. Fillbates, 77 Va. 317; Wimbish v. Breeden, 77 Va. 324; Wilcher v. Robertson, 78 Va. 602; Davis v. Town of Point Pleasant, 32 W. Va. 289, 9 S. E. 228.

saying, "being an instrument under seal," and is a sufficient recognition of the seal in the body of the instrument. But this paper is invalid as a *bond of the county,* because it does not appear in the record that at the court at which it had been executed the justices had all been summoned, or that a majority were present; indeed, it appears that only three justices were present. It cannot be presumed in a case like this that the justices had been summoned. This ought to appear affirmatively, and the record should show that a majority were present. The court was acting upon a matter of special jurisdiction, conferred by a special statute, and upon a matter outside of its general jurisdic-
876 tion. The *case does not therefore come within the doctrine declared by this court in *Ballard & als.* v. *Thomas & Ammon,* 19 Gratt. 14. Here the jurisdiction was special, fixed by a special statute, and must be exercised in accordance with the provisions of the statute; that is, either when the justices had all been summoned, or when a majority were present. The proceeding in this case (the execution of a bond) *not being a judicial proceeding,* within its ordinary jurisdiction, must be shown affirmatively to be strictly within the provisions of the statute within which the proceeding was had."

The principles thus declared in the Dinwiddie case would seem to be conclusive of the case before us. But as it was urged by the able counsel for the appellees here that the question arose only incidentally in the Dinwiddie case, and that the attention of the court in that case was directed mainly to the great question of *the constitutionality of the act,* we have gladly permitted them to argue this point, as if no decision had ever been made by this court in respect to it. And with an anxious desire to correct our judgment (if wrong) on this point, we have carefully considered their argument and the authorities upon which it was based, as well as all others at our command, and our conclusion is, that both upon principle and authority the doctrines declared in the Dinwiddie case on this point are sound and true, and established by the decisions of the supreme court of the United States, as well as by the well considered decisions of the state courts.

It was argued by the learned counsel for the apellee that the case of *Ballard & als.* v. *Thomas & Ammon,* 19 Gratt. 14, was in opposition to the opinion of the court in the "Dinwiddie case;" and that to affirm
877 the *Dinwiddie case would be to overrule the former case. These cases are perfectly consistent, and can well stand together. In the Dinwiddie case, the court distinguished that case from that of *Ballard & als.* v. *Thomas & Ammon.* The distinction is plain. In the Dinwiddie case, and in this case, the action of the county court was *purely ministerial* and *not* judicial. In the case of *Ballard & als.* v. *Thomas & Ammon,* the action of the court *was judicial.* JUDGE JOYNES recognizes this distinction, and founds his opinion upon the ground that laying the county levy was a *judicial act.* He said (page 22): For while in the assessment of the tax the county court exercised power which does not come within the ordinary scope of judicial power, yet in the adjudication of the debts chargeable upon the county, on which rests the right of the creditor to proceed against the sheriff and his securities, the court exercises a power which is *purely judicial in its nature,* though it is not exercised in the usual form of judicial proceedings. The action of the court, in the exercise of *such a power,* cannot be questioned in a collateral proceeding."

In *Harvey* v. *Tyler,* 2 Wall. U. S. R. 328, 342, the supreme court of the United States uses the following language: "The jurisdiction which is now exercised by the common law courts in this country is, in a very large proportion, dependent upon special statutes conferring it. * * * * * In all cases where the new powers thus conferred are to be brought into action in the usual form of common law and chancery proceedings, we apprehend there can be little doubt that the same presumptions as to the jurisdiction of the court and the conclusiveness of its action will be made as in cases falling more strictly within the usual powers of the court. On the other hand, powers may
878 *be conferred on the court and duties required of it, to be exercised *in a special and often summary manner,* in which the order or judgment of the court can only be supported by a record which shows that it had jurisdiction of the case."

In the case of *Galpin* v. *Page,* 18 Wall. U. S. R. 350, 370, MR. JUSTICE FIELD, in an able and exhaustive opinion in which he reviews many authorities, says, in noticing the argument of counsel in that case: "This reasoning would abolish the distinction in the presumptions of law when applied to the proceedings of a court of general jurisdiction acting within the scope of its general powers, and when applied to its proceedings had under special statutory authority. And, indeed, it is contended that there is no substantial ground for any distinction in such cases. The distinction, nevertheless, has long been made by courts of the highest character both in this country and in England and we had supposed its existence was not open to discussion." "However high the authority to whom a special statutory power is delegated," says MR. JUSTICE COLERIDGE, of the Queen's Bench, "we must take care that in the exercise of it the facts giving jurisdiction plainly appear and that the terms of the statute are complied with."

In *Morse* v. *Presly,* 5 Foster R. 299, referred to by MR. JUSTICE FIELD, the supreme court of New Hampshire said: "A court of general jurisdiction may have special and summary powers wholly derived from statutes, not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction. In such cases its decisions must be regarded and treated like those of courts of limited and

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special jurisdiction. The jurisdiction in such cases, both as to the subject matter of
879 the judgment *and as to the persons to be affected by it, must appear by the record; and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it."

In commenting upon the case. MR. JUSTICE FIELD, in *Galpin* v. *Page* (*supra*), p. 371, says: "The qualification here made, that the special powers conferred are not exercised according to the course of the common law, is important. When the special powers conferred are brought into action according to the course of that law—that is, in the usual form of common law and chancery proceedings— * * * the same presumption of jurisdiction will usually attend the judgment of the court as in cases falling within its general powers. But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction, upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgments of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record."

From these cases, and the principles therein declared, may be extracted the following general legal propositions of universal application:

1. Where a court of general jurisdiction acts within the scope of its general powers, its judgments will be presumed to be in accordance with its jurisdiction, and cannot be collaterally impeached.

2. So also when a court of general jurisdiction has conferred upon it special powers by special statute, and such special powers are exercised *judicially*, that is, according to the course of the common law and pro-
880 ceedings *in chancery, such judgment cannot be impeached collaterally.

3. But where a court of general jurisdiction has conferred upon it special and summary powers, wholly derived from statutes, and which do not belong to it as a court of general jurisdiction, and when such powers are not exercised according to the course of the common law, its action being ministerial only and not judicial, in such case its decision must be regarded and treated like those of courts of limited and special jurisdiction, and no such presumption of jurisdiction will attend the judgment of the court. But in such cases the facts essential to the exercise of the special jurisdiction must appear upon the face of the record.

Applying these principles to the case before us, it is plain that the judgment of the circuit court must be reversed. While it is true that the county courts, which were clothed by the act of May 1862, with the power to purchase and distribute salt, were courts of general jurisdiction, yet such power did not belong to it as a court of general jurisdiction, but was a special summary power conferred by statute. It was a power *purely ministerial*, and was not exercised judicially according to the course of the common law. The conditions prescribed for the exercise of this special power, outside of the scope of its ordinary powers, were either that all the justices should be summoned or that a majority should be present. These were the essential and prerequisite facts necessary to confer this extraordinary and special power; and these facts must appear upon the record to give validity to the judgment. In such a case no presumption of jurisdiction will attend the action of the court.

881 *Certainly the power to purchase salt and bind the people of the several counties for its payment was not judicial power, to be exercised according to the course of the common law. It was a special and extraordinary power, to be exercised ministerially, and not judicially.

It was natural and proper in the highest degree that the legislature should throw around the exercise of this extraordinary power, by which the county courts could bind the people of the several counties of this commonwealth to the payment of millions of dollars, all the checks and restraints possible to secure its judicious exercise.

It was not intended that so large a power should be exercised by the ordinary county court, composed of but three justices of the peace; but, in order that a matter of such importance to the public should be properly considered, the statute provided that all the justices should be summoned or that a majority should be present. In a matter like this, purely ministerial, and in which all the people of the counties were interested, the justices of the peace were in a certain sense the representatives of the people, and, as such, were to judge both of the necessity of appropriating the people's money and the extent of such appropriation.

To give validity to such action of the county court, the condition prescribed by the statute must be complied with, and it must so appear upon the record. The facts essential to give the court jurisdiction must appear affirmatively, and no presumption of jurisdiction will attend the judgment.

Inasmuch, therefore, as it does not appear upon the record in this case that when the contract was made by the county court of Pulaski with Stuart, Buchanan
882 *& Co., for the purchase of salt, the justices of the peace had been summoned, or that a majority were present, I am of opinion, for the reasons above stated, that the judgment of the circuit court is erroneous and must be reversed.

The other judges concurred in the opinion of CHRISTIAN, J.

JUDGMENT REVERSED.

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883 ***Nowlin v. Burwell.**

July Term, 1877, Wytheville.

Absent, ANDERSON, J.

At the August term 1874 of the county court of P, N presented a plat and certificate of land assessed

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in the name of L, and sold in her name in 1860 by the sheriff of the county for the non-payment of taxes due thereon, and purchased by N's assignor. B, claimant of the legal title to the land, opposed the recording of the plat and certificate, and proved he had paid to the clerk the taxes, &c., but he offered no evidence of his title. The court admitted the plat and certificate, and B appealed to the circuit court; and that court reversed the order of the county court, on the ground that the county court should have admitted evidence of B's title. On the second trial in the county court B traced back his title to a deed from T, as attorney in fact of L, to S; but the power of attorney was not produced or proven. The county court sustained the claim of B, and rescinded its order, admitting the plat and certificate to record; and upon appeal by N to the circuit court the last order of the county court was affirmed.—HELD:

1. **Order of Court.**—The first order of the county court admitting the plat and certificate to record was proper.
2. **Evidence—Reversal.**—It not appearing that B offered any evidence of his title to the land, it was error in the circuit court to reverse the order of the county court, and send the cause back to let B introduce such evidence.
3. **Title to Land—Error.**—B not producing or proving the power of attorney under which T professed to act, he failed to establish his title to the land; and the second order of the county court and the order of the circuit court affirming it were erroneous.
4. **Statute—Construction.**—The act, Code of 1873, ch. 38, § 18 and 19, in relation to the sale of land for taxes, is only intended to furnish evidence of the identity of the land sold, not 884 only for the information of *the former owner, and all others interested, but for the guidance of the clerk in making the deed. When the purchaser offers the plat and certificate for recordation, the sole duty of the court is to consider whether the plat and certificate, or the report of the surveyor, as the case may be, is in conformity to the requirements of the law in respect to the description and identity of the land. It is no concern of the court whether the purchaser has acquired a title, or whether the owner has properly exercised his right of redemption. The proceeding is *ex parte* in its character, and does not in the least affect the rights of third persons.

At the August term 1874 of the county court of Patrick county, Spencer F. Nowlin, assignee of G. H. Ashworth, presented to the court a plat and certificate of a tract of three hundred and seventy-two acres of land, lying on Russell's creek in said county, assessed in the name of Lucinda Barker, and sold in her name on the 20th of September 1860, by Rufus Turner, sheriff of said county, for the non-payment of taxes due thereon, and purchased by the said G. H. Ashworth at said sale. And thereupon William A. Burwell, a claimant of the legal title to said land, appeared and opposed the motion to record said plat and certificate. But the court upon hearing the evidence, and on examination of the plat and certificate, was of opinion that the said plat and certificate were correctly made according to law, and ordered that the same should be recorded.

Burwell excepted to this opinion and judgment of the court. The only evidence referred to in the bill of exceptions is the plat and certificate, and proof that he had tendered to Nowlin the amount paid by Ashworth with ten *per cent.* interest thereon, and that he requested Nowlin to state if he had incurred any other or additional expense, or had paid taxes on said land; which question Nowlin declined to answer; and 885 *that he had therupon paid the money to the clerk. But it does not appear that there was any evidence as to Burwell's title to the land offered to be introduced.

Burwell obtained an appeal to the circuit court of the county; and the case same on to be heard on the 6th of April 1875, when the court was of opinion that there was error in the judgment in this, that evidence should have been admitted by the county court to show that Burwell was the former owner of the land in question, or an heir or assignee of such owner. The judgment was therefore reversed, and the cause sent back to the county court for further proceedings to be had therein, with instructions, that if on the hearing of the cause, the appellant is shown to be the former owner of the land in question, or an heir or assignee of the owner, to set aside the order made at the August term of said court 1874, and allow appellant's claim.

On the 1st of October 1875 the case came on again to be heard in the county court, when the court held that Burwell was the owner of the land in question, and that he had tendered to the plaintiff payment of the amount of taxes, &c., which the plaintiff refused to receive, and that he had thereupon paid it to the clerk; and the motion of the plaintiff was overruled; and the previous order of the court admitting the plat and certificate to record, was rescinded.

Upon the trial of this motion Nowlin took two exceptions to the opinion of the court overruling his objection to the admission of evidence. It appears that Burwell, to prove that he was the assignee of the owner, of the land, offered in evidence a deed bearing date June 20th, 1849, from Thomas H. Bayles, as attorney in fact for Lucinda A. Barker, to David W. Smyth, conveying the land in question to said Smyth. 886 *And he deduced the title by regular conveyances from Smyth to himself; but the power of attorney under which Bayles purported to act was not produced, nor was there evidence in relation to it.

Upon the application of Nowlin the judge of the circuit court awarded a *supersedeas* to this judgment; but when the case came on to be heard on the 4th of April 1876, the judgment of the county court was affirmed. And thereupon Nowlin applied to this court for a *supersedeas;* which was awarded.

A. M. Lybrook, for the appellant.

J. E. Penn, for the appellee.

STAPLES, J., delivered the opinion of the court.

The court is of opinion, that the order of

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the county court entered at the August term, 1874, directing the plat and certificate of survey presented by the appellant Spencer F. Nowlin, to be recorded, is plainly right. The bill of exceptions show that the appellee William A. Burwell was the claimant of the legal title to the tract of three hundred and seventy-two acres—the subject of controversy—but it does not show that he was the owner of said land, or that he was the heir or assignee of such owner, or that he had a right to charge such land with the payment of a debt. The judgment of the circuit court reversing the said order of the county court, was based upon the ground that evidence should have been admitted by the latter court to show that the said William A. Burwell was the owner of the land in question, or an heir or assignee of such owner.

The bill of exceptions does not show 887 that the said *Burwell offered any such evidence. It does not appear that the county court refused to hear it. No complaint was made of such alleged refusal. The petition for an appeal or writ of error proceeded solely upon the assumption that no deed having been made to the purchaser within two years from the date of sale, the said Burwell, as the mere claimant of the legal title, had the right to redeem the land by paying the taxes in arrear and legal charges thereon; that he had made a proper tender, which being refused, he had thereupon paid to the clerk a sufficient amount to effect a redemption; and that the court erred in permitting the recordation of the plat and certificate *after* proof of *these facts*. This is the only error complained of, and the only one that could arise on the bill of exceptions. It is apparent therefore that the circuit court reversed the judgment of the county court, which was plainly right in the case as presented to that court, upon grounds of error which were not assigned as such, and which were not presented in any form by the record.

The court is further of opinion, that the judgment of the county court entered at the October term, 1875, rescinding the previous order admitting said plat and certificate to record, is erroneous. The circuit court in its judgment of reversal just alluded to, had remanded the cause, with instructions, "that if on the hearing of the same, the appellee Burwell is shown to be the former owner of the land, or his heirs or assignee, the county court should set aside the order made at the August term, 1874, and allow appellant's claim. When the cause came on to be tried in the county court at the October term, 1875, the appellant, Burwell, produced in evidence regular deeds of conveyance by which he connected himself with one Thomas 888 H. *Bayles. Bayles had conveyed the land professionally as agent and attorney in fact of Lucinda A. Barker, in whose name the land was assessed and sold as delinquent. But no deed or power of attorney was produced establishing such agency; nor is it pretended that any evidence was adduced showing that Bayles had the shadow of claim or interest in the land, or authority to sell and convey it. And yet the county court admitted said deeds as proof of title in Burwell, and rescinded its previous order for the recordation of the plat and certificate; and upon appeal this judgment was affirmed by the circuit court. And thus it is upon a proceeding of the most summary character, in the absence of an essential link in his chain of title, Burwell is adjudged to be the owner of the land, his right to redeem, and the validity of his redemption adjudicated, and Nowlin's title or claim under his purchase declared to be worthless. Such certainty, is the effect of these judgments, for it is manifest that without the recordation of the plat and certificate of survey, the clerk can make no proper deed to the purchaser.

The court is further of opinion that said judgments of the county and circuit courts are erroneous upon another ground. The 18th and 19th sections of chapter 38, Code of 1873, provide that the purchaser of a tract of land in any county, sold for taxes and not redeemed within two years, shall have the quantity surveyed and laid off at his expense by the surveyor of the county. The said survey to commence on either of the lines of the tract or lot at the option of the purchaser, so as not to include the improvements on the same, if it can be avoided, and to be in one body, the length whereof shall not be more than double the breadth, where that is practicable. When the entire tract is sold, the purchaser shall have a re- 889 port made *by the surveyor, showing the metes and bounds of the tract, the names of the adjoining owners, and giving such further description of the land sold as will identify the same. In either case, if the court finds the plat and certificate, or report, in conformity with the requirements of the section, it shall have the same recorded. Under the 20th section, the clerk, in making the deed to the purchaser, is required to refer to the plat and certificate, if it be of a part of the tract, or to the surveyor's report, if it be of an entire tract.

It is obvious, from the most cursory examination of these provisions, the sole design of the enactment is to furnish record evidence of the identity of the land sold—not only for the information of the former owner and all others interested, but for the guidance of the clerk in making the deed. It could never have been intended, in a proceeding of a character so summary, to adjudicate all the questions arising upon delinquent land sales. These questions, as our reports fully attest, are of the most complicated nature—questions as to the regularity of the proceedings under which the sale is made, and of the sale itself, whether the taxes are due, whether the land is delinquent, whether the person claiming the right to redeem is authorized so to do, whether he has tended the proper amount—and numerous others constantly arising in this class of cases. If, when the purchaser offers the plat and certificate for recordation, the former owner may appear and object upon one ground affecting the right, it is obvious he

may do so upon any other ground which would show the purchaser has no title, either for defects and irregularities in the sale, or because the owner has exercised his right of redemption.

It is not the province of the county 890 court to inquire *into these matters. Its sole duty is to consider whether the plat and certificate, or the report of the surveyor, as the case may be, is in conformity to the requirements of the law in respect to the description and identity of the land. It is no concern of the court whether the sale is regular, whether the purchaser has acquired a title, or whether the owner has properly exercised his right of redemption. The proceeding is *ex parte* in its character, and does not in the least affect the rights of third persons. The owner of the land, or the person entitled to redeem, cannot be prejudiced by the recordation of the plat and certificate, or any judgment of the court thereon. As to him, the proceeding is *res inter alios acta.* The court therefore erred in permitting the appellee Burwell to be heard in opposition to the motion to record the plat and certificate, upon the grounds mentioned.

The judgment of the circuit court and of the county court, except the judgment of the August term 1874, are therefore erroneous and must be reversed and annulled. The judgment or order of the county court at the August term 1874 is affirmed, but without prejudice to the rights of the appellee Burwell to assert in any proper form his claim or title, whatever it may be, to the land in controversy.

JUDGMENT REVERSED.

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891 *Scott and Boyd v. Shelor.

July Term, 1877, Wytheville.

Absent, ANDERSON, J.

1. **Malicious Prosecution — Constituent Parts.***—In an action for malicious prosecution, to warrant a verdict and judgment for damages, it must be proved on the part of the plaintiff: First, that the prosecution alleged in the declaration has been set on foot and conducted to its termination, and that it ended in the final acquittal and discharge of the plaintiff. Second, that it was instigated or procured by the co-operation of the defendant. Third, that it was without probable cause. Fourth, that it was malicious.
2. **Same—Want of Probable Cause—Burden of Proof.**—Although the allegation of want of probable cause in the declaration, in actions of this kind is negative in its character, yet it must be proved, or the plaintiff must fail.
3. **Same — Probable Cause — Definition.** — Probable cause, in a criminal prosecution, is "the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted."
4. **Same—Malice—Want of Probable Cause.**—Both malice and the want of probable cause must concur and be proved. Malice may be inferred from the want of probable cause, but the latter can never be inferred from the plainest malice.
5. **Same—What Is Malice.**—In a legal sense, any unlawful act which is done willfully and purposely, to the injury of another, is as against that person malicious.
6. **Case.**—Circumstances which will maintain an action for malicious prosecution.
7. **Examination of Witnesses—Discretion of Judge.**—The general course of the examination of witnesses is, and must of necessity be, left to the discretion of the trying judge, and the exercise of that discretion will never be interfered with by an appellate court unless it plainly appears that some injustice has been done.
8. **Evidence — Admissibility—Res Gestæ.**—The declarations of a party are not generally admissible as evidence in his own favor, but they are so admissible whenever they form a part 892 *of the *res gestae.* To come within the terms and operation of the rule, the declarations must accompany and explain an act done, which is a fact in issue, or is relevant to the the issue.
9. **Malicious Prosecution—Termination of Cause.**—Although an action for malicious prosecution cannot be maintained, unless the plaintiff has been fully acquitted of the criminal charge, and a *nolle prosequi* is not sufficient; yet the plaintiff is not obliged to prove that he was acquitted by the jury promptly, without hesitation, delay or deliberation; and the evidence of a juror, to show that the deliberation of the jury was caused by their doubt as to the guilt or innocence of the accused, is inadmissible.

This was an action for malicious prosecution in the circuit court of Floyd county, brought by William B. Shelor against Matthew Scott and James M. Boyd. There was a verdict and judgment in favor of the plaintiff for one thousand dollars. The defendants thereupon applied to this court for a writ of error and *supersedeas;* which was awarded. The case is fully stated by JUDGE BURKS in his opinion.

John E. Penn and *J. N. Liggett,* for the appellants.

Taylor & Phlegar, Shelton and *Junkin,* for the appellee.

BURKS, J. This is a writ of error awarded the plaintiffs in error to a judgment of the circuit court of Floyd county, rendered against them on behalf of the defendant in error in an action for malicious prosecution.

There was a general demurrer to the declaration, which was overruled, and the parties went to trial before a jury, on issue joined on the plea of "not guilty," which resulted in a verdict for the plaintiff (defendant in error here) of $1,000, as award for damages; upon which verdict, and in accordance therewith, the judgment aforesaid was rendered.

In the course of the trial the defend- 893 ants tendered *four bills of exceptions

*Malicious Prosecution — Constituent Parts—Evidence of Probable Cause.—See Womack v. Circle, 29 Gratt. 192; Womack v. Circle, 32 Gratt. 324, and *note*; Forbes & Allers v. Hagman, 75 Va. 168; Jones v. Finch, 84 Va. 204; Vinal v. Core, 18 W. Va. 1; Hale v. Boylen, 22 W. Va. 234.

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to the rulings of the court, which were signed, sealed, and made a part of the record.

The first three are to the exclusion by the court of certain evidence offered by the defendants, and the fourth and last is to the refusal of the court to set aside the verdict of the jury and grant them a new trial, on a motion based upon the ground that the verdict was contrary to the law and the evidence.

There are six counts in the declaration. The last five substantially allege that the defendants maliciously and without probable cause procured the plaintiff to be charged with and prosecuted for felony, in that he did feloniously pass, utter, &c., a false, forged and counterfeited United States treasury note of the denomination of fifty dollars, well knowing the said note to be false, forged and counterfeited, with intent to defraud, &c., setting out the complaint, warrant, arrest thereunder, examination, indictment, trial, imprisonment during the prosecution, verdict of acquittal by the jury, and final discharge by the Federal court, in which the trial was had; and further alleging that heavy and enormous costs had been incurred by the plaintiff in defence of the prosecution, &c.

The first count differed from the other five only in alleging that the grievances complained of were directly committed by defendants, instead of being instigated and procured by them as in the other counts alleged.

The declaration seems to have been carefully and skillfully drawn, and I think the demurrer, which was not argued before this court at all, was properly overruled.

On the trial before the jury, the
894 plaintiff introduced *as a witness one John Walsh, a United States commissioner for the western district of Virginia, who testified that he issued the warrant for the arrest of the plaintiff on the sworn complaint of one George E. Smith; that the plaintiff was arrested on that warrant, examined and recognized by him to answer an indictment in the United States court; and that he had retained the complaint and sent the warrant, with a statement of the evidence of the witnesses who testified on the examination, to the clerk of the United States court at Abingdon.

"On cross-examination (of Walsh), the defendants asked him who were the witnesses before him. He replied, J. M. Boyd and Mr. Scott (the defendants). * * * Witness said he took Boyd's testimony in writing, which he filed in the papers in the case. Defendants then showed witness a paper taken from the files in the case, and asked him if that was the paper referred to. He said it was. Thereupon the defendants' counsel asked the witness, 'What was the conduct of J. M. Boyd (who was one of the defendants) before him, and whether he manifested any anxiety on the subject of the prosecution?'" The plaintiff, by his counsel, objected to the answering of this question by this witness. The court sustained the objection, and gave as a reason for doing so, "that it was not a proper question to be asked by the defendants and have answered on cross-examination." To this ruling the defendant's first bill of exceptions was tendered and made a part of the record.

Evidently the court did not exclude the answer to the question propounded for the reason that it was incompetent and irrelevant evidence, but because the question was, in the opinion of the court, asked at an improper stage of the examination. The paper,
895 which *had been shown to the witness for the purpose of identifying it, had not been offered in evidence. It contained what purported to be the testimony of the defendants as taken down by the witness on the examination of the plaintiff before him. The defendants, after asking whether the defendants testified at the examination, then propounded the question objected to. It seems to me they should have waited until the testimony contained in the paper had been offered by the plaintiff. The demeanor of the defendant Boyd, if a proper subject of inquiry at all, would have been more appropriately inquired into after it had been shown what his testimony was. At all events, as I construe the bill of exceptions, the answer was only excluded because the question was out of time. It appears, from the evidence set out in the fourth bill of exceptions, that the testimony of the defendant, Boyd, before the commissioner, as contained in the paper referred to, was, at some time during the trial, read in evidence to the jury. No doubt if, after the paper had been so offered and read, the defendants had renewed their question, the answer would have been admitted.

The general course of examination of witnesses in judicial proceedings is, and must of necessity be, for the most part, subject to the discretion of the presiding judge; and the exercise of such discretion will never be controlled or interfered with by an appellate court, unless it plainly appears that some injustice has been done. *Brook* v. *Wilcox*, 11 Gratt. 411.

I do not think that any injustice has been done to the defendants in this matter, and no error has been committed in the ruling complained of.

The defendants' second bill of exceptions states that, on the trial, the plaintiff
896 introduced a witness, *H. Alderman, who testified that he was a deputy marshal, and as such arrested the plaintiff. On cross-examination, the defendants' counsel asked the witness the following question: "When you were on the way to arrest Shelor (the plaintiff), in July 1873, did you see Scott and Boyd (the defendants); and if so, did they or not manifest any anxiety for the prosecution to be carried on?" This question was objected to by the plaintiff's counsel, and the court said that the witness might state the acts and conduct of Scott and Boyd, but not their declarations; and to this refusal of the court to permit the question to be answered, except as qualified by the court, the defendants excepted. It does not appear that the question, as limited by the court, was asked, or any answer given.

The declarations of a party are not, in general, admissible as evidence in his own favor; they are so admissible, however,

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when they are a part of what is called the *res gestæ*. In a late English treatise of great excellence, condensing and illustrating the rules of evidence in admirable style, the author tersely states the rule thus: When any act done by any person is a fact in issue, or is relevant to the issue, the following facts (among others) are relevant—that is to say, all statements made by or to that person accompanying and explaining such act. Stephens' Digest of the Law of Evidence, ch. 2, art. 7, and note 5, art. 3. To come within the terms and operation of the rule, the declarations must accompany and explain an act done, which is a fact in issue or is relevant to the issue. Manifestly the sole object of the question propounded to the witness was to draw from him a narrative statement given by the defendants of something which had previously taken place, or some expression or indication of the present feeling or purpose of the defend-
897 ants *unconnected with any act then done which was a fact in issue or relevant to the issue. Hence, as soon as the declarations were excluded, all inquiry into the acts and conduct of the parties, allowed by the court, as tending, in its opinion, I suppose, to show their then disposition touching the prosecution, was dropped. I think the declarations were properly excluded; and if the court had gone further, and absolutely refused to allow answer to the question, even to a limited extent, I am not prepared to say it would have been error. The prosecution had commenced. The warrant was in the hands of the officer for service, beyond the control of the parties, and no act or declarations of theirs would then be admissible, as it seems to me, when offered as evidence by themselves, to prove that the prosecution then in progress had not been set on foot maliciously and without probable cause. As to *res gestæ*, see further 1 Greenleaf's Ev., § 108, 110; *Haynes* v. *Commonwealth*, (*Virginia Law Journal*, June No., 1877), to be reported in 28 Gratt.

In the further progress of the trial, a witness, Jackson Huff, one of the jury that tried the plaintiff on the indictment, after testifying, without objection, it would seem, that the jury had deliberated from one to two hours on the question of the guilt or innocence of the plaintiff, was thereupon asked by the counsel of the defendants, "if, in considering their verdict, the jury, or he as a juror, took into consideration the rule of law that the prisoner was entitled to the benefit of a reasonable doubt, and if they were induced by said rule of law to render a verdict of not guilty?" The answer to the question, on objection by plaintiff's counsel, was excluded; and the exclusion was the ground of the defendants' third bill of exceptions.

898 *In *Smith v. McDonald*, LORD KENYON is represented as saying, that if the evidence on the indictment was such as to make the jury pause, he would hold it probable cause; but this, of course, must be understood of their doubting on the evidence, where it is legal, and has no reference to the case where the evidence is afterwards shown to be corrupt. 1 Amer. Lead. Cases, 217; 3 Esp. R. 7.

In 1 Hilliard in Torts, ch. 16, § 28, it is said: "It has been held that if the jury in the former trial entertained sufficient doubts upon the evidence to induce them to pause before rendering a verdict of acquittal, this is sufficient evidence of probable cause. (*Smith* v. *McDonald, supra,* and other cases cited.) The principle, however," continues the author, "is usually stated with great qualification. And in late cases it has been distinctly decided that the opinion of the jury on the former trial is not material; and that, although an action cannot be maintained unless the plaintiff has been fully acquitted, and a *nolle prosequi* is not sufficient, the plaintiff is not bound to prove that he was acquited by the jury promptly, without hesitation, delay or deliberation." See cases cited by the author.

If the deliberation of the jury on the former trial is evidence at all of probable cause (which seems very doubtful from these authorities), and that fact may be proved, I should be unwilling to extend the rule so far as to allow enquiry to be made of the jury, or any of their number, as to whether such deliberation was the result of doubt as to the guilt or innocence of the accused. Such evidence, at best, would be most unsatisfactory, and should not be allowed to influence the minds of any jury in determining the question of probable cause. The
899 chief, if not the only object of *introducing the verdict on the former trial, is to show that the prosecution is ended; and if the verdict of acquittal is evidence at all of the want of probable cause, it must be very slight and inconsiderable. I do not think any error was committed by the circuit court in refusing to allow an answer to be given to the question put to the witness.

This brings me to the fourth and last bill of exceptions taken by the defendants to the refusal of the court to set aside the verdict of the jury and grant them a new trial on their motion, based on the ground that the verdict was against the law and the evidence.

To have warranted the verdict of the jury, which was jointly against the defendants, it must have been proved on the part of the plaintiff—

First. That the prosecution alleged in the declaration had been set on foot and conducted to its termination, and that it ended in the final acquittal and discharge of the plaintiff.

Second. That it was instigated and procured by the co-operation of the defendants.

Third. That it was without probable cause.

Fourth. That it was malicious.

Upon an examination of the bill of exceptions, it is quite plain that the judge, for the most part, certifies the evidence given on the trial, not the facts proved by the evidence. The bill, it is true, purports to certify what was "proven" in detail, and concludes with the statement, "these being all the facts proven," &c.; but a careful scrutiny of the whole bill shows that in many particulars what is certified as "proven" is merely what the witnesses said. Moreover, it distinctly

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appears that the evidence was more or less conflicting on material points. For example, after two witnesses had testified as to
900 statements made by the *defendant Scott, it is certified that "Scott, when he testified, denied the allegations of both of these witnesses."

Considering and treating the bill, therefore, as containing a certificate of the evidence given, rather than of the facts proved, this court will not reverse the judgment of the court below, unless, after rejecting all the parol evidence of the defendants and giving full faith and credit to that of the plaintiff, the decision of the court below still appears to be wrong. *Read's case,* 22 Gratt. 924, 928, 929, and cases there cited.

Applying this rule, rejecting all the parol evidence of the defendants, and giving full faith and credit to the evidence of the plaintiff, does the decision of the court below still appear to be wrong? In other words, were the jury warranted, upon the plaintiff's evidence alone, giving to it full faith and credit, in rendering the verdict which they did render?

First: To maintain the issue joined on his part, it was incumbent on the plaintiff, as before stated, to prove that he had been prosecuted for the offence alleged in the declaration; that the prosecution was ended, and had ended favorably to him. These facts were all proved. There is no dispute about them. He was charged with a felony, in passing a counterfeited United States treasury note of the denomination of fifty dollars, well knowing the same to be counterfeited, with intent to defraud, &c. Upon this charge he was arrested, examined, indicted, tried, acquitted and discharged.

Second: Was this prosecution instigated or produced by the defendants (plaintiffs in error here), and by their co-operation? To warrant the joint verdict, there must have been a joint wrong. The guilt of one
901 only *of the two defendants, however clearly proved, would not have authorized a verdict against both. To support such a verdict, the evidence must have shewn that the two co-operated in the procurement or instigation of the prosecution. Did they instigate the prosecution and did they co-operate in doing so?

The evidence shews, that one George D. Smith, on the 21st day of May, 1873, made a complaint in writing on oath before John Walsh, a commisisoner of the United States for the western district of Virginia, "that William B. Shelor (the plaintiff), of Floyd county, Va., did, on or about the 17th day of May, 1873, or during said month of May, 1873, knowingly and willfully pass upon James M. Boyd (one of the defendants), of Jacksonville, Va., a counterfeit of a U. S. treasury $50 note, receiving therefore its face value." Such is the tenor of the sworn complaint of Smith, which was produced and shewn in evidence. Upon this complainant, thus made, and on the day of its date, Walsh issued a warrant for the arrest of the plaintiff. It was placed in the hands of a deputy marshal of the United States for service. It appears not to have been executed until the 20th July, 1873. The plaintiff, when arrested, was taken before Walsh and examined by him; each of the defendants, who had been summoned for the purpose, appearing and testifying against the plaintiff. The examination resulted in recognizing the plaintiff for his appearance before the district court of the United States, at Abingdon, to answer an indictment; and the prosecution, thus commenced, was conducted to final trial, ending, as before stated, in the plaintiff's acquittal by the jury and discharge by the court.

Why did Smith make this complaint? Was he possessed of any knowledge
902 or reliable information as to *the facts to which he made oath so positively? If so, when, how, from whom, and under what circumstances, did he obtain such knowledge or information? The evidence furnishes the answer to these questions.

I shall, in this connection, refer only to such parts of the evidence as tend to show how and by whom the prosecution was set on foot.

It appears, that Scott & Boyd (the defendants), were merchants and partners, and sold goods at their storehouse in Floyd county. Boyd was the son-in-law of Scott. The plaintiff (Shelor), lived in the same county. In the month of March, 1873, Shelor, in the course of some dealings at the store of Scott & Boyd, the particulars of which will be hereafter noticed in a different connection, passed to Boyd (one of the firm), a fifty dollar treasury note of the United States. This note having been taken by Boyd to Baltimore, and its genuineness there questioned, he informed Shelor of the fact, and Shelor promised to take it back. A short time afterwards, Shelor saw Boyd again, and not having the money with which to take up the note, asked that it be surrendered to him, as he was going to Lynchburg and would have the note examined there, and he would give Boyd his due bill for it and pay it on his return from Lynchburg. Boyd refused to do this, and thereupon Shelor became very angry, and used abusive language towards Boyd and the Scott family, telling him (Boyd) that he took the note on his own responsibility—to "crack his whip," &c. This occurred on the 17th day of May. On the very next day, Scott wrote to George W. Henderlite, a United States collector of internal revenue, who resided at Marion, in Smyth county, one hundred miles distant from Floyd Court-house where he (Scott) resided. That letter was not produced
903 on the trial, but according *to the statements of Henderlite and Smith, the former handed it to the latter, and the latter to Walsh, the commissioner, and that was the last seen of it. Henderlite and Smith say that it was a letter on business. Smith says, that "in the latter part (of the letter), in a few lines, Matthew Scott mentions Wm. B. Shelor having passed a fifty dollar counterfeit note in the store of Scott & Boyd, upon one of the firm of their clerk." Henderlite says it was "a letter

from Matthew Scott on business connected with the office, in which he complained of persons passing counterfeit money," and that he referred the letter to Smith, who was his deputy, "to have the matter investigated." Henderlite and Smith both say that the letter did not recommend or suggest any prosecution against Shelor. Upon the information contained in this letter, Smith says he based the complainant which he made, and to which he made oath. It is to be observed that this letter was written, as before stated, on the 18th of May. The distance it had to travel was one hundred miles. It probably did not reach Henderlite under a day or two, and Smith's complaint and the warrant were both dated on the 21st of May, so that Smith had very little time "to have the matter investigated." indeed, the only investigation it seems he proposed was upon a warrant on a charge of felony before a United States commissioner, based solely on the information contained in Scott's letter. It was open to the observation of the jury that this letter, which was a most important piece of evidence, was not produced, and as it was the groundwork of the prosecution it ought to have been carefully preserved. Nor could it have escaped the scrutiny of the jury that the written 904 complaint of *Smith bears internal evidence of the fact that Scott's letter, which gave him the only information he had, must have contained more information than the witnesses seem to have remembered, else how was it that Smith was enabled to swear that the counterfeit note was passed "on the 17th of May," or sometime during the month of May? It will be remembered that the 17th of May was the day on which Shelor abused Boyd and the Scott family, and told Boyd to "crack his whip." Smith knew nothing of this. Scott wrote the next day, and this date (17th of May) must have been referred to in Scott's letter in connection with the note, which he said in his letter Shelor had passed to Boyd. Again, Smith in his complaint swears positively that Shelor knew the note was a counterfeit at the time he passed it to Boyd. He says the only information he had, and on which he based the complainant, was obtained from Scott's letter. Now it is perfectly apparent that Scott must have in some way referred in his letter to what passed between Shelor and Boyd on the 17th of May, for that date mentioned in the complaint shows it. Having stated, as he must have done, what occurred on that day, or some part of what occurred, is it an unreasonable inference that Scott gave in his letter the same account which Boyd gave in his testimony before the United States commissioner? Boyd then stated that Shelor, on the 17th of May said that he knew the note was counterfeit when he let him (Boyd) have it. It was moreover proved in the case that Scott had said "Shelor had abused his family about that note; that he, Scott, had written to a revenue officer about it, and he reckoned he never would hear anything more about that note that Shelor had been arrested and 905 would be *tried; that when Boyd told him (Scott) about Shelor cursing him, he told Boyd to let that alone, he (Scott) would attend to that."

It was further proved that "on the trial at Abingdon, Boyd admitted that he told Captain Shelton in a private conversation, that he would not have set the prosecution on foot if Shelor had not abused the Scott family. It was also proved that he made the same declaration to other persons that he made to Shelton." Now here is an unqualified admission by Boyd that he set the prosecution on foot because Shelor abused the Scott family; and the evidence as we have seen, was quite sufficient to show that Scott, operated upon by the same motives, cooperated with his son-in-law.

Third. Was the prosecution without probable cause?

Although the allegation of want of probable cause in the declaration in actions for malicious prosecution is negative in its character, yet it must be proved, or the plaintiff must fail. This rule, based upon considerations of public policy, is well settled, and need not be dwelt upon.

MR. JUSTICE WASHINGTON, in the case of *Munns* v. *Dupont &c.*, 3 Wash., C. C. 31, 1 Amer. Lead. Cases 200, defines probable cause, in a case of criminal prosecution, as follows: "A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offence with which he is charged." This is said to be one of the best definitions ever given, and has been frequently applied. 1 Amer. Lead. Cases 213; *Spengler* v. *Davy*, 15 Gratt. 381, 388. It has been held, in some cases, that probable cause has reference rather to the state of fact as it respects the person prosecuted, than to the degree of knowledge of that fact 906 in the party prosecuting; *and so it seems to have been stated by JUDGE TUCKER, in *Mowry* v. *Miller*, 3 Leigh 561. This proposition, however, is combatted by JUDGE DANIEL in his opinion in *Spengler* v. *Davy*, *supra*, in which opinion the other judges concurred. The true doctrine, as it seems to me, and that which is supported by the greatest weight of authority, is declared by the supreme court of United States in the case of *Wheeler* v. *Nesbitt*, 24 How. U. S. R. 544, where it is held that "probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted."

The like doctrine is elsewhere stated in somewhat different terms thus: "Probable cause for instituting a prosecution, is held to be such a state of facts known to and influencing the prosecutor, as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice, upon the facts within the party's knowledge, to believe or entertain an honest and strong suspicion that the person

accused is guilty." 1 Hilliard on Torts, ch. 16, § 18, and cases there cited.

I proceed to inquire whether the defendants, Scott & Boyd, at the time they instigated or procured the prosecution of the plaintiff for the offence of which he was charged, believed the plaintiff to be guilty, and whether such belief was warranted by the facts and circumstances then within their knowledge, taking them to be men of ordinary caution, prudence and judgment?

The evidence which can be regarded by this court, and to which full faith and credit must be given, shows that some time **907** in March 1873 the plaintiff *Shelor went "to Floyd courthouse and purchased a small article at Scott & Boyd's store, and offered to pay for it with a two-dollar note. In getting out his money, Boyd saw Shelor have a fifty-dollar note, and proposed to sell him goods for it or to give him small change, as he, Boyd, was about to go to Baltimore to buy goods. Shelor said he wanted no goods, and said the note had been disputed, and asked Boyd what he thought of it. Boyd examined it, and said he thought it was good. He then gave the note to Boyd and received small notes for it. Some weeks afterwards, Boyd sent a message to Shelor that the note had been disputed in Baltimore. He took it to four banks; the first three would not receive or condemn it, but it was pronounced counterfeit by the fourth. Shelor came up and said, 'I will take it back.' Boyd said, 'any time within two or three weeks will do.' Shelor said, that was more time than he wanted. A short time thereafter, on the 17th day of May, Shelor came to Boyd's store and called him out for a private conversation, in which he told Boyd he was going to Lynchburg with his tobacco next week, and he wanted to take the note and have it examined, and did not have the money, but would give his due bill for it, and when he came back from Lynchburg would bring the money. Boyd declined to give up the note in exchange for the due bill. Shelor started away; but immediately becoming very angry, returned and said, 'I have asked you to take my due bill; you refuse to credit me; you must think I am insolvent; but (with an oath here omitted) I can buy you and the whole Scott family. You took the note on your own responsibility; now (oath used omitted) crack your whip.'" The foregoing evidence is from the bill of exceptions.

In this connection, it is stated in the **908** bill that "the *plaintiff assigned as a reason for becoming angry that it occurred to him, as he started off, that Boyd intended to prosecute him and do what he has done;" that "considerable abuse was then used by Shelor towards Boyd and Scott." The facts and circumstances established by this evidence, together with the fact that Shelor resided in the same county with the defendants, had been long well-known to them and admitted by Scott to have been a man of reputed honesty, were all the facts and circumstances shown by such of the evidence as can be considered by this court, within the knowledge of the defendants, affecting the question of probable cause for the prosecution. It would be a waste of time to argue to show that they fall far short of proof of probable cause. No man of ordinary caution and prudence would be warranted in the conclusion of guilt based upon upon such facts and circumstances. They would indeed seem scarcely sufficient to raise a slight suspicion. Nor would it help the defendants if in deciding this cause we were to take into consideration all the facts and circumstances proved by the evidence, or which the evidence tends to prove, touching the question of probable cause, supposing they had all come to the knowledge of the defendants before the prosecution was commenced.

Shelor acquired the treasury note in 1872 from some persons in Franklin county, as part of the purchase money for land sold to them. In February 1873 he gave it to W. H. Frances, his son-in-law and partner in business, to be used in purchase of goods in Baltimore. It was passed by Frances to some merchants in Baltimore in payment for goods. The merchants returned the note to Frances "as doubted, but they would not condemn it." It was then examined by two merchants in Christiansburg, good **909** judges of *money, one of whom had been a teller in a bank, and they pronounced the note genuine. Afterwards, Shelor offered to pass it to a saddler at Franklin Court-house in the purchase of a saddle; and a question being raised about its genuineness, it was submitted to the examination of Greer, the cashier of a bank at Franklin Court-house, who pronounced it good. When Shelor passed the note to Boyd, he told him the note had been disputed, but did not tell him where or when it had been disputed. Scott had information at the time he wrote the letter to the revenue officer that Shelor had offered to pass the note at Franklin Court-house, but he did not regard the information as reliable. Now all these facts, treating them as proved, and assuming, contrary to the fact, that they were in the knowledge of the defendants when they commenced the prosecution, did not of themselves, nor in connection with what was actually known to the defendants, furnish any reasonable ground of suspicion against Shelor. A prosecution based upon such facts would be a prosecution without probable cause.

Fourth. Was the prosecution malicious?

To maintain his action, the plaintiff must not only prove want of probable cause, but malice also. The two must concur. Both must be proved. Malice may be inferred from the want of probable cause, but the latter can never be inferred from even the plainest malice. In a legal sense, any unlawful act which is done willfully and purposely, to the injury of another, is as against that person malicious. 1 Hillard on Torts, ch. 16, § 24. The improper motive, or want of proper motive, inferrable from a wrongful act, based on no reasonable ground, constitutes of itself all the malice deemed assential in law to the maintenance of

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910 *the action for malicious prosecution. *Spengler* v. *Davy*, 15 Gratt. 381.

It is impossible to read the evidence in this case without coming to the conclusion that the motive for the prosecution sprang from the abusive language used by Shelor on the 17th of May. Moved by resentment, engendered by this language, Scott wrote the letter to the revenue officer the next day. Indeed, it was proved that Boyd admitted "that he would not have set the prosecution on foot if Shelor had not abused the Scott family;" and he was heard further to say, after the prosecution commenced, "that he did not believe Colonel Shelor knew the note was counterfeit when he passed it." Again, when Boyd testified before commissioner Walsh, on the examination of the plaintiff, touching the felony with which he was charged, he represented Shelor as having said to him on the 17th day of May that he (Shelor) knew that the note was counterfeit when he let him (Boyd) have it. And yet the language employed by Shelor, on the 17th of May, as proved on the trial of this case, contains no such admission as Boyd imputed to Shelor on the examination before the commissioner. From this evidence, and from other circumstances proved in the case, it is manifest that the prosecution proceeded from a desire and purpose on the part of the defendants to injure the plaintiff, and was therefore malicious.

Upon the whole matter, I conclude that the plaintiff proved his case, and was entitled to a verdict. He was maliciously, and without probable cause, arrested and prosecuted on a false charge of felony. He was taken from his home and his family, carried to a distant place, and there tried by a 911 jury of strangers; in *the course of the trial was imprisoned; and besides the ignominy and annoyance to which he was subjected, it was proved that he incurred costs to the amount of six hundred dollars in defence of the prosecution. A special jury, selected under the law, assessed his damages at $1,000. The learned judge who presided at the trial found no fault with the verdict, nor do I find any.

I am therefore of opinion to affirm the judgment of the circuit court with damages.

JUDGMENT AFFIRMED.

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912 *Fay v. The Commonwealth.

January Term, 1877, Richmond.

1. **Criminal Law — Larceny — False Pretences.***—F is indicted for the larceny of $208 of notes of United States currency, the property of R. The proofs refer to F's obtaining money from R by false pretences. To sustain the prosecution the commonwealth must prove every fact which would be required to be alleged in an indictment for obtaining money on false pretences.

2. **Same—Indictment—Allegations.**—In such an indictment it would be a material allegation that the money was obtained by the false pretence alleged, and therefore it is necessary to be proved under the indictment for larceny in order to a conviction.

3. **Same—False Pretences.**—The false pretences, either with or without other causes, must have had a decisive influence upon the mind of the owner, so that without their weight he would not have parted with his property.

4. **Same—Same—Intent.**—Unless the selling of the property by F to R was by false pretence, with intent to defraud the buyer, the case is not within the statute. Therefore the fraudulent intent must have existed at the time the false pretences were made, by which the money was obtained.

5. **Same—Proofs.**—In the absence of proof, that such money as is charged in the indictment to have been stolen was received by the prisoner, he cannot be properly convicted.

In September, 1876, William Fay was indicted in the hustings court of the city of Richmond, for stealing divers notes of the United States currency amounting to two hundred and eight dollars, the property of Nelson Randolph. He was tried at the October term of the court, and was found guilty, and the term of his imprisonment in the penitentiary was fixed by the jury at three years. The prisoner then moved the court for a new trial, which was refused by 913 the court; *and sentence according to the verdict was pased upon him.

The prisoner excepted to the opinion of the court overruling his motion for a new trial; and the facts as shown by the bill of exceptions were as follows:

Sometime in the spring of 1873, at Seabrook's warehouse, the prisoner had an interview with one George E. Bowden, the owner of two lots of land, in which Bowden expressed his willingness to sell the two lots together for three hundred dollars, but declared he would not sell them separately. In the latter part of January, 1874, the prisoner sold one of these lots to Nelson Randolph, a colored man, for two hundred dollars, telling him that he owned them; and Randolph paid him fifty dollars in cash, and agreed to pay the residue in monthly installments of fifteen dollars each. About the 8th or 9th of February, 1864, the prisoner called on Bowden and

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*__Criminal Law — Indictment — Larceny—Embezzlement.__—The principal case is cited in Pitsnogle's Case, 91 Va. 811, to support the proposition that on an indictment for larceny, proof of embezzlement is sufficient to sustain the charge. See also, Shinn's Case, 32 Gratt. 899, and *note*. In State v. Halida, 28 W. Va. 503, the court says: "Both counts in the indictment here are good as counts for simple larceny. It is therefore not important whether or not the first count is also good as an indictment for obtaining the mule under false pretences, because under the decision above cited, all the evidence which could be introduced to sustain an indictment for obtaining the mule by false pretences can also be introduced in support of an indictment for simple larceny, the legal offense as well as the punishment in both cases being precisely the same," citing the principal case and Dull's Case, 25 Gratt. 965. See also, Anable's Case, 24 Gratt. 563; Leftwich's Case, 20 Gratt. 716; Dowdy's Case, 9 Gratt. 727.

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said, "I have come for those lots;" and Bowden replied, "You can have them." The prisoner asked on what terms as to time, the amount being mutually understood, and nothing being said about it at that time; and it was agreed that fifty dollars of the amount (including the two lots) should be paid cash, and the residue in three notes at eight, sixteen, and twenty-four months. The prisoner paid the cash and executed the notes, which, at prisoner's request, were dated on the 1st of February, as was the contract, the actual time of contract being the 9th or 10th of February, whereupon a paper was drawn up and delivered by Bowden to Fay, setting forth the contract, which paper was as follows:

914 *Richmond, Va., February 1st, 1874.

This 1st day of February, 1874, between Geo. E. Bowden, of the city of Richmond, of the first part, and Wm. Fay, of the said city, of the second part, doth agree, in consideration of the sum of three hundred dollars, payable one-fourth cash and the balance in three equal instalments of eight, sixteen and twenty-four months (with interest added) respectively, after date, to convey to Wm. Fay, of the second part, or his heirs or assigns, certain real property in the county of Henrico, state of Virginia, as follows: all that certain lot, piece or parcel of land lying and being in the county of Henrico, near Union hill, on the west side of 25th street, between R. and S. streets, fronting sixty feet on 25th street, running back between parallel lines one hundred and twenty-five feet to an alley in common fourteen feet, designated as lots Nos. six and seven in square 121 of Adam's plan, being the same land conveyed to the said George E. Bowden, of the first part, by deed dated July 13th, 1868. And we do agree that the title to the above property shall be retained until all the purchase money is paid.

GEO. E. BOWDEN,
WILLIAM FAY.

It was further proved, that on the delivery of this paper, the prisoner said to Bowden, "I have made one hundred dollars today, for I have sold those lots to two colored men;" and asked that the deed should not be made until they paid, and then made to them, to save expense; that Bowden replied, "I don't care, as I have got by price;" that the prisoner thenceforward paid the taxes on the lots, Bowden declining to pay when the bills were presented to him.

915 and sending *the collectors to Fay, the prisoner, telling them that Fay had bought them; the taxes on Randolph's lot being charged to him, and paid by him to Fay in the first payment to Fay; that when the prisoner's first note fell due he failed to pay it, saying the negroes had not paid him; that he paid it eventually, but in instalments.

And that he failed to pay the balance, continuing his excuse for failure to pay on the same ground, and did not pay at all; the balance remaining unpaid until paid by the negro, Randolph, in April 1876, to Bowden, in order to get his title; and that Randolph never knew or was informed that the property did not belong to Fay until he asked for his deed.

It was further proved that shortly after the last payment on said note, Fay went into bankruptcy, and has never paid the other notes.

It was further proved, that upon Nelson Randolph completing his payments as agreed, Fay gave him the following order on Bowden, to wit:

April 3, '76.

Mr. Bowden:

Sir,—This is to certify that Nelson Randolph has paid all except $1.00 for one lot of land on 25 st., in sq. 121, fronting on 25 st. 30 ft., running back 125 ft., it being the south lot. Is entitled to his deed as soon as he pays the balance and I settle with you.

WM. FAY.

That Randolph went to see Bowden with Fay's order, but that Bowden refused to give Randolph his deed unless the balance of one hundred and fifty dollars due on that lot by Fay was paid to him, and

916 *Fay himself, a few days after, went with Randolph to see Bowden, with the same result, and that Randolph finally paid his balance, amounting to eighty-seven dollars of principal and interest, when Bowden executed his deed to Randolph, the prisoner telling him that was the best thing to do, and promising to reimburse him; which he had not done.

It was further proved that the prisoner had lived in the city for above twenty years, and was a man of good repute.

Upon the application of the prisoner, a writ of error and *supersedeas* was awarded by this court.

Crump, Young and *Keiley*, for the prisoner.

The Attorney General, for the commonwealth.

ANDERSON, J., delivered the opinion of the court.

This is a prosecution in fact for obtaining money on false pretenses, which is made larceny by the statute; and the indictment is for larceny.

It is a reasonable proposition, that upon this indictment it is necessary for the commonwealth to prove every fact which would be required to be alleged in an indictment for obtaining money on false pretences. And in such indictment it would be a material allegation that the money was obtained by the false pretence alleged, and therefore was necessary to be proved in this indictment in order to a conviction. The false pretence must be the instrument of the cheat. Bishop on Criminal Law, § 437. The pretence need not have been the only inducement. If, operating either alone or with other causes, it had a controlling influence, so that but for it the person to whom

917 it was addressed *would not have yielded, it is sufficient. In a note to the above section the author says: In *Commonwealth* v. *Drew*, 19 Pick. R. 179, MORTON,

J., stated the true doctrine thus: "that the false pretences, either with or without the co-operation of other causes, had a decisive influence upon the mind of the owner, so that without their weight he would not have parted with his property." In *People* v. *Haynes*, 11 Wend. R. 557, 14 Wend. 546, CHANCELLOR WALWORTH employed much the same language, saying: "It is not necessary to constitute the offence of obtaining goods by false pretences, that the owner should have been induced to part with his property solely and entirely by pretences which were false; but if the jury are satisfied that the pretenses proved to have been false and fraudulent were a part of the moving causes which induced the owner to part with his property, and that the defendant would not have obtained the goods if the false pretences had not been superadded to statements which may have been true, or to other circumstances having a partial influence upon the mind of the owner, they will be justified in finding the defendant guilty of the offence charged, within the letter as well as the spirit of the statute on the subject." Other inducements may have combined with the false pretences to induce the owner to part with his property; but it must appear that but for the false pretences the owner would not have parted with his property—that they had the controlling, prevailing influence. *Anable's case*, 24 Gratt. 563, 567.

The only proof of any false pretence in this case, or that the prisoner made any statement that was not strictly true is, that he said he was the owner of the lots. It appears from the certificate of facts that, in the spring of 1873, the prisoner had an interview
918 with *George E. Bowden, the owner of two lots of land, in which Bowden expressed his willingness to sell the two lots together for $300, but declared that he would not sell them separately; and that afterwards, in the latter part of January 1874, the prisoner sold one of them to Nelson Randolph, a colored man, for $200, telling him he owned them; that Randolph paid him fifty dollars in cash, and agreed to pay the balance in monthly instalments of fifteen dollars each. It is contended for the commonwealth, that "telling him that he was the owner of the lot" was a false pretence. But it is not proved that he, Randolph, was influenced by that declaration to make the purchase, and that he would not have purchased and made the cash payments but for that declaration of the prisoner, nor can it be inferred. It is rather to be presumed that Randolph desiring to have the lot would have accepted the offer of the prisoner if he had said nothing to him about the ownership, as he made no inquiry of him about it, so far as this record shows. It does not appear that the declaration made by the prisoner was made in response to an inquiry made by Randolph, but seems to have been incidentally mentioned by the prisoner. This defect in the proof, if it had been in the allegations of an indictment for obtaining money on false pretences, would have been fatal on demurrer, and it would seem ought to avail the prisoner as effectually in this proceeding. The court is of opinion, therefore, that upon this ground the verdict was contrary to the law and the evidence, and ought to have been set aside.

The court is further of opinion, that unless the selling was by false pretence, *with intent to defraud the buyer*, the case is not within the statute. It follows that the fraudulent intent must have existed at the time
919 the *false pretences were made, by which the money was obtained. If there was an intention by the prisoner to defraud Randolph, he could not have intended, when he sold him the lot, and received fifty dollars in part of the price, ever to pass to him title for the same. But the facts as certified by the court show the contrary. It is a fair inference from them that he had previously been in treaty with Bowden for the purchase of the lots, and ascertained that he could purchase them together for three hundred dollars, and was well satisfied that all that was necessary for him to do was to accept Bowden's offer, and the lots were his; and finding that he could sell each lot for two hundred dollars, and make a handsome speculation, he determined to take them at Bowden's offer, and consider them as virtually his. It is evident that he had no purpose to cheat Randolph by inveigling him to pay him his money for property which he had no right to sell him, and for which he could not and did not intend to make him a title. This is shown by the fact, that a few days after the sale to Randolph he went to Bowden and completed the contract of purchase with him, paying him in cash fifty dollars, the money or the amount he had received from Randolph, and executing his notes for the deferred payments, and entering into articles of agreement with him, setting out the terms of the sale and purchase, informing him that he had sold each of the lots for two hundred dollars, at an advance of one hundred dollars on the price he was to pay him for them, and requesting him, when the purchase money was paid, to convey the lots respectively to his vendees. By this conduct he showed a *bona fide* intention that Randolph should get what he sold him, and for which he had received the cash payment, and conclusively repels the idea of an intent to cheat or defraud him in
920 *the sale. If in his subsequent dealings with him there was evidence to show that he had changed his purpose, and sought to cheat and defraud him, which we think there is not, it could not make the previous act fraudulent and criminal, which was *bona fide* and lawful. The payments which he afterwards received from Randolph, though in small sums, he ought to have turned over to Bowden until he had secured title to Randolph, and to have run no risk of not being able to make the payments to Bowden when they fell due. But it would be a harsh judgment to say that his not doing so evidenced an intention to cheat and defraud Randolph. It is more probable, and it is more just to conclude, that he calculated upon being able, and *bona fide* intended to make the payments to Bowden when they

fell due from other sources, in which he was disappointed by misfortunes, which reduced him to bankruptcy; and that his failure to fulfil his contract, and to secure Randolph's title was, though censurable, rather his misfortune than a crime. But he had reduced the amount due on Randolph's lot to eighty-seven dollars, which Randolph paid to Bowden, and received his deed with the approval of the prisoner, who though discharged from his legal liability by the act of bankruptcy, revived it by his promise to refund the amount to Randolph. The court is clearly of opinion that the evidence is wholly insufficient to establish the fraudulent intent, which conclusion is strengthened by the fact that the prisoner has resided in this city for twenty years in good repute.

The indictment charges the larceny of divers notes of the United States currency, for the payment of divers sums of money, in the whole amounting to the sum of $208, the property and notes of Nelson Randolph.

921 The evidence does not show that the prisoner *received from Randolph notes in United States currency. The proof is, that he received fifty dollars in cash, and that Randolph agreed to pay the balance in monthly installments of $15 each. Upon the authority of the case of *Johnson* v. *Commonwealth*, 24 Gratt. 555, the court is of opinion that in the absence of proof that such money as was charged by the indictment to have been stolen was received by the prisoner, the jury was not warranted in finding a verdict against him. Upon the foregoing grounds the court is of opinion to reverse the judgment and to remand the cause.

JUDGMENT REVERSED.

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922 *Hoback v. The Commonwealth.

January Term, 1877, Richmond.

Criminal Law—Verdict—Indictment.* — On an indictment, under ch. 202, § 29, of the Code of 1873, of H, for that he maliciously and of his malice aforethought did shoot one S, the jury returned their verdict: "We, the jury, find the defendant H not guilty of malicious shooting, as in the within indictment charged, but guilty of unlawful shooting with the intent to maim, disfigure and kill, and fix his term of confinement in the penitentiary at two years." The verdict is to be read in connection with the indictment, and therefore sufficiently indicates the person shot.

The case is stated by MONCURE, P., in his opinion.

Crockett & Blair, for the prisoner.

The Attorney General, for the commonwealth.

MONCURE, P., delivered the opinion of the court.

This is a writ of error to a judgment of the circuit of Wythe county, rendered on the 22d day of September, 1876, convicting the plaintiff in error John Hoback, of felony, and sentencing him therefor to imprisonment in the penitentiary for the term of two years. He was indicted, for that he "feloniously and of his malice aforethought, did shoot one Brown Seagle, with intent him, the said Brown Seagle, to maim, disfigure, disable and kill." On his arraignment he pleaded not guilty, on which plea issue was thereupon joined, which issue was tried by a jury.

After having been duly sworn, and heard the evidence and argument of counsel,

923 the jury returned a *verdict in the following words, viz: "We the jury find the defendant, John Hoback, not guilty of malicious shooting, as in the within indictment charged, but guilty of unlawful shooting, with intent to maim, disfigure, disable and kill, and fix his term of confinement in the state penitentiary at two years." And thereupon the prisoner, by his counsel, gave notice that on to-morrow he would move the court in arrest of judgment, and to set aside the verdict of the jury and grant a new trial, but did not state the grounds of the motion, so far as appears from the record. On the next day the motion was accordingly made, and the court took time to consider the same. Afterwards, and on another day, to wit, on the said 22d day of September, 1876, the court, having considered the motion in arrest of judgment, and to set aside the verdict of the jury and grant a new trial, overruled the said motion; to which ruling of the court, it is stated in the record, that the prisoner by his counsel excepted, though there is no bill of exceptions in the record. Nothing further being alleged in arrest or delay of judgment, the same was then accordingly rendered as aforesaid. To that judgment the prisoner applied to a judge of this court for a writ of error, which was accordingly awarded.

But one error in the judgment is assigned in the petition for a writ of error. After setting out the verdict of the jury, the petitioner proceeds to assign the error in these words: "Now nowhere in this verdict does the jury say *whom* it was that petitioner unlawfully shot, &c. It charges a simple unlawful shooting, but omits all mention of *any person* injured. The first part of the verdict refers to 'within indictment,' but does not name person shot. The latter clause, or 'guilty' clause does not even refer to the

924 'within indictment.' *This verdict was clearly too uncertain in so grave a case, and the court erred in refusing to set it aside and grant a new trial and to arrest the judgment."

It is impossible to misunderstand the verdict of the jury, and if there be any defect in it, it is purely technical, and no doubt would have been at once removed if the attention of the court had been called to it before the discharge of the jury.

But is there even a technical defect? Certainly there is not a substantial defect.

A verdict of a jury in a criminal case

***Criminal Law—Verdict—Indictment.**—In Price's Case, 77 Va. 395, and Wolverton's Case, 75 Va. 911, the principal case is cited for the rule that the verdict is to be read in connection with the indictment. See also, Hairston's Case, 97 Va. 756; State v. Staley, 45 W. Va. 792, 32 S. E. 198.

must always be read in connection with the indictment; and if it be certain, upon reading them together, what is the meaning of the verdict, it is sufficiently certain. The indictment is never copied or repeated in the verdict; nor need the charge be set out in the latter with anything like the same particularity with which it is set out in the former. The verdict refers to and adopts the indictment, in whole or in part, either expressly or by plain implication. When the indictment contains but one charge, of which the accused must be either guilty or not guilty, and the verdict simply is, "we, the jury, find the prisoner guilty," or "not guilty," as the case may be, what, then, is the meaning of the words of the verdict—guilty or not guilty of what? Of course, of the offence charged against him in the indictment. Now, if we take away the indictment, the verdict, taken by itself, will be nonsense. But, taken in connection with the indictment, as it always is and must be taken, it is perfectly plain. The verdict is a direct response to the issue of guilty or not guilty, which the jury are sworn to try. It is a direct response to the question, which, after the jury have come into court and announced their 925 agreement *in their verdict, the clerk, in the presence of the prisoner, and after telling the jury to look upon him, propounds to them, viz: "How say you? Is he guilty of the offence whereof he stands indicted, or not guilty? 3 Rob. Pr., old ed., 262.

But sometimes an indictment contains several counts, or an offence charged in one count is a generic offence which embraces several species of the same offence. If in such cases the jury find the accused guilty of all the offences charged in the several counts, or of the whole offence charged in an indictment containing but one count, they have nothing to do but to find him "guilty," unless the offence charged be murder, in which case the statute requires them further to find whether he is guilty of murder in the first or second degree.

But if in such cases the jury find the accused guilty of some only of the offences charged in the several counts, or only of some specific offence embraced in a larger offence charged in one count, a simple verdict of guilty or not guilty will not do; but the jury must sufficiently designate the counts under which, or the specified offence of which, they find the accused guilty, to make their meaning intelligible.

This is a case of the latter class, in which it was not enough for the jury to find a verdict simply of guilty; but it was necessary for them to designate sufficiently the specific offence of which they intended to find the accused guilty, reading their verdict in connection with the indictment, as before stated. Have they done so in this case?

The law under which this case arises may be found in the Code of 1873, ch. 187, § 10, and ch. 202, § 29.

Chapter 187, section 10, declares that "if any person maliciously shoot," &c., 926 any person, "with intent *to maim, disfigure, disable or kill, he shall," &c. "If such act be done unlawfully, but not maliciously, with the intent aforesaid, the offender shall," &c. Under that chapter and section, the indictment against the accused might have contained two counts, one for doing the act maliciously, and the other for doing it unlawfully only; and the accused, in that case, might have been found guilty under either of the counts, according to the facts as proved before them.

But chapter 202, section 29, declares that "on any indictment for maliciously shooting," &c., a person, "with intent to kill him, the jury may find the accused not guilty of the offence charged, but guilty of maliciously doing such act with intent to maim, disfigure or disable, or unlawfully doing it with intent to maim, disfigure, disable or kill such person."

The indictment in this case was under the latter chapter and section, that is, for maliciously shooting a person with intent to kill him. The jury certainly intended, under the direction and authority of that chapter and section, to find the accused not guilty of the offence as charged, that is, of maliciously doing the act, but guilty of unlawfully doing it, with intent to maim, disfigure, disable or kill such person. Have they sufficiently indicated their intention in their verdict? We think they have.

Now look at the verdict in connection with the indictment and with the section under which it was found, and how can we understand the verdict otherwise?

"We, the jury, find the defendant, John Hoback, not guilty of malicious shooting, as in the within indictment charged." This certainly is plain enough, and sufficiently ignores the charge of maliciously doing the act. It expressly refers to the indict- 927 ment, on *the back of which it is written. And it thus proceeds, after a mere comma, "but guilty of unlawful shooting with intent to maim, disfigure, disable and kill, and fix his term of confinement in the state penitentiary at two years." Are not the meaning and effect of the verdict and indictment, construed together, precisely the same as if the words "of his malice aforethought" were not in the indictment, the word "unlawfully" was there in their stead, and the verdict of the jury was simply a verdict of "guilty." Can we place upon the verdict so unreasonable a construction as to make it doubtful whether the jury intended to find that Brown Seagle was the person shot, or that no person was in fact shot? See 1 Chit. Cr. Law, 636 marg. and *seq.*; 2 Va. Ca. 231, 273.

Canada's case, 22 Gratt. 899; and *Randall's case*, 24 Id. 644, are cited by the counsel of the plaintiff in error as fully sustaining their view of the case. We do not think they at all sustain it. In *Canada's case*, the prisoner was indicted for making an assault upon another, and feloniously and maliciously cutting him, &c., with intent, &c. The jury found "the prisoner not guilty of the malicious cutting and wounding, as charged in the within indictment, but guilty of an assault and battery, as charged in the within indictment, and

assessing his fine at $500." Held: This is an acquittal of the prisoner of the felony charged, whether of the malicious or unlawful cutting, &c., with intent to maim, &c.; and it is a conviction for the misdemeanor of assault and battery. We cannot conceive how that case can give any support to the view of the prisoner's counsel in this case. *Randall's case* seems to be more pertinent to this. There the prisoner was indicted, for that he, "with malice aforethought," did "unlawfully shoot and wound I. S.
928 Moore, with intent *him the said I. S. Moore, with set purpose and malice afterthought to kill and murder." The jury found a verdict in these words: "We, the jury, find the prisoner, Henry Randall, guilty of malicious shooting, and fix the term of imprisonment in the penitentiary at five years."

There was a motion in arrest of judgment, which, however, the court below rendered according to the verdict. The case was brought to this court by a writ of error, and one of the errors assigned by the plaintiff in error was, that the verdict found him guilty of no offence at all, having found him guilty merely "of malicious shooting." The attorney general admitted that this error was well assigned; and this court, concurring in that view, reversed the judgment of the court below on that and other ground. Now if the jury in response to the indictment, and to the question propounded to them by the clerk when they came into court to render their verdict, had simply pronounced the prisoner "guilty," it would have been all sufficient, and have had the same effect as if they had repeated after the word "guilty" the whole charge contained in the indictment in manner and form as therein made. But they found him guilty of "malicious shooting," without saying whether anybody, and if anybody who was shot, and with what intent the shooting was, and without referring to the indictment, and it did not even appear from the record that the finding was endorsed upon the indictment. The finding was of a single fact mentioned in the indictment, to wit: maliciously shooting, which in itself was no felony, and indeed not a criminal offence at all. We herefore think that *Randall's case* does not sustain the view contended for by the counsel of the plaintiff in error in this case.

929 *A recent case decided by the supreme court of North Carolina, 74 N. C. Reports 246, *State* v. *Hudson,* was brought to the notice of this court during the argument of this case, as seeming to have some bearing upon it. We cannot see that it has. There the indictment was for assault and battery, in the ordinary form. The jury found the defendant "guilty of shooting." "Shooting at what?" enquired the judge, who delivered the opinion of the court. "In what direction? If at any human object, was that object within the carrying distance of the gun, so as to constitute an assault? If the indictment had charged that the assault was made by shooting at the prosecutor, possibly the verdict could be sustained by the reasonable certainty of its meaning, to be obtained by construing the bill and verdict together. But the instrument contains no such charge, and the verdict standing by itself is therefore senseless, certainly it is not responsive to the indictment." We think that decision is correct, and that it is not at all in conflict with, if it does not sustain our opinion in this case.

We think there is no error in the judgment of the court below, and that it ought to be affirmed.

JUDGMENT AFFIRMED.

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930 *Roussell v. The Commonwealth.

January Term, 1877, Richmond.

Criminal Law—Motion for Continuance.*—R is indicted for larceny in the corporation court of Norfolk in October, 1875. The clerk, at her instance twice sends a *subpoena* for C as a witness, to the sheriff of Surry, where C lives, which are returned, "came too late to serve." He sends another, which is not returned. In June the case is continued for the commonwealth. The counsel of R relying on the practice of other clerks, to issue *subpoenas* for a witness once directed to be summoned, does not direct the issue of one to the October term; and one is not issued, and C is not present when on the 2nd of October the case is called at that term. The court continues the case until the 9th, and the clerk by the first mail (the next day) sends a *subpoena* for C to the sheriff of Surry; but on the 9th the writ is not returned nor is the witness present. Though the counsel for R states in writing that he has conversed with C, and that he will prove material facts, which he states, in favor of R, and R swears that C is a material witness for her, and she cannot go safely to trial without him, and that she can prove by him the facts stated by the counsel, the court held justified in refusing a continuance of the cause.

At the October term 1875 of the corporation court of Norfolk, Amedee Roussell and Amelia Roussell were jointly indicted, for, on the 7th of September, 1875, stealing a large quantity of jewelry, a gold watch and silver fork, the property of Emile Goulard. The cases were continued until the October term 1876, the parties being admitted to bail. When the case was called at the October term 1876, the attorney for the commonwealth elected to try them separately, and to take

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***Motion for Continuance—Discretion—Review.**—In Norfolk R. Co. v. Shott, 92 Va. 45, the court citing the principal case says: "The court in which a trial takes place is in a position to determine, better than any one else can do, the sufficiency of ground relied on for a continuance; hence it is that an appellate court does not interfere, unless the judgment of the court below, on such a motion, is *plainly erroneous.*" The following cases also cite the principal case approvingly: Welch v. Com., 90 Va. 321; Phillips v. Com., 90 Va. 403; Com. v. Mister, 79 Va. 5; Keesee v. Border Grange Bank, 77 Va. 132; Pairo v. Bethell, 75 Va. 828; The Bland and Giles County Judge Case, 33 Gratt. 443 and *note,* distinguished in Walton v. Com., 32 Gratt. 855.

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up first the case of Amelia Roussell. She, by her counsel, then moved the court for 931 a continuance of *the cause, upon the ground of the absence of George T. Clarke, a material witness for her, who lived in the county of Surrey. The counsel stated in writing that he had conversed with Clarke, and he expected to prove by him that Goulard, the prosecutor in the case, and the main witness, was unworthy of belief, and that disposition had been made of part, if not the whole, of the property alleged by Goulard to have been stolen by the prisoners prior to the time at which the prisoners were charged with the theft. And the prisoner made oath to the materiality of the witness, and that she could not go safely to trial without him. That she expected to prove by him that Goulard was unworthy of belief, and that some, if not all, of the articles alleged to have been stolen by her were disposed of by Goulard, in Surry county, before the day on which it is alleged she stole them.

It appeared that in September 1875, before the indictment was found, the prisoner had caused a *subpœna* to be issued by the clerk of the corporation court for Clarke, addressed to the sheriff of Surry county, returnable October 7th, 1875; which was returned by sheriff, "came to hand 11th day of October 1875, too late to be executed." That on the 19th of October the counsel caused to be issued two *subpœnas* for Clark, returnable to the November term; and one of these he mailed to the sheriff of Surrey, and the other to Clarke; but no return was made of said writs. That on the 4th of November the court caused a rule to be issued against Clarke, directed to the sheriff of Surry county, returnable on the 10th of November, on which there was a return of—"came to hand November 15th, too late to execute." That Clarke being a member of the legislature, the case was continued to the April term of the court; but the clerk by 932 mistake issued a *subpœna* *returnable to March term, which was returned executed. Nothing was done at the April term in the case. At the June term Clarke was present; but the case was continued for the commonwealth. That prisoner's counsel relying upon what was the habit of clerks in other courts to regularly issue *subpœnas* in all cases when once an order had been given, to every term of the court in which the case was docketed for trial, without further directions, did not give any additional memorandum to the clerk directing said witness, Clark, to be *subpœnaed*. That on the 2d of October 1876, upon the calling of the case for trial, Clarke being absent, not being summoned, and no directions given to the clerk since the first calling of the cause, on motion the court continued the case in order to get said witness present, to the 9th day of October 1876. That then and there the prisoner through her counsel caused another *subpœna* to be issued for said witness, Clarke, returnable to the 9th of October; and that the clerk sent the said *subpœna* by the first mail (the next morning), directed to the sheriff of Surry county; but said *subpœna* was not returned in time for the trial, nor did the witness appear. The court overruled the motion for a continuance of the case; and the prisoner excepted.

On the trial the jury found the prisoner guilty, and fixed the term of her imprisonment in the penitentiary at five years; and the court sentenced her accordingly. And the prisoner thereupon applied to a judge of this court for a writ of error; which was awarded.

Godwin & Crocker, and *T. W. Pierce*, for the prisoner.

The Attorney General, for the commonwealth.

BURKS, J. On the 11th day of October 933 1876 Amelia *Roussell (the plaintiff in error) was tried in the corporation court of the city of Norfolk, on an indictment for grand larceny. The jury found her guilty, fixed the term of her imprisonment in the penitentiary at five years; and she was sentenced by the court accordingly.

When the case was called for trial, she by her counsel moved the court for a continuance of the cause, on the ground of the absence of a witness. The court overruled the motion, and she excepted.

The single question presented for the consideration of this court upon the writ of error is, whether the court below erred in overruling the prisoner's motion for a continuance.

In support of her motion, she proved by her counsel that the witness on account of whose absence the motion was made, was George T. Clarke, of the county of Surry, Virginia; that the counsel had conversed with the witness on the subject of his testimony; that it was material to the defence of the prisoner, and that she expected to prove by said Clarke that M. Goulard, the prosecutor and main witness for the commonwealth (whose goods she was charged in the indictment with having stolen), was unworthy of belief; and that Goulard had disposed of a part, if not the whole of the goods charged to have been stolen, prior to the time at which it was alleged that the prisoner had committed the larceny thereof. In addition to this statement of her counsel, she made an affidavit to the same effect, and further, that she could not safely go to trial in the absence of the witness.

It appears by the record that she was indicted in the corporation court of Norfolk, on the 4th day of October 1875. So that twelve months intervened between the finding of the indictment and her trial and 934 conviction *thereunder. By the direction of her counsel, a *subpœna* for the witness Clarke was issued on the 30th day of September, four days before she was indicted, addressed to the sheriff of Surry, and returnable on the 7th day of October following. It was not executed; the sheriff making return that it came to hand "too late to execute." The case was continued to the November term following. Previous to that term, to wit, on the 19th of October, the prisoner's counsel caused two *sub-*

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pœnas to be issued for Clarke, one of which was mailed to the sheriff of Surry, and the other was mailed to Clarke himself, both returnable to the November term of the court; but no return was ever made of either.

At the November term, to wit, on the 4th day of November, a rule was made against Clarke, returnable to the 10th day of the same month; to which rule the sheriff of Surry made return, that it "came to hand 15th November, too late to execute."

The court learning that Clarke was a member of the Virginia legislature, continued the case to the April term following (1876). The clerk issued a *subpœna* for Clarke, but by mistake made it returnable to March instead of to the April term. The *subpœna* was executed, but nothing was done in the case at the April term. At the June term, it is stated in the bill of exceptions, but no copy of any order of the court at that term appears in the record, that Clarke was present and that the case was continued "on the motion of the commonwealth, and not upon the motion of the prisoner." At the July term the case was continued for the commonwealth, on account of "the illness of an important witness for the commonwealth."

Whether the witness, Clarke, was in attendance at the July term does not
935 appear. The case was continued *at that term to the October term following (1876). When the case was called for trial at the Octber term, to wit, on the 2nd day of October, the witness, Clarke, was not in attendance, and it appeared that he had not been summoned to attend, that no process had issued requiring his attendance, and none had been ordered to be issued; "the prisoner's counsel relying," as stated in the bill of exceptions, "upon what was the habit of the clerks of other courts to regularly issue *subpœnas* in all cases, when once an order had been given, to every term of the court in which the case was docketed, without further directions." The bill then proceeds as follows: "that on the 2nd day of October, 1876, upon the calling of the case for trial, the said witness Clarke being absent, not having been summoned, and no direction having been given to the clerk since the first calling of the case, on motion, the court continued the case, in order to get said witness present, to the 9th day of October 1876. That then and there the prisoner, through her counsel, caused another *subpœna* to be issued for said witness, Clarke, returnable to the 9th day of October 1876; that the clerk of said court did issue said *subpœna*, and sent it by the first mail (the next morning) directed to the sheriff of Surry county, that said *subpœna* was not returned in time for the trial, nor did the witness appear."

"A motion for a continuance," says JUDGE MONCURE, delivering the opinion of the court in *Hewitt* v. *Commonwealth*, 17 Gratt. 627, 629, "is addressed to the *sound discretion* of the court, under all the circumstances of the case; and though an appellate court will supervise the action of an inferior court on such a motion, it will not reverse a judgment on that ground, unless such action is *plainly* erroneous."

936 *Was the action of the corporation court in refusing the continuance in this case under all the circumstances "plainly erroneous?" I cannot think so. Although the case was pending in court for twelve months, it does not appear that a *subpœna* was ever served upon the witness Clarke but once, and then the *subpœna* was returnable to the wrong term of the court; nor does it appear that he was ever in attendance except at one term, (June), and it does not appear that he had been summoned to that term. Surely, under the circumstances disclosed by the record, after the case had been continued from the July term to the October term following, it behooved the prisoner to use diligence in preparing for trial at that term. And yet no summons was issued for the witness whose testimony was deemed of such great importance to the prisoner on the trial, and no steps whatever were taken to secure his attendance. The only excuse offered for this omission, was, that the prisoner's counsel relied upon the habit of the *clerks of other courts*, when a *subpœna* for a witness had once been ordered in a case, to continue to issue it afterwards from term to term until trial, without further directions. This is not a valid excuse. After the delay, which had occurred, special efforts should have been made to secure the attendance of this witness. Instead of that, no effort was made at all. It cannot be said that she was prevented from making such efforts by confinement in jail: for she was at large on bail the greater part of the time after she was indicted, and during the whole of the time from the July term till the October term following at which she was tried. When the case, therefore, was called for trial on the 2nd day of October, 1876, it would not have been error if the court had proceeded at once with the trial in the absence of the
937 witness. *But the court, out of mere indulgence, doubtless, to the prisoner, and to enable her still to secure the attendance of Clarke at the trial, postponed it till another day of the term, the 9th day of October. After this had been done, it was not the exercise of due diligence on the part of the prisoner merely to cause a *subpœna* for the witness to be sent through the mail into another county to a sheriff who on two previous occasions in the same case had made return on process "not time to execute," and at other times had not returned the process at all. The prisoner could not have known that the *subpœna* thus sent would have reached the sheriff in time to be executed by him, if it reached him at all. Under the circumstances, some other more certain mode should have been adopted to have the *subpœna* served, or at least placed in due time in the sheriff's hands for service.

The affidavit of the prisoner, that Clarke was a material witness, and that she expected to prove by him certain facts, should, under

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the circumstances, have further stated, if true, that she could not prove the same facts by any other witness present at the trial.

The counsel for the prisoner, in his printed note of argument, cites in support of his assignment of error the case of *Gwatkin* v. *Commonwealth*, 10 Leigh 687. That case was essentially different from the one we are now considering. There it was shown that the absent witness had been duly summoned, that his testimony was material, that facts material to the defence could be proved by him which could not be proved by any other witness, and that the witness was probably prevented from attending by his sickness. The certificate of the judge in the bill of exceptions in this case that the evidence on the trial (which was made a part of the record) was of "a circumstantial
938 nature and *conflicting," can have no controlling influence in determining the propriety of the action of the court in refusing to grant the continuance.

I am of opinion that there is no error in the judgment of the corporation court of the city of Norfolk, and that the said judgment should be affirmed.

MONCURE, P., and CHRISTIAN and STAPLES, Js., concurred in the opinion of BURKS, J.

ANDERSON, J., dissented.

JUDGMENT AFFIRMED.

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939 *McPherson v. The Commonwealth. Stewart v. The Commonwealth.

March Term, 1877, Richmond.

1. **Marriage between the Races—Validity.**—A marriage between a white man and a woman who is of less than one fourth of negro blood, however small this lesser quantity may be, is legal.
2. **Statute—Negro—Construction.**—A woman whose father was white and whose mother's father was white, and whose great-grandmother was of brown complexion, is not a negro in the sense of the statute.

These cases were separate indictments, the one against Rowena McPherson for living in illicit intercourse with George Stewart, he not being her husband; and the other against George Stewart for living in the same way with Rowena McPherson, she not being his wife. The proofs were that they had been married; and the only question in this court was, whether she was a negro, and therefore the marriage illegal, as Stewart was a white man. On that question the facts proved are stated by JUDGE MONCURE in his opinion. Both the parties were found guilty and assessed with a fine. And they thereupon applied to this court for a writ of error; which was allowed.

George D. Wise, for the appellants.

The Attorney General, for the commonwealth.

MONCURE, P., delivered the opinion of the court in *McPherson's case*.

Cited and approved in Jones v. Com., 80 Va. 538.

940 *The court, without deciding any of the questions presented by the first and second bills of exceptions, is of opinion, in regard to the question presented by the third bill of exceptions, that the hustings court of the city of Manchester erred in overruling the motion of the defendant in that court, the plaintiff in error, to set aside the verdict, because the same was contrary to the law and the evidence, and grant a new trial. It appears from the certificate of the facts which were proved upon the trial that Rowena McPherson, with whom George Stewart is alleged to have intermarried, is not a negro; and therefore the said marriage is not on that account illegal. It appears from said certificate, among other things, "that her father was a white man; that her mother was also by a white man, out of a brown skin woman; that Washington Goode, the half-uncle of the said Rowena McPherson, testified that the said brown skin woman, who was his grandmother, and the great-grandmother of said Rowena McPherson, told him that she was a half-Indian; and that his mother, her daughter, also told him the same." It thus appears that less than one-fourth of her blood is negro blood. If it be but one drop less, she is not a negro. Besides having certainly derived at least three-fourths of her blood from the white race, she derived a portion of the residue from her great-grandmother, who was a brown skin woman, and, of course, not a full-blooded African or negro, whose skin is black, and never brown. It was said in the family that the said brown skin woman was a half-Indian—a fact which is confirmed by the color of her skin. If any part of the said residue of her blood, however small, was derived from any other source than the African or negro race, then Rowena McPherson cannot be a negro.

941 *The court is therefore of opinion that the judgment of the said hustings court is erroneous; and it is considered that the same be reversed and annulled, that the verdict of the jury be set aside, and that the cause be remanded to the said hustings court for a new trial to be had therein, in conformity with the foregoing opinion.

Which is ordered to be certified to the said hustings court of the city of Manchester.

CHRISTIAN, STAPLES and BURKS, Js., concurred in the opinion.

In *Stewart's case* the opinion and judgment was the same.

JUDGMENTS REVERSED.

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942 *Haynes v. The Commonwealth.

March Term, 1877, Richmond.

Absent, MONCURE, P., ANDERSON, J.

I. On a prosecution for larceny, the prosecutor gave evidence tending to show when and how the larceny was committed on him. On re-examination he was asked by the attorney for the commonwealth if he did not immediately after the alleged larceny go to the house of another person, who lived a few doors

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off, and tell him that he had been robbed, and the circumstances? On objection to the question by the counsel for the prisoner, the court below sustained the objection to so much of the question as referred to the details of the statement, but allowed the witness to state that he had told the other person at the time named "that he had been robbed," and then allowed this person, to whom the statement was made, to testify that the prosecutor had come to him and told him that he had been robbed; to which the counsel for the prisoner excepted.—HELD:

1. **Criminal Law—Res Gestæ.***—The statements were inadmissible. They were inadmissible as part of the *res gestae*. "Facts which constitute the *res gestae* must be such as are so connected with the very transaction or fact under investigation as to constitute a part of it," and the above statements do not come within the definition.
2. **Same—Complaints—Evidence.**—They were inadmissible, as a *complaint* made by the prosecutor recently after the outrage was committed. The only exception to the general rule, excluding the statements or declarations of parties as hearsay evidence as a *complaint*, is that in cases of *rape*, and in this case the *complaint* must be made at *once*.
3. **Same—Evidence.**—They were inadmissible, for the purpose of rebutting the imputation that the prosecutor was drunk at the time the statements were made. If the credibility of a witness is assailed because he was drunk, the only way to meet the assault is by proving by others his *actual* condition at the time of the transaction of which he speaks, and not by statements and declara-
943 tions of his *own and others, which might prejudice the prisoner while given in evidence under the pretence of showing that they were such as a sober man would make under the presumed circumstances of the case.

John S. Haynes was indicted in the hustings court of the city of Richmond for grand larceny; and on his trial he was found guilty, and the term of his imprisonment in the penitentiary was fixed at five years; and the court sentenced him accordingly.

On his trial the prisoner took two exceptions to rulings of the court; and applied to a judge of this court for a writ of error; which was awarded.

The bills of exception are set out in the opinion of JUDGE CHRISTIAN.

Crump and *Will*, for the prisoner.

The Attorney General and *George D. Wise*, for the commonwealth.

CHRISTIAN, J., delivered the opinion of the court.

This case is before us upon a writ of error to a judgment of the hustings court of the city of Richmond. The prisoner was indicted for the larceny of twenty dollars from the person of McDonough, the prosecutor.

Neither the facts proved on the trial, nor the evidence, are certified in the record.

The single question we have to decide is as to the admissibility of certain testimony offered by the commonwealth's attorney, as shewn by the following bills of exceptions:

FIRST BILL OF EXCEPTIONS.

Be it remembered, that on the trial
944 of this cause, *the commonwealth introduced as its first witness, Dominick McDonough, the prosecutor, who gave evidence on examination in chief, tending to show that the accused had, on the night stated in the indictment, stolen from his person his pocket book, containing the money named in the indictment, and on cross-examination he was asked whether he had not been drinking liquor on that night, to which he replied, yes, but that he was sober and in his perfect senses. Whereupon, on re-examination, he was asked by the attorney for the commonwealth, if he did not, immediately after the alleged larceny, go to the house of one William Disney, who lived a few doors from the place where the alleged larceny occurred, and tell him that he had been robbed, and the circumstances of the robbery as he had detailed them on his examination in chief; to which question the prisoner, by counsel, objected, and the court sustained the objection to so much of the question as referred to the details of the statement, but permitted so much of it as stated to Disney that he had been robbed; to which question, as modified, the accused excepted; and thereupon the witness stated that he had gone to Disney's, who lived three or four doors from the place of the alleged larceny, and told him he had been robbed; to the admission of which evidence the accused also excepted, and asked that the same be excluded; but the court overruled said objection, and admitted and refused to rule out the said evidence; to which two opinions, in permitting said question, as modified, to be put, and in permitting the same to be answered, the accused, by counsel, excepts, and prays that this, his first bill of exceptions, may be signed, sealed and reserved to him, which is accordingly done.

945 *SECOND BILL OF EXCEPTIONS.

Be it remembered, that after the testimony stated in the first bill of exceptions (which is herein referred to and made part hereof) had been given, the commonwealth called William Disney, who was asked by the attorney for the commonwealth on his examination in chief, whether Dominick McDonough, the prosecutor and witness who had just testified, as stated in the first bill of exceptions, had not come to his house on the night of the alleged larceny, as stated in the indictment, and informed him that he had been robbed; to which question the accused, by counsel, objected; but the court allowed the said question to be put; to which the witness

*Criminal Law—Res Gestæ.—The rule laid down by the principal case that "Facts which constitute the *res gestae* must be such as are so connected with the very transaction or fact under investigation as to constitute a part of it" is adopted in Briggs v. Com., 82 Va. 562. See also Barley v. Byrd, 95 Va. 322; Jones v. Com., 86 Va. 742; Kirby v. Com., 77 Va. 687; Oliver v. Com., 77 Va. 594; Scott & Boyd v. Shelor, 28 Gratt. 896, citing principal case.

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answered, yes, he had come to his house and said he had been robbed; to which evidence the accused objected, and asked the court to exclude; which the court refused to do: to which question and answer the accused, by counsel, excepts, and prays that this, his second bill of exceptions, may be signed sealed and reserved to him; which is accordingly done.

These two bills of exceptions raise the single question, whether the *statement* made by the prosecutor to the witness Disney as testified to, by the prosecutor and by Disney, was legal and proper evidence to go to the jury. Its admissibility is urged here by the attorney general, and by Mr. Wise, the commonwealth's attorney of the city of Richmond who appeared with him, on three grounds. First, for the purpose of rebutting the imputation of drunkenness, suggested by the cross-examination of prisoner's counsel. Second, that it was admissible as part of the *res gestæ;* and third, that it ought to **946** be received as a **complaint* made by the prosecutor shortly after an outrage perpetrated against him.

As to the first ground it is sufficient to say, that if the credibility of the witness was assailed because he was intoxicated, the only way to meet such an assault upon his credibility, was to prove by other witnesses his actual condition at the time of the transaction of which he speaks, and not by statements and declarations of his own, to others, which might at the same time prejudice the prisoner, while given in evidence under the pretence of showing that they were such as a sober man would utter under the presumed circumstances of the case. If the prisoner's counsel imputes drunkenness to the prosecutor, this imputation may be repelled by direct testimony, showing that he was sober, but certainly not by statements or declarations which are mere hearsay, and may be used to the prejudice of the prisoner, and which as independent evidence must be excluded as hearsay evidence.

As to the second ground upon which the admissibility of this statement of the prosecutor to the witness, Disney, is urged, to wit, that it is a fact of the *res gestæ*, we are of opinion that this statement could not be introduced as a part of the *res gestæ*.

As a definition of what in law is *res gestæ*, the following may be adopted as accurately defining its limits and meaning: *Facts which constitute the res gestæ must be such, as are so connected with the very transaction or fact under investigation as to constitute a part of it.* Now the statement made by the prosecutor to Disney after the larceny, was no part of the transaction under investigation, but was something that occurred afterwards, and was not so connected with it as to form a part of it. It was the prosecutor's narrative of a past transaction, and was mere **947** hearsay. Nor *could such evidence be received for the purpose of corroborating the evidence of McDonough, the prosecutor? Such evidence upon both the English and American decisions is plainly inadmissible. See 1 Parker Crim. Cases, and cases there cited. *Robb* v. *Hackley*, 23 Wend. 50; *King* v. *Parker*, 3 Doug. R. 242; Bull, N. P. 291; 1 Starkie 149, note; 1 Cowen and Hill's notes 776.

Thirdly. It is urged in argument that this evidence is admissible as a *complaint* made by the prosecutor *recently* after the outrage had been perpetrated; and it is evident that it was upon this ground that the learned judge of the hustings court of the city of Richmond admitted the evidence, because the bill of exceptions shows that while he excluded all the *details* of the statement of the prosecutor, he admitted the statement made to Disney that he had been robbed, &c.

We have carefully examined all the authorities referred to by the learned counsel to sustain this position, and it is manifest that the only exception (established by well-considered cases and reliable text-writers) to the general rule excluding the statements or declarations of parties as hearsay evidence, as a complaint is the exception in cases of rape. For peculiar reasons, the complaint of the victim of this diabolical outrage and crime is received as evidence. Such a victim must *at once* make complaint, or she will be suspected of consent. The instincts of human nature, revolting at this unnatural and heinous crime, compels the victim to cry out and denounce its foul perpetrator; and such complaint, made under the smart and indignation of such a cruel injury, has been received by the courts as evidence. But even in such cases the evidence is confined to the new complaint, and no detailed statement of the transaction is permitted to go in **948** evidence. *See 3 Starkie (Metcalf's ed.) 1266, and cases there cited; *Regina* v. *Osborne*, 41 Eng. C. L. R. 338.

This is a well recognized exception to the general rule, excluding the declarations of the party injured, which are not admissible as part of the *res gestæ*. Such statement in the form of complaint is admissible, though not a part of the *res gestæ*. But we think the exception must be confined to cases of rape for the peculiar reasons above stated. It does not apply to any other case, unless the statement or declaration comes within the *res gestæ*. There is one case cited by the attorney general, and it is the only one that can be found, which seems to hold that the complaint of a party who has been robbed may be given in evidence. That is an English case decided at *nisi prius*, and reported very briefly and obscurely in 25 Eng. Crim. Law Rep. 456, *Rex* v. *Wink*.

There is no case which we can find which affirms the doctrines of this case, though it is referred to in the notes to some of the text-writers on the Law Evidence. But it is opposed by all the recent English and American cases. See *People* v. *Finnegan*, 1 Parker Crim. Cases 147, and numerous cases there cited; 1 Bush R. 208, *Morris* v. *Hazelwood; Tucker* v. *Hood*, Ib. 210, and cases cited.

We are not disposed to extend this exception to the rule of evidence further than to cases of rape, and only to recognize this exception as one growing out of the peculiar reasons already adverted to.

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It would be dangerous, to the last degree, to permit a party making a criminal charge against another to support his own evidence by proof of declarations made by him *subsequent* to the alleged crime.

The adjudication of the rights and the protection of the liberties of the citizen
949 require that mere hearsay *evidence should be excluded, and that the court in every case should confine the testimony to the issue made by the pleadings and to that character of evidence which is legal and admissible under the settled principles of the laws of evidence.

We are of opinion, for the reasons herein stated, that the judgment of the hustings court of the city of Richmond, in admitting the testimony of the prosecutor McDonough and of the witness Disney, as to declarations made by the former to the latter subsequent to the alleged larceny, was erroneous and must be reversed. And in consequence of such error a new trial must be awarded to the prisoner.

JUDGMENT REVERSED.

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950 *Stuart v. The Commonwealth.

July Term, 1877, Wytheville.

Absent, ANDERSON, J.

1. **Criminal Procedure—Verdict as to one Count—Effect.***—It is settled law in this state, that where there are several counts in an indictment, and the jury find the accused guilty upon one of the counts, saying nothing as to the others, the verdict operates as an acquittal upon the counts of which the verdict takes no notice; and the court should enter a judgment accordingly.

2. **Same—Same—Former Jeopardy.**†—In such a case, if the accused applies for and obtains a new trial, he does not thereby waive the advantage of the acquittal thus obtained. But he must be tried, and can only be tried again, on the count on which he was convicted, and not on the counts on which he has been before acquitted. And the rule is the same whether the new trial is granted because the verdict is contrary to the evidence, or because the verdict is so defective, or uncertain, that legally no judgment can be pronounced thereon.

3. **Same—Same—Same.**—And the same rule applies where on an indictment for murder, the jury found the prisoner guilty of manslaughter, or on an indictment for malicious stabbing, &c., with intent to maim, disfigure or kill, the jury find the prisoner guilty of unlawful stabbing with intent to kill.

4. **Same—Verdict of Guilty—Effect as to Other Counts.***—Where there is but one count in an indictment on which the accused may be convicted of one of several offences which are covered by the indictment, the verdict of the jury finding the accused guilty of one of the said offences is a verdict of acquittal of all the others of a higher grade of offence: as on an indictment for murder, a verdict finding the accused guilty of manslaughter, is a verdict of acquittal as to the murder: and on an indictment for *malicious* stabbing with intent to kill, a verdict finding the accused guilty of *unlawful* stabbing with intent to kill is an acquittal of malicious stabbing. And the rule stated in No. 2 applies. *Quaere:* If this rule applies where on an indictment for murder the jury find the prisoner guilty of murder in the second degree.

951 *5. **Same—Same—Second Trial.**—On a second trial of the offence for which the accused was found guilty by the jury, if the jury find him guilty they may fix his imprisonment or other penalty at any period or penalty authorized by the statute, though it be greater than that fixed by the first jury.

6. **Same—Indictment.**—Under an indictment with only one count, for malicious shooting, stabbing or cutting, with the intent to kill, the accused may be convicted of the offence charged, or of unlawfully doing such acts, or indeed, of any other offence—felony or misdemeanor—which is substantially charged in the indictment.

7. **Same—Acquittal—Effect of Subsequent Quashing of Indictment.**—The acquittal obtained by the first verdict is not affected, if the indictment under which it was found is afterwards quashed by the court on the motion of the attorney for the commonwealth; nor is the prisoner entitled to be discharged from prosecution on another indictment for the offence of which he was convicted in the first indictment, because that indictment was quashed; he would have every right under the second indictment that he had under the first, and no more.

8. **Same—Indictments—Bar.**—The mere pendency of one indictment is no bar to another, even for the same offence; the accused cannot be tried on both, but the commonwealth may elect on which it will prosecute.

9. **Same—Jury—Verdict—Effect.**—The discharge of a jury, after they have rendered a verdict against a prisoner, but which verdict is adjudged to

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***Criminal Procedure—General Verdict—Bad Count.**—In Richards v. Com., 81 Va. 110, the principal case is cited for the proposition that when of two counts, the second is bad, but the jury find general verdict of guilty and fixes a punishment that could not be fixed under the first, the verdict must be set aside and a new trial awarded and accused is entitled to acquittal under the first count as the verdict must have been under the second, citing also Mowbray's Case, 11 Leigh 674; Page v. Com., 26 Gratt. 943.

†**New Trial—Former Jeopardy—Statute.**—In Benton's Case, 91 Va. 789, the court construing sec. 404, Code 1887, held that when an accused is convicted of an offence and applies for and obtains a new trial, he thereby waives his former jeopardy and subjects himself to further trial. And where more than one offence is distinctly or substantially charged in one count of an indictment, and there has been a verdict of conviction therein, which has been set aside and a new trial awarded, on such new trial the accused shall remain liable to be convicted of any offence charged in the indictment for which there is no severer penalty than for the offence of which he was convicted. See also, Briggs v. Com., 82 Va. 554.

***Same—Verdict on One Count—Effect as to Others.**—In State v. Cross, 44 W. Va. 321, 29 S. E. 527, the court says: "The court should render judgment of acquittal in the counts on which he is not found guilty, though the verdict is silent as to them and if the court omits such judgment, the law enters it," citing the principal case and Lithgow's Case, 2 Va. Cas. 297; Bennett's Case, 2 Va. Cas. 235; Kirk's Case, 19 Leigh 627.

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be a nullity because it was not duly perfected, and thereupon set aside as insufficient, is no bar to a prosecution under the same or a new indictment.

10. **Same — Preliminary Examinations.**— When a prisoner is arrested under a warrant of a justice, examined and committed to jail, and indicted and tried, and afterwards that indictment quashed and a new indictment found against him for the same offence, he is not then entitled to a new preliminary examination before a justice under the last indictment found against him.

11. **Same—Habeas Corpus.**—Where a prisoner has been carried to the penitentiary in execution of the judgment of the court below, and after that a new trial is granted him by the court of appeals, the last named court will award a writ of *habeas corpus*, directed to the superintendent of the penitentiary, to bring the prisoner before it, and order him to be committed to the sheriff of the county in which the court of appeals is sitting, to be by him conveyed to the jail of the county in which the judgment of conviction was rendered, for the purpost of being again tried in conformity with the judgment of the appellate court.

Robert Stuart was indicted in the county court of Washington at the July term 952 1876, for "unlawfully, *maliciously and feloniously" assaulting one Leander Galliher, with intent to "maim, disfigure, disable and kill" him. There were two counts in the indictment, both charging the same offence. The second count was more specific as to the weapon used in the assault. The defendant demurred to the indictment; which was overruled, and the trial proceeded with on the plea of "not guilty" at that term. At that trial a verdict was found in these words: "We, of the jury, find the defendant guilty of unlawful assault, and fix the term of his imprisonment in the state penitentiary for two years." On the motion of the plaintiff in error this verdict was set aside and a new trial granted, and the cause continued until the August term of the court. At the August term, owing to the "mutilated" condition of the indictment, on the motion of the attorney for the commonwealth it was quashed. The plaintiff in error then moved the court to discharge him from custody, which motion was overruled, and he was remanded to jail, and the plaintiff in error excepted. At the September term the plaintiff in error was again indicted for the same offence, the second indictment being the same in every material point as the first. The plaintiff in error then moved the court to be sent before a justice of the peace for a preliminary examination on this latter indictment (such examination was had before the finding of the first indictment), which motion was overruled, and the plaintiff in error excepted. He then offered two special pleas to this indictment: one of a former acquittal; the other setting out all the proceedings on the first indictment, and claiming that he could not be convicted under the second indictment. Both of these pleas were, on the motion of the attorney for the commonwealth, rejected by the court; and the plaintiff in error again 953 *moved the court to discharge him. which the court refused to do. He then pleaded "not guilty." A trial was had, and a verdict was found in these words: "We, the jury, find the prisoner, Robert Stuart, guilty of the *malicious* assault, with intent to maim, disfigure, disable and kill, and ascertain the term of his imprisonment in the penitentiary to be five years;" which verdict the plaintiff in error moved the court to set aside; but the court overruled the motion, and entered up judgment on the said verdict: to all of which rulings the plaintiff in error excepted, and filed his bill of exceptions. A writ of error was awarded by the circuit court of Washington, and the judgment of the county court was affirmed by it. The plaintiff in error then obtained a writ of error from a judge of this court. The errors assigned are fully stated and discussed in the opinion of the court.

Buchanan & Trigg, for the prisoner.

The Attorney General, for the commonwealth.

STAPLES, J. It is well settled law in this state, that where there are several counts in an indictment, and the jury find the accused guilty upon one of the counts, saying nothing as to the others, the verdict operates as an acquittal upon the counts of which the verdict takes no notice, and the court should enter a judgment accordingly. *Lithgow* v. *Com.*, 2 Va. Cases 297; *Page* v. *Com.*, 9 Leigh 683; *Canada's case*, 22 Gratt. 899; *Page's case*, 26 Gratt. 943. It may be regarded as equally well settled, that in such case if the accused applies for and obtains a new trial, he does not thereby waive the advantage of the acquittal thus obtained. But he must be tried, and can only be 954 tried *again on the count on which he was convicted, and not on the counts of which he had been before acquitted. The reason is, that the accused having been rightfully acquitted of one or more of several offences which have been joined in the said indictment, he cannot again be brought into jeopardy for these alleged offences, because, having been wrongfully convicted on another, he seeks and obtains redress against the wrong done him.

The attorney general did not seriously controvert this doctrine. He maintained, however, that the rule applied only in those cases where the new trial is granted, because the verdict is against evidence; and that it had no application when the new trial is granted on account of a defective verdict, which is in effect a mistrial. In other words, if the finding is so defective or uncertain that legally no judgment can be pronounced thereon, it is a mere nullity, and the accused is precisely in the same condition as if there had been no trial; the whole case being again open for investigation upon its merits. The learned counsel cited no authority for the supposed distinction in the two cases, nor have we been able to find any that sustains it.

It would seem to be clear, that whether the verdict be set aside because it is defective, or because it is contrary to evidence, the legal

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result must be the same. If, in the first case, the verdict is not severable, but is so entire, that to vacate the conviction necessarily carries with it the acquittal, the like consequences must ensue, whatever may be the ground upon which the verdict may be set aside. On the other hand if, where the finding is set aside because it is against evidence, the new trial is to be construed as applying only to the offence of which the
955 accused is convicted, and not to *that of which he was acquitted, it must have the same effect where the verdict is set aside, because it is uncertain or otherwise defective. In neither case can the accused be put twice in jeopardy for the same offence as the price of his relief against an erroneous verdict. The case of *Marshall* v. *Commonwealth*, 5 Gratt. 663, is directly in point. There the indictment contained two counts, the first for malicious stabbing, the second for unlawful stabbing. The jury found the defendant not guilty under the first count, but "guilty of unlawful stabbing," and fixed the term of his confinement in the penitentiary at five years; and judgment was entered accordingly. Upon a writ of error to the general court the judgment was reversed, upon the ground that the verdict was defective. But the general court in setting aside the verdict directed a new trial to be had only on the second count, upon which the defendant had been convicted. This decision is conclusive of this branch of the question. In the present case, upon the trial of the first indictment, the jury found the defendant "guilty of unlawful assault," and fixed the term of his imprisonment in the penitentiary at two years. As this verdict, while it imposed the punishment prescribed for a felony, failed to find the intent necessary to constitute a felony, it was very properly set aside by the court. It is, however, manifest that the jury intended to find, and have in effect found a verdict of acquittal upon so much of the indictment as charges a malicious assault. Upon that part of the finding a judgment of acquittal ought to have been entered, and the new trial confined to the allegation of an unlawful assault, with intent to maim, disfigure, disable and kill. This is the necessary result of the doctrine in *Marshall's case*, unless
956 there be something *in the form of the indictment requiring the application of a different principle.

In *Marshall's case*, as has been seen, the indictment contained two counts, one for malicious, the other for an unlawful assault. In the present case, the first indictment contained two counts, both, however, for malicious assault; the only difference being that one of the counts sets forth the instrument with which the injury was inflicted. Both counts must, therefore, be treated as one, so far as the grade of the offence is involved. It has been held in several cases that the same rules do not apply to a trial and acquittal upon an indictment with one count that govern in a trial upon an indictment with several counts. Thus, in the *State* v. *Behimer*, decided by the supreme court of Ohio, 20 St. R. 572, the indictment contained a single count for murder in the first degree. The prisoner being convicted of murder in the second degree, obtained a new trial. The question arose, whether upon such new trial the investigation should embrace all the charges in the indictment, or be confined to murder in the second degree. The court was of opinion that the verdict was severable only where there is a conviction or acquittal on several counts for different and distinct offences; and where there is but one defendant, and in fact but one offence, the verdict is entire, and a new trial re-opens the whole case upon its merits. The cases of *Hale* v. *Commonwealth*, 2 Hill (S. C.) R. 273; *Morris State*, 1 Blackf. R. 37; *United States* v. *Harding*, 1 Wallace Jr. R. 127, hold the same doctrine.

In *Livingston's case*, 14 Gratt. 592, upon an indictment containing a single count for murder, the accused was convicted of volun-
957 tary manslaughter, and the *term of his imprisonment in the penitentiary fixed at one year. This court reversed the judgment for errors committed by the lower court in the progress of the trial. The question was presented, whether upon the second trial the accused might be tried and legally convicted of murder, or whether the charge to the jury was to be so modified as to limit the finding to the offence of manslaughter. JUDGE DANIEL took the ground that a party who has been erroneously convicted of manslaughter, and who has appealed to this court for redress, had the right to have his wrong remedied, without being put in jeopardy for a higher offence of which the jury has found the prisoner not guilty. He said, if there had been one count for murder and another for manslaughter, and a verdict of guilty on the latter count, taking no notice of the former, it would seem to be clear, under the authority of the cases, the cause would have to be sent back for another trial for manslaughter only. He asked, what difference it made that the verdict had been rendered on a single count for murder, instead of two counts, one for murder and the other for manslaughter. In either case, the verdict of manslaughter was as much an acquittal of murder as a verdict pronouncing his entire innocence could be. In support of this view, he cited a number of cases. *Slaughter* v. *State*, 6 Hump. R. 410; *Hurt* v. *The State*, 25 Miss. R. 378; *Brennan* v. *The People*, 15 Illi. R. 572; *The People* v. *Gilmore*, 4 Cal. R. 376; *Jones* v. *The State*, 13 Texas R. 168. He said he had seen no case holding a contrary doctrine, except the case of the *United States* v. *Harding*, 1 Wallace Jr. 127, in the circuit court of the United States. In the course of his opinion JUDGE DANIEL referred to the cases of *Ball* v. *Commonwealth*, 8 Leigh 726, and *Gwatkin's case*, 9 Leigh
958 678, in both of which *the accused was convicted of murder in the second degree. A new trial was granted; but the judgment of the general court in each case, directing a new trial, was general in its terms. In neither case was any question raised as to the character of the order to be made upon

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the new trial, nor does it appear the matter was in any manner brought to the attention of the court. The cases were, therefore, in JUDGE DANIEL'S opinion, not entitled to the weight of an express adjudication of the point involved.

The other judges sitting with JUDGE DANIEL in *Livingston's case*, without expressing any opinion upon the question, were in favor of remanding the cause for a new trial to be had on the indictment as it stands, and without any change in the usual charge to the jury.

The question must, therefore, be considered as still unsettled in Virginia. The decision of the general court in *Ball's case* and in *Gwatkin's case* cannot be regarded as binding authority in the present case, not only for the reason already stated, that the question was not raised, but for another suggested by JUDGE DANIEL, growing out of particular rules only applying to murder in the second degree. What is said by JUDGE DANIEL on this subject may be seen by reference to his opinion.

Whatever may be the just rule when there is a conviction of murder in the second degree, which we are not called on to discuss, it is generally conceded that when the indictment contains two counts, one for murder and one for manslaughter, which are distince offences, if the accused is acquitted of murder and convicted of manslaughter, and a new trial is granted him, he can
959 only be tried the second time for the *offence of which he was convicted, and not for that of which he was acquitted.

It will be seen, therefore, that the whole argument turns upon a supposed distinction between an indictment which contains a single count, and on indictment containing two or more counts. It is difficult to believe the idea could ever be entertained that the most valued rights of the citizen are to be made to depend upon the number of counts a prosecuting attorney may put in his indictment. The doctrine that liability to, or exemption from, punishment rests upon such a tenure in any case, illy accords either with the humane spirit of the law, or those constitutional guarantees which define and protect individual rights. If the accused has been fairly acquitted of any offence, he ought not to be tried for it again, whatever may be the form of the proceeding against him. If there be anything valuable in the principle that "no man can be twice put in jeopardy for the same offence," its efficacy should not be impaired by distinctions so technical and unsatisfactory. In most of the states this principle is enforced by express constitutional provision. The Virginia constitution, however, contains no such provision; but with us the maxim has all the sanctity of constitutional enactment, and is viewed by the courts with the greatest favor. If a party improperly convicted of an offence can only have the conviction set aside upon the terms of submitting to a greater wrong; if an error can only be corrected at the price of surrendering a great privilege, and all this because the government has pursued its accusation one way, instead of another, the most valued rights rest upon a very feeble foundation.

In the *State* v. *Martin*, 30 Wisc. R. 216, 11 Am. Rep. 367, JUDGE COLE, in delivering the unanimous
960 *opinion of the court said: "A person already convicted may waive the constitutional protection against a second prosecution, and ask for a new trial to relieve himself from the jeopardy he is in. And when he does so, what ought to be the extent of his application? Is it to expose himself to the possible conviction of a charge of which he has been acquitted, or is it to relieve himself of one of which he has been convicted? It would seem that a bare statement of the proposition was sufficient to furnish the proper answer. The motion for a new trial could only properly apply to the crime of which he has been convicted. The verdict for the purpose of determining for what offence the defendant may constitutionally be a second time tried, must be treated as divisible in its nature." These observations were made with reference to an indictment containing a single count for murder. Their justness and soundness must be conceded by all. If any other rule were established, as has been well said by a learned judge, no man will subject himself to the risk of being hung for murder, when convicted of manslaughter, and he will prefer, in many instances, although innocent, to rest under the conviction rather than to encounter the dangers of a second trial. In every case where the timid and unfriended are involved, this will be found to be the result; and in times of high popular excitement, those who may be bold in consciousness of innocence will hesitate long before they assume so great a risk and pay so fearful a premium for the privilege of asserting their innocence. MURRAY C. J., in the *People* v. *Gilmore*, 4 Cal. R. 376.

In 1 Bishop on Crim. Law, sec. 676, in speaking of the doctrine "that no man is to be brought into jeopardy more than once for the same offence," the author
961 *proceeds to say: "If, therefore, the verdict which finds a prisoner guilty of part of the charge against him, finds him not guilty of another part—as, for example, guilty on one count of the indictment, and not guilty on another count; or *where there is but one count*, guilty of manslaughter, and not guilty of murder—and a new trial is granted him, he cannot be convicted, on the second trial, of the matter of which he was acquitted on the first." The same doctrine is laid down by Wharton, who declares, upon a review of the authority, "The true view, however, is that when the major and minor offences are together before the jury, the defendant's conviction of the second offence is an acquittal of the major, and is a bar to the further prosecution of the major." 1 Wh. C. Law, sec. 556. In support of this position, the author cites decisions of the supreme courts of California, Georgia, Illinois, Iowa, Missouri, Mississippi, Tennessee, and Wisconsin, which may be seen by reference to his work.

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The main argument generally relied on by those who take a different view of this question is, that a verdict is an entirety, and if that part of it finding the defendant not guilty be set aside, the part acquitting him is also necessarily set aside. It might, however, with equal propriety, be said that a verdict acquitting some of the defendants is an entirety; but there is no pretense for saying if it is set aside as to those convicted, it must share the same fate as to those acquitted. And so when the indictment contains several counts, it may be said the verdict is entire; and yet there is no question but that in such case the verdict is divisible. An indictment for murder is, in legal contemplation, an indictment for every offence of which the accused may be convicted under it. It is to be treated, for all
962 practicable purposes, *as an indictment for manslaughter, as much so as an indictment for murder. The reason is, that it is not necessary to find all the allegations with reference to the attendant circumstances, but only so much of them as constitute a substantial offence charged in the indictment. The jury, in passing upon the homicide, may negative the averment of malice aforethought, and convict of manslaughter. In such case the lesser offence is merged in the greater. When, therefore, upon a conviction of the offence of manslaughter, the accused obtains a new trial, he is, in effect, tried the second time upon the indictment, as it is, precisely as though the indictment contained a count of manslaughter in addition to the count for murder.

Suppose the jury find the defendant not guilty of murder, in express terms, but guilty of manslaughter. This is, in effect, two findings—a verdict of acquittal of one offence, and a verdict of guilty of the other. If the court sets aside the verdict of conviction, the verdict of acquittal remains. The principle is precisely the same, as this court has repeatedly held, when there is a verdict of conviction as to one of the counts, and nothing is said as to the others. When the jury say the defendant is guilty of manslaughter, they affirm, and, in effect, find, by irresistible implication, he is not guilty of murder. What difference can it make in such case, whether there be two counts or one count, or whether there be two express findings, or one express and the other implied by law. In either case there is no difficulty in treating the verdict as several, with respect to the different offences. In either case, the granting of a new trial, on conviction of one offence, has no sort of connection with the verdict of acquittal of the other offence,
963 the latter *may well be allowed to stand and have effect, though the former should be set aside. It is said, however, that if the defendant is convicted of manslaughter, for example, and sentenced to imprisonment for one year, upon the second trial he may be convicted and sentenced for five years; and thus he may be subjected to greater punishment on the second trial than is awarded on the first. This is undoubtedly true. But the conclusion intended to be deduced from it proves too much. Upon an indictment containing two counts—one for murder and the other for manslaughter—if the defendant is convicted of manslaughter, and acquitted of murder, it is conceded he can be tried again only for manslaughter; and yet his second conviction may result in a more extended imprisonment than the first. And so in *Marshall's case*, the general court directed a new trial upon the second count; and yet the term of imprisonment for the offence, upon the second trial, might have exceeded what the jury awarded on the first trial. The truth is, the maxim that a man is not to be put twice in jeopardy for the same offence, is applied in reference to the nature of the offence, and not to designate the *quantum of punishment*.

It must be borne in mind, that in the case supposed the accused is not acquitted of the offence in respect to which he asks a new trial, but convicted. In applying for a new trial, he necessarily consents again to be tried for the same offence, with all its incidents and consequences. To this end his waiver operates, but no further.

Thus far the question has been considered with reference to prosecutions for homicide, because the cases decided and the principles involved apply directly to the case in
964 hand. With respect to the *latter, however, there are considerations which do not apply to the former. While the practice has always been, in this state, to frame indictments for murder with a single count, it was otherwise until recently with respect to indictments for malicious assaults. Under the Code of 1819, the course uniformly pursued was to insert two counts—the one for malicious and the other for an unlawful assault. At the revisal of 1849 a change was introduced, so that the commonwealth may now proceed upon a single count for malicious shooting, stabbing or cutting, with intent to kill, and under it may convict the accused of the offence charged, or of unlawfully doing such acts, or, indeed, of any other offence, felony or misdemeanor, which is substantially charged in the indictment. *Canada's case*, 22 Gratt. 905. The object of this change in the law was to save the trouble of several counts, and to avoid the delays and mischief arising from the acquittal of the defendant upon mere variance between the allegations and proofs. It can hardly supposed it was the design of the legislature, even if it were competent to do so, to deprive the accused of any important rights which appertained to an indictment framed under the old law. If, upon an indictment containing two counts, the defendant, being convicted of the less offence, could not again be tried for the greater, he ought not to be deprived of that privilege, because, as a matter of convenience, the commonwealth may now proceed upon a single count in an indictment.

The courts would hesitate long before giving construction to a statute so utterly at variance with the rights of the citizen and the well regulated principles of criminal jurisprudence.

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The attorney general has, however, 965 argued that the *petitioner is not entitled to the benefit of the rule in question, because the indictment upon which he was first tried was quashed with the consent of the petitioner. He is thus precluded from relying upon anything done under that indictment. In the first place, it does not appear that the petitioner gave his consent that the indictment should be quashed. It is very true he made no objection; he was not required to do so. All that he did was to call the attention of the court to the fact, that the indictment had become so mutilated he could not be safely tried upon it. The court, having inspected the indictment, was of the same opinion. Thereupon the prisoner, by his counsel, moved the court that he be discharged from custody; which motion the court overruled; to which ruling the prisoner excepted. The commonwealth's attorney then moved the court to quash the indictment, because of said mutilation; which motion was sustained, and the indictment quashed, and the prisoner remanded to jail to await further action of the grand jury. This statement is sufficient to show that the prisoner did not give his consent to a single step taken by the court. It was for the court, and not the petitioner, to determine what course was to be pursued when the condition of the indictment was ascertained. But even if it appeared that the petitioner had agreed that the indictments should be quashed, such agreement could not be construed beyond a simple consent to a new indictment as a substitute for the former. Upon such new indictment the petitioner would have every right which justly belonged to him under the first. It cannot be supposed he thereby intended to surrender the protection of the acquittal already obtained upon the previous trial. Such a construction would be grossly unjust to the petitioner, as well as to the 966 court *and the attorney for the commonwealth. It is obvious that the sole purpose was to place the petitioner in the same position he would have occupied if the indictment had not been so mutilated; to furnish clear and unmistakable evidence by the record, of the offence with which he was charged, and for which he was to be tried. If he was fairly acquitted, on the first trial, of the offence of malicious wounding, he could never be tried for it again, whatever might be the fate of the indictment. Although the indictment is out of the way, the verdict of acquittal still remains.

The petitioner, however, insists that he could not be legally tried under the second indictment, because he had once been tried under another indictment for the same offence, and he ought to have been discharged from custody upon quashing the first indictment.

This position is equally untenable with that of the attorney general. The petitioner was acquitted of a malicious assault, but of no other offence charged in the indictment. He was convicted of an unlawful assault with the intent alleged. Having moved for a new trial, he is conclusively presumed to waive any objection to being put a second time in jeopardy for that offence. All the authorities concur upon this point. The petitioner was therefore liable to be tried for any and every offence of which he had not been acquitted on the first indictment. It was a matter of no moment whether such trial took place on the first or on a new indictment. After the new trial granted, the commonwealth might have entered a *nolle prosequi* in the case, and have proceeded on a new indictment; or even while the first was pending, a second indictment for the same offence might have been found, because the mere finding of one indictment is no bar to another, even for the same 967 offence. The accused cannot *be tried on both, but the commonwealth may elect on which it will proceed; the better practice however being to withdraw the first, and proceed to trial on the second. In *Gibson's case*, 2 Va. Cases 111, it was held that the discharge of a jury, after they have rendered a verdict against a prisoner, but which verdict is adjudged to be a nullity, because it was not duly perfected, and therefore set aside as insufficient, is no bar to a prosecution under the same or a new indictment. That case would seem to be conclusive of the question here.

The only remaining assignment of error to be noticed is, that the petitioner had not been tried before a justice, nor had any preliminary examination of the offence for which he was indicted. It appears from the certificate of the county judge that, previous to the finding of the first indictment on the 22d of July, the petitioner was arrested under a warrant of a justice, was examined for the offence and committed for trial, and two days thereafter an indictment was found against him. The petitioner having thus had his preliminary examination before the finding of the first indictment, and that indictment having been quashed under the circumstances already detailed, he was not entitled to another examination before a justice upon the finding of the second indictment. The latter was for the same offence as charged in the former indictment, and as already stated was intended as a substitute for it. This assignment was therefore not well taken.

But for the error already mentioned, I am of opinion the judgment of the county court is erroneous, and should be reversed, the verdict of the jury set aside, and the petitioner awarded a new trial. Upon such new trial he may be convicted of un- 968 lawfully cutting, *wounding, beating with intent to maim, disfigure, disable and kill, and sentenced to such term of imprisonment as is prescribed by the statute, in the discretion of the jury, whether the same shall or shall not exceed the period ascertained by the first verdict; or he may be convicted of any lesser offence substantially charged in the indictment. *Canada's case*, 22 Gratt. 899.

But it appearing that the petitioner is now in the penitentiary, in execution of the said judgment against him, it will be necessary

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to have him brought before this court upon a writ of *habeas corpus*, and committed to the sheriff of this county, to be by him conveyed to the jail of Washington county, for the purpose of being tried again for the offence aforesaid, in conformity with the course pursued in *Barber's case*, 2 Va. Cas. 122, and *Jones' case*, 20 Gratt. 857. A writ of *habeas corpus* is therefore awarded accordingly, directed to the superintendent of the penitentiary, commanding to bring the prisoner before this court, &c.

CHRISTIAN and BURKS, JS., concurred in the opinion of STAPLES, J.

MONCURE, P., dissented.

JUDGMENT REVERSED.

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969 *Walker v. The Commonwealth.

July Term, 1877, Wytheville.

Absent, ANDERSON, J.

1. **Criminal Law—Stolen Goods—Presumptions.***—QUERE: If the rule of evidence which applies to simple larceny, in regard to the effect of the accused being found in possession of the stolen property recently after the larceny thereof, applies to a case of compound larceny, as where larceny is a component part of the offence of burglary of house breaking.
2. **Same—Same—Same.**—Though the mere possession of the stolen property might not be *prima facie* evidence of the burglary or house breaking charged in the indictment, yet, in connection with other evidence of such burglary or house breaking, evidence of such possession of the stolen goods is admissible.

In July 1876 Charles Walker was indicted in the county court of Roanoke, for entering a dwelling house with intent to steal, and stealing therefrom certain articles described in the indictment. He was tried at the October term of the court; when the jury found him guilty, and fixed the term of his imprisonment in the penitentiary at five years; and sentence was rendered against him in accordance with the verdict. Upon a writ of error to the circuit court of the county, the judgment was affirmed; and Walker then obtained a writ of error to this court. The case is fully stated in the opinion of JUDGE MONCURE.

G. W. Hansbrough, for the prisoner.

Daniel, Attorney General, for the Commonwealth.

970 *MONCURE, P., delivered the opionion of the court.

This is a writ of error to a judgment of the circuit court of Roanoke county, affirming a judgment of the county court of said county, convicting the plaintiff in error, Charles Walker, of felony. He is indicted for an offence defined in sections 12 and 13, of chapter 188, page 1195, of the Code, which, so far as it is material to state them here, are, in effect, as follows: If a person shall in the night, enter without breaking, or shall, in the day time break and enter, a dwelling house, &c., with intent to commit larceny, &c., he shall be confined in the penitentiary not less than one nor more than ten years, or, at the discretion of the jury, be confined in jail not less than one nor more than twelve months. The indictment contained two counts. In the first it was charged that the accused did, on the 31st day of December 1875, in the night time of that day, feloniously enter, without breaking, the dwelling house of one George Keagy, situate in said county with intent the goods and chattels of the said George Keagy, in the said dwelling house then and there being, feloniously to steal, take and carry away; and did then and there feloniously steal, take and carry away, various articles of different values enumerated and described in the count, of the goods and chattels of the said George Keagy, then and there being found in the said dwelling house. In the second count the offence was charged as in the first, except that in the second it was charged that the accused did in the day time feloniously break and enter the said dwelling house, with intent, &c.

Issue was joined on the plea of not guilty, on which the jury found a verdict in these words: "We, the jury, find the prisoner Charles Walker, guilty, in man-
971 ner *and form as in the indictment alleged against him, and fix his term of imprisonment at five years in the penitentiary of this state." And judgment was thereupon accordingly rendered against him. That judgment was affirmed by the circuit court of said county, on a writ of error obtained thereto. To the judgment of the circuit court the accused applied to a judge of this court for a writ of error, which was accordingly awarded; and that is the case we now have under consideration.

But one error was assigned in the judgment, either of the county or the circuit court; and that error consists in the refusal of the county court to give an instruction which was asked for by the accused. An exception was taken to the action of the county court in that respect, and a bill of exceptions was accordingly signed, sealed and made a part of the record in the case. It states that on the trial of the indictment, after the jury were empanelled to try the same, and the commonwealth had introduced evidence tending to maintain the issue on her part, and had closed her case, the prisoner, by his attorney, moved the court to give the jury an instruction, which is in the words and figures following, to wit: "The court in-

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***Criminal Law—Possession of Stolen Goods—Presumptions.**—The ruling of the principal case contained in the second headnote is cited approvingly in Wright v. Com., 82 Va. 188; Porterfield's Case, 91 Va. 806. In Taliaferro v. Com., 77 Va. 411, the court citing the principal case, stated that it had never been held that possession of goods recently stolen is even *prima facie* evidence of burglary, and cites several authorities where the contrary is laid down. See also, Gravely v. Com., 86 Va. 401 and cases cited; State v. Reece, 27 W. Va. 379; State v. Heaton, 23 W. Va. 773.

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structs the jury that mere possession of the stolen goods mentioned in the indictment, by the prisoner, is not sufficient to give *prima facie* evidence of the charge in said indictment contained, and that unless the jury believe from other evidence than the evidence adduced before them, tending to show that the prisoner was in possession of the said goods, that the prisoner broke and entered, or entered without breaking, the dwelling house in the said indictment mentioned, with intent to steal therefrom, the jury cannot find the prisoner guilty of the charge in the said
972 indictment contained; *though the jury may on said evidence find the prisoner guilty of petit larceny." Which motion the court overruled, and refused to give the said instruction, &c.

The object of the prisoner's counsel, in asking for the said instruction, was to have the jury informed by the court that the rule of evidence, which certainly applies to simple larceny, in regard to the effect of the accused being found in possession of the stolen property recently after the larceny thereof, does not apply to a case of compound larceny, as where larceny is a component part of the offence of burglary or house-breaking.

The rule referred to, at least in its application to simple larceny, is thus laid down in 2 Russell on Crimes, edition of 1857, page 123. Upon proof of a larceny having been committed, and of the goods stolen having been found shortly afterwards in possession of the prisoner, "the general rule will attach, that wherever the property of one man, which has been taken from him without his knowledge or consent, is found upon another, it is incumbent on that other to prove how he came by it, otherwise the presumption is, that he obtained it feloniously. This rule, founded on the necessity of the case, which cannot admit offences of this kind to go unpunished, wherever positive and direct evidence is wanting of the guilt of the party, will probably seldom lead to a wrong conclusion if due attention be paid to the particular circumstances by which such presumption may be weakened or entirely destroyed. Among the most prominent of these will be the length of time which elapsed between the loss of the property and the finding of it in the possession of the prisoner; the probability of the prisoner's having been
973 at the time of the *theft near the place from which the property was taken; and more especially the conduct of the prisoner, from first to last with respect to the property found in his possession, and the charge brought against him of having obtained it by stealing." 2 East P. C., c. 16, § 93, p. 656, and Phil. on Ev. 168, 7th edition, are cited in a note to the passage above quoted.

The rule is laid down in the same words in Davis's Criminal Law, page 193.

In 3 Greenleaf on Ev., § 31, that writer says: "We have heretofore adverted to the possession of the instrument or the fruits of a crime as affording ground to presume the guilt of the prisoner; but on this subject no certain rule can be laid down of universal application, the presumption being not conclusive but disputable, and therefore to be dealt with by the jury alone as a mere inference of fact. Its force and value will depend on several considerations. In the first place, if the facts of possession stands alone, wholly *unconnected with any other circumstances,* its value or persuasive power is *very slight,* for the real criminal may have artfully placed the article in the possession or upon the premises of an innocent person, the better to conceal his own guilt, whether it be the instrument of homicide, burglary or other crime, or the fruits of robbery or larceny; or it may have been thrown away by the felon in his flight, and found by the possessor, or have been taken away from him in order to restore it to the true owner; or otherwise have come lawfully into his possession. It will be necessary therefore for the prosecutor to add the proof of other circumstances indicative of guilt, in order to render the naked possession of the thing available towards a conviction; such as the previous denial of the possession
974 *by the party charged, or his refusal to give any explanation of the fact, or giving false or incredible accounts of the manner of the acquisition, or that he has attempted to dispose of it, or destroy its Marks," &c., "or other circumstances naturally calculated to awaken suspicion against him, and to corroborate the inference of guilty possession."

And in section 56 of the same volume that writer further says, on the same subject: "Actual participation in the crime may be shown by the guilty possession of goods proved to have been in the house at the time of the act done, even though such possession may amount to another felony." *Rex* v. *Rickmer,* 2 East P. C. 1034, cited in note.

And in section 34 of the first volume of the same work, the author says: "But possession of the fruits of crime recently after its commission is *prima facie* evidence of *guilty possession;* and if unexplained either by direct evidence, or by the attending circumstances, or by the character and habits of life of the possessor, or otherwise, it is taken as conclusive. This rule of presumption is not confined to the case of theft, but is applied to all cases of crime, even the highest and most penal. Thus, upon an indictment for arson, proof that property which was in the house at the time it was burnt was soon afterwards found in the possession of the prisoner, was held to raise a probable presumption that he was present and concerned in the offence. The like presumption is raised in the case of murder accompanied by robbery, and in the case of the possession of an unusual quantity of counterfeit money."

In 3 Rob. Pr., old edition, page 224, that writer says: The possession of stolen
975 goods creates a presumption *that the person found in possession of them is the thief. *Bennet's case,* 2 Const. Rep. 692.

"In *Millard's case,* 1 Mass. R. 6, the indictment was for breaking and entering a shop in the night time, and stealing therefrom divers goods, wares &c. Upon the trial it was proved that part of the goods stolen from

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the shop were found in the possession of the defendant. The judge who presided at the trial instructed the jury that this was presumptive evidence, not only that the defendant stole the whole of the articles taken from the shop, but also of his breaking and entering, as alleged in the indictment, unless the defendant would give some reasonable account how he came by these goods. This he did not attempt to do; and the jury found the defendant guilty of the whole charge."

On the other hand, the counsel for the plaintiff in error, in insisting in his petition that the county court erred in refusing to give the said instruction, contends that "mere possession of stolen goods is not sufficient to give even *prima facie* evidence of burglary or of house-breaking;" and to sustain his position makes the following references: Whar. Am. Cr. Law, § 729; Burrill Cr. Ev. 456; *People* v. *Davis*, 1 Park. Cr. Ca. 447-451; 2 Bishop Cr. Pro. § 747, note 3. We have examined the books here referred to, or such of them as we had access to, and they certainly tend to sustain the position contended for.

There has been no decision of the question in this state, either of the late general court or of this court. Though there have been one or more decisions of this court in which the general rule before referred to has been recognized in its application to cases of simple larceny; but nothing has been said in any case in this state which we have seen, in regard to its application
976 *to a compound offence, such as burglary or feloniously breaking or entering a house, or which larceny may be a component part. The cases in this court which have a bearing on the general rule, in its application to a case of simple larceny, are *Hunt's case*, 13 Gratt. 757; *Wash's case*, 16 Id. 530; and *Price's case*, 21 Id. 846. In *Hunt's case* it was held that in a case of larceny of goods, which had been actually lost, the mere possession of the goods does not furnish any conclusive, or even *prima facie* proof of guilt; of itself it does not raise the suspicion of guilt. The case is valuable for the light which it throws on the subject or larceny in the finder of goods actually lost. *Wash's case* is valuable, among other things, for the light which it throws on the subject of presumption of law and fact; treating the presumption arising from the recent possession by the accused of goods proved to have been stolen, as one of fact and not of law. In *Price's case* the rule in its application to a case of larceny and its extent and effect are fully stated.

Thus it appears that it is by no means a settled question, at least in this state, that the general rule referred to is confined to cases of simple larceny, and does not extend to a case like the present.

But it is not necessary, and therefore is not intended, to decide the question in this case. We will proceed to consider this case upon the admission *pro hac vice*, that the rule applies only to cases of simple larceny. And upon that admission let us enquire whether the county court erred in refusing to give the instruction asked for? Let us now look at it again. It is "that mere possession of the stolen goods, mentioned in the indictment, by the prisoner is not sufficient to give *prima facie* evidence of the charge in said indictment contained," &c. A fatal ob-
977 jection *to this part of the instruction is, that it is a mere abstraction, and is not warranted by any evidence which appears to have been before the jury on the trial. None of the evidence is set out in the record. It is only stated in the bill of exceptions in regard to evidence, that after the jury were empanelled to try the indictment, "and the commonwealth had introduced evidence tending to maintain the issue on her part, and had closed her case, the prisoner, by his attorney, moved the court to give the jury an instruction," &c. What was the evidence so introduced does not appear. It may have been sufficient to prove, not only that the offence charged in the indictment was actually committed, but that the accused committed it; and that, too, independently of any presumption arising from the recent possession by him of the stolen property. If it was in fact so sufficient, it was then, certainly, a pure abstraction, "that mere possession of the stolen goods mentioned in the indictment by the prisoner is not sufficient to give *prima facie* evidence of the charge in said indictment contained," &c. If there was in fact no other evidence before the jury to connect the prisoner with the offence charged in the indictment, than the *mere* possession by him of the stolen goods in the indictment mentioned, that fact ought, certainly, to have appeared in the record to warrant the giving of the instruction asked for, and as it does not so appear, the court did not err in refusing to give it.

Again, the instruction asked for thus further proceeds: "and that unless the jury believe, from other evidence than the evidence adduced before them tending to show that the prisoner was in possession of the said goods, that the prisoner broke and entered, or entered without breaking, the dwelling house in the said indictment mentioned, with intent to steal therefrom,
978 *the jury cannot find the prisoner guilty of the charge in the said indictment contained, though the jury may on said evidence find the prisoner guilty of petit larceny." Now it is very clear, that even though the mere possession of the stolen property might not be even *prima facie* evidence of the offence charged in the indictment, yet certainly the recent possession of the stolen property is admissible and very important evidence in the case, and, in connection with the other evidence in the case, may have been amply sufficient to warrant the prisoner's conviction. The instruction asked for altogether ignores this important evidence, and treats it, not only as insufficient to convict, but also as inadmissible. It requires, in order to the prisoner's conviction of the offence charged, that the jury should believe "from *other* evidence than the

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evidence adduced before them tending to show that the prisoner was in possession of the said goods, that the prisoner broke and entered, or entered without breaking, the dwelling-house in the said indictment mentioned, with intent to steal therefrom."

We are therefore of opinion that the court did not err in refusing to give the said instruction; that there is no error in the judgment of the circuit court, affirming that of the county court; and that the said judgment of the circuit court must be affirmed.

JUDGMENT AFFIRMED.

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INDEX.

ADVANCEMENTS.

1. Testator by his will gives land and stock to his son H. By the 3d clause of his will he gives to his five daughters, by name, the balance of his land, his daughter M to account to the rest of his daughters in the sum of $3,500, and his daughter L. $5,200, these being the amounts paid for homes for them. By the 4th clause he gives to his son H and his five daughters the balance of his personal property, to be equally divided among them—HELD:

1. The advancements to M and L are only to be brought into the division of the real estate.
Lewis *v.* Henry's ex'or & als., 192

2. The personal estate embraced in the 4th clause is to be equally divided among the son and the five daughters.
Idem, 192

ADVERSARY POSSESSION.

1. J has held possession of a piece of ground in a city for forty years, which, in all that time, has been within his enclosure, claimed by him and cultivated as his property. His said possession is adverse to T and those under whom he claims, claiming the land, and the statute of limitations is a bar to any claim which T might otherwise have to the land; and the title of J thereto, even if it may not have been originally good, has thus matured and become perfect by adverse possession, and by lapse of time, and the operation of the statute of limitations.
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1. As to inheritance of real estate in Virginia, see Inheritance, No. 1, and
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1. When answer to a discovery called for by the bill is to be taken as true. See Practice in Chancery, No. 15, and
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1. On appeal from a decree dissolving an injunction to a sale of land under a deed of trust and dismissing the bill, the statute provides that an appeal bond shall be given to pay all damages and costs which may be awarded against, and all fees which may be incurred by the appellant; but it is not intended to cover the rents and profits of the land in his possession.
Cardwell *v.* Allen, Trustee, 184

2. The penalty of the appeal bond should be sufficient to indemnify and save harmless the surety in the injunction bond.
Idem, 184

3. An appeal from a decision of the board of supervisors of a county, rejecting a claim arising under an order of a county court, made in 1862, is properly taken to the county court of the county.
Dinwiddie County *v.* Stuart, Buchanan & Co., 526

4. A decree which overrules certain exceptions to a commissioner's report, and confirms the report as to the questions involved in these exceptions, is a decree settling the principles of the cause as to these questions, from which the party excepting may appeal, although the report is recommitted to the commissioner as to other matters involved in other exceptions.
Garrett's adm'x *v.* Bradford, 609

5. Where a warrant is brought before a justice upon a claim exceeding twenty dollars, and upon the application of the defendant before trial, it is removed to the county court, an appeal lies to the
982 *circuit court, from the judgment of the county court in the case.
Carter's adm'r *v.* Kelly, judge, 787

6. Pending a suit by judgment creditors against the debtor and others, to set aside a deed of trust, or subject the surplus to payment of their debts, the debtor is declared a bankrupt on his own petition; and in the suit he claims his exemption and homestead out of the surplus of the purchase money of the land, after satisfying the debt secured by the deed. The court below dismisses his application, and makes a decree distributing the fund. The bankrupt has such an interest in the case as entitles him to appeal.
Barger *v.* Buckland & als., 850

APPELLATE COURT.

1. A commissioner in settling the account of W, committee of C, a lunatic, makes two statements, the only difference being in a single item of $1,000, which is inserted in one statement and omitted in the other, and he refers the question as to this item to the court. The court adopts the statement giving the committee the credit. On appeal, held an exception to the report was not necessary, and the appellate court may correct the decree.
Cole's Committee *v.* Cole's adm'r, 365

2. Accounts settled by W in 1859 and 1863, speak of him as trustee of C; but in the account by the commissioner he is treated as committee of C. There being no exception to the report for bringing into the latter account the charges in the first two, W's administrator cannot object to the report on that ground in the appellate court, he not having excepted in the circuit court.
Idem, 365

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3. Where in a suit in equity, the rights of the parties involve the decision of questions which were not put in issue by the pleadings, or so vague and uncertain as not to inform the opposite party of what were the issues between them, so as to prepare his case in a way to secure a full investigation by the court, and a decision according to the very right of the case, and which would do justice to all concerned, the appellate court will reverse the decree of the court below, and send the cause back, with leave to the parties to amend their pleadings.
Nash v. Nash & als., 686

4. In an action of unlawful detainer the defendant appears; but, though the case is continued for years, he does not file any plea. The cause is proceeded in precisely as if there was a plea filed—the jury are sworn to try the issue joined, and the defendant makes full defence. There having been a verdict and judgment in favor of the plaintiff, the defendant cannot set up the want of the plea and issue thereon in the appellate court.
Bartley v. McKinney, 750

5. There having been oral evidence expressly proving that the land in controversy is part of the land devised to the plaintiff by her husband, and jury having so found, though there may be documentary evidence tending to show it was not embraced in the tract of the husband; yet the bill of exceptions of the defendant to the refusal of the court to grant a new trial, containing the evidence and not the facts proved,—the court certifying its inability to certify the facts because of conflict of evidence—the appellate court cannot reverse the judgment, but must take it to be correct. Idem, 750

6. The general course of the examination of witnesses is, and must of necessity be, left to the discretion of the trying judge, and the exercise of that discretion will never be interfered with by an appellate court unless it plainly appears that some injustice has been done.
Scott and Boyd v. Shelor, 891

ASSUMPSIT.

1. Where an action of assumpsit is brought for goods sold and delivered, and the declaration contains only the common counts, the bill of particulars is filed and the only count to which the evidence applied was for goods sold and delivered. If it is proved that the goods were absolutely paid for by a check, the demand upon the account is thereby extinguished and there is no count in the declaration upon which the plaintiffs can recover.
Blair & Hoge v. Wilson, 165

ATTACHMENTS.

1. When a sale of a negotiable note is valid against an attaching creditor. See Negotiable Instruments, No. 3, and
Howe, Knox & Co. v. Ould & Carrington, 1
Bartlett & Robins v. Same, 1

983 *2. R, by a verbal contract, sells a house and lot to M, who pays all the purchase money and is put in possession. R has no interest in the property which may be subjected by attachment against him, as an absent debtor, to the payment of his debt.
Hicks v. Riddick & als., 418

3. After the purchase money had been paid and M put into possession, R sent M a deed executed by himself for the property; but M, insisting that R's wife should join in the deed, returned it to R; and it was not again delivered. If the deed might be considered as accepted by M, that would not render the property liable to the attachment.
Idem, 418

BAILMENT.

1. The finder of a bank note, as against a bailee without reward, to whom he delivers it to be kept for the finder, has such a possessory interest in the note as entitles him to recover the same of the bailee, on his refusal to redeliver it to the finder upon his request, and in the absence of any claim of the rightful owner made known by him to such bailee. Tancil v. Seaton, 601

2. Such bailee is not bound to use as great care and diligence in the keeping of the note as he would be if he were a bailee for compensation; and if the note was stolen from his possession, he will not be liable for it, unless the loss was the result of gross negligence on his part. Idem, 601

3. In such a case, to entitle the plaintiff to recover, he must show that the note was a genuine note, and of the value he claimed.
Idem, 601

BANK NOTES.

1. See Bailments, No. 1, 2, 3, and
Tancil v. Seaton, 601

BONDS.

1. See Appeals, No. 1, 2, and
Cardwell v. Allen, trustee, 184

2. A paper which in the body of it says, "as witness my hand and seal," has the word "seal" affixed to the signature of the maker. It is a sealed instrument within the meaning of the statute. Code of 1849, ch. 143, § 2, p. 580.
Lewis' ex'ors v. Overby's adm'or, 627

BOUNDARIES OF LAND.

1. In an action of ejectment parol evidence is admissible to prove that the calls for course and distance in a deed are mistaken, and do not designate the true boundary of the land intended to be conveyed.
Elliott v. Horton, 766

BURGLARY AND HOUSEBREAKING.

1. See Larceny, No. 4, 5, and
Walker's case, 969

CHECKS ON BANKS.

1. While the giving of a check by a debtor to a creditor is generally presumed to be only a provisional or conditional payment of

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the debt for which it is given, yet such may, by agreement of parties, be given and received in full payment and absolute discharge and satisfaction of the debt; and whether it was so given and received is a question of fact for the jury.

Blair & Hoge *v.* Wilson, 165

2. A check may be offered in evidence under the money counts; and if there is no other evidence in the case, it is of itself sufficient to entitle the plaintiffs to recover on those counts; yet it is only prima facie evidence of money lent, paid and advanced, or had and received; and where it is proved that no money had come to the hands of the defendant, the presumption raised by the check is rebutted, and no recovery can be had on those counts. Idem, 165

3. Where an action of assumpsit is brought for goods sold and delivered, the declaration filed contains only the common counts, the bill of particulars is filed, and the only count in the declaration to which the evidence applied was that for goods sold and delivered. If it is shown that the goods were absolutely paid for by a check, the demand upon the account is thereby extinguished, and there is no count in the declaration upon which the plaintiff can recover. Idem, 165

4. Quære: Whether under the evidence in this case the action could have been maintained on the check if it had been specially declared on. Idem, 165

984 *CONDITIONS.

1. Testator, some months after making his will in which he gave his estate to his children, of whom M was one, makes a codicil to it, in which he says: If my estate should have to pay the debt, or any part thereof, in the lawsuit brought by M's administrator against Dr. B's estate, I hereby direct that my daughter M is to forfeit all interest in my estate, and is to inherit nothing under my will. He was the surety of B, who had been the husband of M, and was not sued, but settled the debt and took an assignment of it. After his death, in a suit by his executors, his daughter M brings the money into court, and tenders it—HELD: The condition created by the codicil is a condition subsequent, and the estate not having paid the debt, but M tendering the money to pay it, her interest in her father's estate is not forfeited.

Lewis *v.* Henry's ex'ors & als., 192

CONFISCATION.

1. In a proceeding to confiscate property of a person charged to be in a rebellion, the directions of the attorney general are, that the method of seizure of the property shall be conformed, as far as may be, to the state law, if there be such. When therefore the proceeding is to confiscate debts due from a municipal corporation, the notice to the debtor must be upon the mayor or other officer named in the Virginia statute; and notice given to the auditor of the corporation is of no effect; and the judgment based upon such notice is null and void.

Fairfax *v.* City of Alexandria, 16

2. On such a proceeding against F, the counsel of F does not enter an appearance for him, because in three cases against the same party before the same judge, he was informed by the judge from the bench that it was the rule of his court not to allow an appearance and defence by rebels and traitors; and in these cases the appearance and defence were stricken from the cases; and this a short time before the last case was acted on. The counsel was not in default for failing to enter an appearance for F; and the decree of confiscation is void and of no effect.

Idem, 16

CONSTITUTIONAL LAW.

1. See Interest, No. 1, 2, 5, 6, and Contracts, No. 1, 2, and

Roberts' adm'r *v.* Cocke, &c., 207
Murphy *v.* Gaskins' adm'r, 207

2. Contracts made by counties under the statute for the purchase of salt are valid, and their payment is not prohibited either by the constitution of the state or of the United States.

Dinwiddie County *v.* Stuart, Buchanan & Co., 526
Pulaski County *v.* Same, 872

3. The act approved April 2, 1873, amending section 14, chapter 187, of the Code of 1860, in relation to interest, so far as it confers on courts and juries, in the suits therein mentioned, power to remit interest as therein provided, on contracts entered into prior to April 10, 1865, which said courts and juries did not have under the laws in force at the times such contracts were made, or which empowers courts to reverse judgments and decrees upon motion, and to abate the interest as therein provided, is repugnant to the constitution of the United States and of this state, and is therefore void.

Cecil *v.* Deyerle & als., 775
Linkous & als. *v.* Shafer & als., 775
Garnand & als. *v.* Childress & als., 775
Kent's adm'r *v.* Kent's adm'r, 840

CONTRACTS.

1. The laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of the contract; and that, whether such laws affect its validity, construction, discharge or enforcement.

Roberts' adm'r *v.* Cocke &c., 207
Murphy *v.* Gaskins' adm'or, 207

2. While it is competent for the state to alter or change the remedy on a contract, this can only be done where the change does not impair substantial rights. Idem, 207

3. See interest, No. 1, 2, 3, 4, 5, 6, 7.

Idem, 207
Cecil *v.* Deyerle & als., 775
Kent's adm'r *v.* Kent's adm'r, 840

4. In April 1870 the B life insurance company, of New York, employed W as their general agent, to act as such in a large defined territory in Virginia. W's
985 *duties, as defined in their agreement, were to solicit applications for life

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insurance policies, to deliver the same and collect the premiums thereon, also to constitute sub-agents throughout his whole field, such sub-agents to be under the pay and authority of W. And if the aggregate of commissions earned by W on policies taken by himself, and by the margin of his commissions over that of sub-agents on their work, should not amount to $3,000 for the first year, the company would make up the amount to that sum for that year. And W promised to devote his time, services, &c., to the interest of the company throughout the whole of said territory, exclusive of any other business. In October 1870 the company, having paid W $1,500 of his salary, and received only $423 of premiums from him, discharged him from his agency; and then W brought suit to recover the balance of his salary. On the trial it appeared W had made very little effort to appoint sub-agents, and that he did not travel through his territory; he contending that he was only to appoint sub-agents when directed by the company, and that the company did not furnish him money to enable him to travel.—HELD: That under the agreement, the appointment of sub-agents was committed to W, and he was to pay his own expenses; and having neglected his duties, he was properly discharged by the company.

The Brooklyn Insurance Co. *v.* Bidgood, . 290

5. Contract by a county, under the statute for the purchase of salt in 1862, is valid and binding on the county as at present organized, and its payment is not prohibited by the constitution of either the state or the United States.

Dinwiddie County *v.* Stuart, Buchanan & Co , 526

6. As to parol contracts for sale of land, as against subsequent judgment creditors of the grantor. See Vendor and Purchaser, No. 1, and Attachments, No. 2, 3, and

Floyd, trustee, *v.* Harding & als., 401

Hicks *v.* Riddick & als., 418

7. When parol contract for land will be enforced. See Vendor and Purchaser, No. 4, and

Rhea *v.* Jordan, 678

8. A parol contract between a father and his son, whereby the father agreed to give to the son a certain tract of land, on the consideration that the son would support the father and his wife for their lives, is a valid contract, and will be enforced at the suit of the children of the son after his death, against other children of the father, who had fraudulently procured a deed for the land from the father, with the knowledge of said contract.

J. W. Lester & als. *v.* F. W. Lester & als., 737

9. The state government of Virginia, which existed at Richmond during the war, and the Confederate government, of which it formed a part, were at least governments de facto; and contracts arising thereunder are valid, and will be enforced, unless prohibited by the constitution of the state.

Pulaski County *v.* Stuart, Buchanan & Co., 872

CORPORATIONS.

1. In a proceeding to confiscate property of a person charged to be in rebellion, the directions of the attorney general are, that the seizure of the property shall be conformed, as nearly as may be, to the state law, if there be such. When therefore the proceeding is to confiscate debts due from a municipal corporation, the notice to the debtor must be to the mayor or other officer named in the Virginia statute; and notice to the auditor of the corporation is of no effect; and the judgment based upon such notice is null and void.

Fairfax *v.* City of Alexandria, 16

2. When corporations, whether private or municipal, owners of wharves, are liable for damages done to a vessel moored at their wharves.

See Negligence, No. 1, 2, and

City of Petersburg *v.* Applegarth's adm'r, 321

COSTS.

1. There are several suits by creditors against the same defendants to subject the land of their debtor to the payment of their debts. Though the suits are consolidated and heard together, each plaintiff is entitled to a decree for his separate costs.

Barger *v.* Buckland & als., 850

986 COUNTY COURTS.

1. An appeal from a decision of the supervisors of a county, rejecting a claim arising under an order of a county court, made in 1862, is properly taken to the county court of the county.

Dinwiddie County *v.* Stuart, Buchanan & Co., 526

2. A county court acting under the statute authorizing county courts to purchase salt, is exercising a special authority, and it must appear from the record that the justices were summoned, or a majority were present, when a bond was executed for salt purchased, or the bond will be held to be null and void.

Idem, 526

Pulaski County *v.* Stuart, Buchanan & Co., 872

3. When an appeal lies from a judgment of a county court. See Appeals, No. 5,

Carter's adm'r *v.* Kelly, judge, 787

COUNTY ORGANIZATIONS.

1. An appeal from a decision of the supervisors of a county, rejecting a claim arising under an order of a county court, made in 1862, is properly taken to the county court of the county.

Dinwiddie County *v.* Stuart, Buchanan & Co., 526

2. A county court acting under the statute authorizing county courts to purchase salt, is exercising a special authority, and it must appear from the record that the justices were

summoned, or a majority were present, when a bond was executed for salt purchased, or the bond will be held to be null and void.
Idem, 526

Pulaski County *v.* Stuart, Buchanan & Co., 872

3. Where a party presents his claim against a county to the board of supervisors, within the time limited by the statute, and they decline to take it up, and adjourn, and no entry is made of it until a subsequent meeting of the board, after the time of limitation, the statute will not be allowed to bar the claim.
Idem, 526

4. Under the statute authorizing counties and corporations to purchase salt to be sold to the people, the county court of Dinwiddie in 1862 makes a contract with S for the purchase of a certain quantity of salt, which is delivered by S. This is a valid contract, binding on the county of Dinwiddie as at present organized, and its payment is not prohibited either by the constitution of the state or of the United States. Idem, 526

COURTS.

1. Where a court of general jurisdiction acts within the scope of its general powers, its judgments will be presumed to be in accordance with its jurisdiction, and cannot be collaterally impeached.
Pulaski County *v.* Stuart, Buchanan & Co., 872

2. Where a court of general jurisdiction has conferred upon it special powers by special statute, and such special powers are exercised judicially, its judgment cannot be collaterally impeached. Idem, 872

3. Where a court of general jurisdiction has conferred upon it special powers by special statute, which are only exercised ministerially, and not judicially, no presumption of jurisdiction will attend its judgments, and the facts essential to the exercise of the special jurisdiction must appear upon the face of the record. Idem, 872

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. F is indicted for the larceny of $208, of notes of United States currency, the property of R. The proofs refer to F's obtaining the money under false pretences. To sustain the prosecution the commonwealth must prove every fact which would be required to be alleged in an indictment for obtaining money on false pretences. Fay's case, 912

2. In the absence of proof, that such money as is charged in the indictment to have been stolen, was received by the prisoner, he cannot be properly convicted. Idem, 912

3. On an indictment under ch. 202, § 29, of the Code of 1873, of H, for that he maliciously and of his malice aforethought, did shoot one S, the jury returned their verdict: "We, the jury, find the defendant H not guilty of malicious shooting, as in the within indictment charged, but guilty of unlawful shooting, with intent to maim, disfigure and kill, and fix his term of confinement in the penitentiary at two years. The verdict 987 *is to be read in connection with the indictment, and therefore sufficiently indicates the person shot.
Hoback's case, 922

4. Upon a motion for a continuance, the case having been in court for a year, and a subpœna for a witness having been several times sent to the sheriff of another county and not served, and the prisoner not having used sufficient diligence to have the subpœna served, a continuance of the cause is properly refused; though the counsel of the prisoner states in writing that he had conversed with the witness, and that he will prove material facts, which he states, in favor of the prisoner, and the prisoner swears that the witness is material for her, and she cannot go safely to trial without him, and that she can prove by him the facts stated by her counsel.
Roussell's case, 930

5. On a prosecution for larceny, the prosecutor gave evidence tending to show when and how the larceny was committed on him. On re-examination he was asked by the attorney for the commonwealth if he did not immediately after the alleged larceny go to the house of another person, who lived a few doors off, and tell him he had been robbed, and the circumstances? On objection to the question by the counsel for the prisoner, the court sustained the objection to so much of the question as referred to the details of the statement, but allowed the witness to state that he had told the other person at the time named "that he had been robbed," and then allowed that other person, to whom the statement was made, to testify that the prosecutor had come to him and told him that he had been robbed; to all which the counsel for the prisoner excepted.—HELD:

1. The statements were inadmissible. They were inadmissible as part of the res gestæ. "Facts which constitute the res gestæ must be such as are so connected with the very transaction or fact under investigation as to constitute a part of it;" and the above statements do not come within the definition. Hayne's case, 942

2. They were inadmissible, as a complaint made by the prosecutor recently after the outrage committed. The only exception to the general rule, excluding the statements or declarations of parties as hearsay evidence, as a complaint, is that in cases of rape, and in this case the complaint must be made at once. Idem, 942

3. They were inadmissible, for the purpose of rebutting the imputation that the prosecutor was drunk at the time the statements were made. If the credibility of a witness is assailed because he was drunk, the only way to meet the assault is by proving by others his actual condition at the time of the transaction of which he speaks, and not by statements and declarations of his own or others, which might prejudice the prisoner while given in evidence under the pretence of showing that they were such as a sober man would make.

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under the presumed circumstances of the case. Idem, 942

6. It is settled law in this state, that where there are several counts in an indictment, and the jury find the accused guilty on one of the counts, saying nothing as to the others, the verdict operates as an acquittal upon the counts of which the verdict takes no notice; and the court should enter a verdict accordingly. Stuart's case, 950

7. In such a case, if the accused applies for and obtains a new trial, he does not thereby waive the advantage of the acquittal thus obtained. But he must be tried, and can only be tried again, on the count on which he was convicted, and not on the counts on which he has been before acquitted. And the rule is the same whether the new trial is granted because the verdict is contrary to the evidence, or because the verdict is so defective or uncertain that legally no judgment can be pronounced thereon. Idem, 950

8. And the same rule applies where on an indictment for murder, the jury find the prisoner guilty of manslaughter. or on an indictment for malicious stabbing, &c., with intent to maim, disfigure or kill, the jury find the prisoner guilty of unlawful stabbing with intent to kill. Idem, 950

9. Where there is but one count in an indictment on which the accused may be convicted of one of several offences which are covered by the indictment, the verdict of the jury finding the accused guilty of one of the said offences is a verdict of acquittal of all the others of a higher grade of offence: as on an indictment for murder, a verdict 988 finding the accused *guilty of manslaughter, is a verdict of acquittal as to the murder: and on an indictment for malicious stabbing with intent to kill, a verdict finding the accused guilty of unlawful stabbing, with intent to kill is an acquittal of malicious stabbing. And the rule stated in No. 7 applies. Quære: If this rule applies where on an indictment for murder the jury find the prisoner guilty of murder in the second degree. Idem, 950

10. On a second trial of the offence for which the accused was found guilty by the jury, if the jury find him guilty they may fix his imprisonment or other penalty at any period or penalty authorized by the statute, though it be greater than that fixed by the first jury. Idem, 950

11. Under an indictment with only one count, for malicious shooting, stabbing or cutting, with intent to kill, the accused may be convicted of the offence charged, or of unlawfully doing such acts, or indeed, of any other offence—felony or misdemeanor—which is substantially charged in the indictment. Idem, 950

12. The acquittal obtained by the first verdict is not affected, if the indictment under which it was found is afterwards quashed by the court on the motion of the attorney for the commonwealth; nor is the prisoner entitled to be discharged from prosecution on another indictment for the offence of which he was convicted in the first indictment, because that indictment was quashed; he would have every right under the second indictment that he had under the first, and no more. Idem, 950

13. The mere pendency of one indictment is no bar to another, even for the same offence; the accused cannot be tried on both, but the commonwealth may elect on which it will prosecute. Idem, 950

14. The discharge of a jury, after they have rendered a verdict against a prisoner, but which verdict is adjudged to be a nullity because it was not duly perfected, and thereupon set aside as insufficient, is no bar to a prosecution under the same or a new indictment. Idem, 950

15. When a prisoner is arrested under a warrant of a justice, examined and committed to jail, and indicted and tried, and afterwards that indictment quashed and a new indictment found against him for the same offence, he is not then entitled to a new preliminary examination before a justice under the last indictment found against him. Idem, 950

16. Where a prisoner has been carried to the penitentiary in execution of the judgment of the court below, and after that a new trial is granted him by the court of appeals, the last named court will award a writ of habeas corpus, directed to the superintendent of the penitentiary, to bring the prisoner before it, and order him to be committed to the sheriff of the county in which the court of appeal, is sitting, to be by him conveyed to the jail of the county in which the judgment of conviction was rendered, for the purpose of being again tried in conformity with the judgment of the appellate court. Idem, 950

CROSS BILL.

1. When it is unnecessary for defendants to set up their claims against co-defendant by a cross bill. See Legacies and Legatees, No. 1, and

Moorman *v.* Smoot & wife & als., 80

DECREES.

1. What is a decree settling principles in a cause from which an appeal may be taken. See Appeals, No. 4, and

Garrett's adm'x *v.* Bradford, 609

DEPOSITIONS.

1. A deposition is taken to be read in a case in which Franklin Bartley is defendant, and that is the name given in the summons and to which he appeared; but the name in which the action is carried on is William F. Bartley. The person is obviously the same, and Franklin is part of the defendant's name. The deposition cannot be objected to on this ground.

Bartley *v.* McKinney, 750

DOCKETING JUDGMENTS.

1. Under the act, Code of 1860, ch. 186, §§ 4, 8, indexing is not a necessary part of the docketing of a judgment; and where a judg-

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ment is properly entered upon the judgment docket, the lien of the judgment is
989 valid against a purchaser *of the land without notice of the judgment.
Old Dominion Granite Co. & als. v. Clarke & als., 617
Same v. Jones & als., 617

DUELLING.

1. Under the constitution and statute of Virginia, a party who has aided and assisted in a duel fought with deadly weapons, may be removed from office by a proceeding by quo warranto; or, if that writ be not in use, by information in the nature of a quo warranto; though he has not yet been convicted of the offence in any criminal prosecution against him. Royall v. Thomas, 130

ELECTION.

1. An infant cannot elect to take land in which her money has been invested by an administratrix; nor can a married woman; but her husband may elect either for his wife or for himself and wife conjointly.
Shanks v. Edmundson & als., 804

EQUITY, JURISDICTION AND RELIEF.

1. A court of equity has jurisdiction of a suit brought by the owner in possession, to set aside a deed which has been put upon record, whereby the complainant's land has been wrongfully conveyed to a purchaser at a tax sale.
Carroll v. Brown, 791

2. See Practice in Chancery, No. 3, 12, 14, 17, 18, 20, 22, 24.

EVIDENCE.

1. When a check upon a bank is evidence under the money counts, to recover the amount from the drawer, and when it is not. See Check on Banks, No. 2, and
Blair & Hoge v. Wilson, 165

2. Parol evidence is admissible to sustain resulting trusts. See Trusts and Trustees, No. 2, and
Borst v. Nalle & als., 423

3. When parol evidence is not admissible to prove that a party signing a paper never read it, and did not know its contents. See Insurance, No. 16, and
Southern Mutual Ins. Co. v. Yates, 585

4. In an action of unlawful detainer, plaintiff claimed under the will of her husband, which gave her in lieu of her dower all his real estate during her life, except certain portions bequeathed to his children. The defendant claimed under a son to whom testator gave a parcel of land. Evidence for the defendant, that the plaintiff had been in possession and enjoyed the benefits of one full half of the cleared lands of her late husband from the time of his death to the time of the trial, is irrelevant and inadmissible.
Bartley v. McKinney, 750

5. In an action of ejectment parol evidence is admissible to prove that the calls for course and distance in a deed are mistaken, and do not designate the true boundary of the land intended to be conveyed.
Elliott v. Horton, 766

6. The declarations of a party are generally not admissible as evidence in his own favor; but they are so admissible whenever they form a part of the res gestæ. To come within the terms and operations of the rule, the declarations must accompany and explain an act done, which is a fact in issue, or is relevant to the issue.
Scott and Boyd v. Shelor, 891

7. In a prosecution for larceny, evidence of the statements made by the prosecutor, immediately after the alleged offence was committed, is inadmissible to sustain the prosecution. See Criminal Jurisdiction and Proceedings, No. 5, and
Hayne's case, 942

8. As to the effect of stolen goods being found in the possession of the accused in cases of simple larceny, or larceny compounded with burglary or housebreaking. See Larceny, No. 4, 5, and
Walker's case, 969

EXECUTORS AND ADMINISTRATORS.

1. A case in which an executor is held liable for money of his testator's estate, which he had collected in July 1861, and which he had deposited in bank in his own name, with his own money.
Vaiden & als. v. Stubblefield's ex'or, 153

2. Although at common law the appointment by a creditor of his debtor as executor operated, as against legatees and distributees, with certain exceptions, as a release of
990 the debt, the rule never applied *to a debtor who was appointed administrator of his creditor.
Utterback's adm'r v. Cooper, 233

3. If the obligor of a bond takes out administration to the obligee and dies, the administrator de bonis non of the obligee may maintain an action for such debt against the executor of the obligor. And so if the administrator is removed from his office, the action may be maintained against him by the administrator de bonis non of the obligee. Idem, 233

4. A lien given to secure the debt due from an executor or administrator to his testator or intestate, is, of course, discharged when the debt is actually paid to the creditors or legatees and distributees of the creditor; but the introducing the debt into an administration account, as a charge to the executor or administrator, is not sufficient to discharge the lien, either as against creditors, legatees or distributees of the creditor, or as against the sureties of the executor or administrator. Idem, 233

5. A sold to his son U a tract of land, taking his bonds for the purchase money, and a deed of trust on the land to secure them. He died, and his son U qualified as his administrator. Shortly afterwards U obtained

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a loan of money and stock from C, and gave a deed on this same land to secure it. Upon a bill filed by C against the administrator de bonis non of A, and U and his sureties in his official bond, to enforce his lien; the court being of opinion, from all the evidence, that U had not paid any part of his debt to A, though he represented to C he had done it, and that he was fraudulently trying to get rid of the lien in favor of A in order to raise money for his own purposes, and that C either knew, or might have known if he had wished it, the facts, and made the loan with the knowledge of them or in willful ignorance,—HELD: in favor of A's estate and U's sureties, that the lien to secure A's debt was a valid subsisting lien, and had preference to that of C. Idem, 233

6. Where executors acting during the late war had full power under the will to do the acts which they performed, and in performing them acted in good faith in discharge of what they believed to be their duty as executors, they are not liable for the ultimate loss which has arisen out of their acts.

Mills & als. *v.* Mills' ex'ors & als., 442
Same *v.* Lancaster & als., 442

7. Executors who are empowered by the will under which they act, to sell real estate and collect debts, and invest the proceeds for the purposes of the trusts, declared in the will, in December 1862, sell real estate, and in January, March and April collect ante-war debts, well secured on real estate, taking payment in Confederate money, which they immediately invest in eight per cent. bonds for the purposes of the trusts of the will.—HELD: That having acted in good faith, and in the exercise of their best judgments, under the circumstances surrounding them, they are not liable for the losses which accrued from such sales, collections and investments. Idem, 442

8. Two of three nominated executors qualify, and sell and convey real estate to the purchasers, who pay up the purchase money in full. Afterwards the third qualifies, and consents to the sale by sharing the commissions.—HELD: The title of the purchaser is valid, at least in equity. Idem, 442

9. There is a perpetual rent secured on real estate, which the lessee has a right to redeem, by paying an amount which, at six per cent., will produce an interest equal to the rent.—HELD: One of these executors may receive the payment, though it may require all to execute the release. Idem, 442

FALSE PRETENCES.

1. In an indictment for obtaining money on false pretences it would be a material allegation that the money was obtained by the false pretence alleged, and therefore it is necessary to be proved under the indictment for larceny founded on the obtaining of money on false pretences, in order to a conviction. Fay's case, 912

2. The false pretences, either with or without other causes, must have had a decisive influence upon the mind of the owner, so that without their weight he would not have parted with his property. Idem, 912

3. Where the false pretence is referred to the sale of a lot by the prisoner, unless the selling of the property was by a false pretence, with intent to defraud the buyer, the case is not within the statute. Therefore the fraudulent intent must have existed at the time the false pretences were 991 *made by which the money was obtained. Idem. 912

GUARDIAN AND WARD.

1. A guardian of a married man has authority as guardian to reduce the wife's choses in action into possession.

Ware *v.* Ware's adm'r, 670

HOMESTEAD EXEMPTIONS.

1. Where a grantor in a conveyance of land had claimed homestead in bonds given for the purchase money by the grantee, and the conveyance is afterwards set aside as fraudulent and void as to judgment creditors of the grantor, he may claim homestead as against the creditors, in the land or in the proceeds of the sale thereof to the amount of said bonds.

Shipe, Cloud & Co. *v.* Repass & als., 716

2. Pending a cause defendant becomes a bankrupt, and claims his homestead. The court should proceed to adjudicate upon the right of the debtor to his homestead.

Barger *v.* Buckland & als., 850

HUSBAND AND WIFE.

1. Wife owns an interest in slaves, subject to the life estate of her mother. The husband sells the said interest, and then dies in the lifetime of his wife and her mother. The sale of the interest is invalid, and the wife is entitled to it.

Moorman *v.* Smoot & wife & als., 80

2. The guardian of a married man has authority, as such guardian, to reduce the wife's choses in action into possession; and having done this, though the husband dies still under the age of twenty-one years, the wife is neither entitled to the property, nor to a settlement out of it.

Ware *v.* Ware's adm'r, 670

3. M, administratrix of her husband, after paying all debts of the estate, has in her hands a sum of money for distribution among herself and her three children. This money, with some that she borrowed, she invested in a tract of land, taking the title to herself. Her daughter, L, marries S, she being at the time an infant. After her marriage, M and the other two children and S execute a deed, by which it is recited that the parties have agreed that M shall have one-half the land for her share, she paying the money she had borrowed, and that S had purchased the interest of M and the other two children in the other half. M and these two children convey to S the last half of the land to be held by him to his own use. HELD:

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1. L, whilst an infant, could not make an election to take the land so purchased in lieu of the money in the hands of the administratrix to which she was entitled, and which had been invested in land.

Shanks *v.* Edmondson & als., 804

2. A wife during coverture has no power to make such election. But the husband may, in behalf of himself and wife, make such election, where it plainly and distinctly appears that he acted for her, or for himself and wife conjointly.

Idem, 804

3. Upon the marriage of L with S, she not having made an election to take the land, she had no interest in the land held by her mother as real estate; but only a claim upon her mother as administratrix, for her proportion of the money which she was entitled to receive as one of the distributees of her father's estate. This was upon her marriage nothing more than a chose in action, which upon a reduction into possession belongs to her husband.

Idem, 804

4. The adjustment made by M and her two children and S, was upon the part of S a reduction into possession of the chose in action. S being a party to the deed, the claim against M was thereby extinguished; and such extinguishment will be held to be a reduction into possession by S to such an extent as to clothe him with the absolute property as against any claim of his wife, either to have the land as hers or to have a settlement upon her.

Idem, 804

5. For the principles applicable to such cases, see the opinion of the court by Christian, J. Idem, 804

INHERITANCE.

1. H, of foreign birth, bought real estate in 1856 and 1859, and died in 1861 seized thereof, without known heirs. The said real estate was escheated to the commonwealth; and in May 1876, persons, natives of 992 and living in Switzerland, *instituted proceedings for the recovery of the property.—HELD:

1. The law as it was at the death of H must govern the case; and under the act of April 7, 1858, Sess. Acts 1857-'8, ch. 42, § 44, Code of 1860, ch. 115, § 557, persons natives of another country, and living there, are not entitled to the real estate.

Haunsteins *v.* Lynham, escheator, 62

2. The treaty of November 1855, between the United States and Switzerland, 11 U. S. Stat. at Large, p. 590, article 5, clause 3, by its terms, depends for its operation and effect upon the legislation of the state in which the real estate lies; and no right in real estate in Virginia will vest in a citizen of that republic under said treaty, there having been, at the death of H, no statute authorizing it. Idem, 62

INSTRUCTIONS.

1. Instructions asked for, which are not founded on the evidence in the case, are properly refused.

Bartlett *v.* McKinney, 750

INSURANCE.

1. A policy of insurance on a building insures K and his legal representatives. The building having been burned after the death of K, his administratrix may maintain an action on the policy.

Geo. Home Ins. Co. *v.* Kinnier's adm'x, 88

2. One of the conditions of the policy is, that it shall be void "if the title of the property is transferred or changed." This does not apply to the descent of the property on the death of the assured to his heirs.

Idem, 88

3. A condition in the policy, that the foreclosure of a mortgage shall be deemed an alienation of the property, and avoid the policy, does not involve a sale under a decree of the court in a creditor's bill against the heirs, &c., which sale is set aside by the court. Idem, 88

4. One condition of a policy is: Any change within the control of the assured, material to the risk, shall avoid the policy. The change here referred to is a change in the condition of the property wrought by the agency of the assured; and not the mere vacation of the house by the assured or its occupants.

Idem, 88

5. A condition of the policy is, that the policy shall be vitiated if the premises insured become vacated by the removal of the owner or occupant for more than twenty days without immediate notice to the company and written consent.—HELD: It was competent for the insurer or his lawful agent to waive the condition; and if at the time the agent of the company received the premium of insurance and delivered the policy, he had knowledge of the vacation of the property, and did not then avoid the policy, but treated it as valid and subsisting, such conduct of the agent was a waiver of the condition, and a breach of it cannot be relied on by the company to defeat a recovery on the policy. Idem, 88

6. As to waivers by the insurers of conditions in a policy, how and by whom they may be made, see the opinion of Burks, J.

Idem, 88

7. A condition of the policy required immediate notice of loss, and that within thirty days the insured render a particular account thereof, with an affidavit, &c.—HELD: If the insurers from any reliable source knew that the building insured had been destroyed by fire, and by any act or declaration of theirs, or their lawful agent, prevented the assured from preparing the schedule, with the affidavit thereto required by the policy, in thirty days, whether verbally or in writing, it was a waiver of the

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performance within the thirty days of that condition; and the omission to do so is no bar to the action on the policy, provided it was done within a reasonable time thereafter. Idem, 88

8. If at the time of issuing a policy I had been authorized by the insurance company to receive and accept proposals for risks subject to their approval and ratification, to issue and deliver policies and renew the same, and receive premiums therefor, and had been supplied with blanks signed by the president, to be filled and countersigned by him; this constituted I the general agent of the company; and the company is bound by all his acts as such, within the scope of his authority, so long as it existed, notwithstanding any private instructions which he may have received limiting
993 *that authority, of which the assured had no notice. Idem, 88

9. For the construction of a contract between an insurance company and a general agent, see Contracts, No. 4, and

The Brooklyn Insurance Co. *v.* Bidgood, 290

10. One condition of a policy of insurance on a building is, "if the building insured stands upon leased ground it must be so represented to the company, and so expressed in the written part of the policy; otherwise the policy shall be void." HELD: The plaintiff may prove that the description of the property was inserted in the policy by the general agent of the company who issued this policy, and that he knew at the time that the building stood upon leased ground.

Manhattan Fire Ins. Co. *v.* Weill & Ullman, 389

11. The knowledge of the general agent issuing the policy is the knowledge of the company, and they receiving the premiums on the policy with that knowledge, are bound by the policy. Idem, 389

12. Another condition of a policy of insurance on buildings is, "if the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured, it must be so represented to the company, and so expressed in the written part of this policy, otherwise the policy shall be void." The assured had given a deed of trust upon the building to secure a debt.—HELD:

1. This condition does not refer to the legal title, but to the interest of the assured in the property: that he warranted to be no other than the entire unconditional ownership of the property. Idem, 389

2. This was no warranty against liens and incumbrances. The assured's interest was the sole ownership. The fact that he had given the deed of trust to secure a debt upon the property does not make the cestui que trust a joint owner. Idem, 389

3. There being no pretence of fraudulent concealment or misrepresentation by the assured, of the deed of trust upon the building, the policy is obligatory upon the insurance company. Idem, 389

13. A policy of insurance is for $5,000—to wit, $2,000 on buildings, describing them, $1,000 on machinery and fixtures, $2,000 on stock of grain, flour, meal, &c. And after prescribing what the insured shall do in case of loss, says: All fraud or false swearing, on the part of the assured, or on the part of any person on his behalf, shall be a forfeiture of all claim under this policy. And it concludes, —and this policy is made and accepted on the above express conditions. In an action by the assured on this policy it is proved that the claim of the plaintiff for his alleged loss on his stock of grain, &c., was fraudulent and false, and that the amount of loss designated in said proof sworn to by him, was fraudulent and false so far as the said stock of grain, &c., was concerned. But it was not shown that his claim or his proof of loss as to the said buildings or machinery and fixtures was fraudulent and false—HELD: The forfeiture for false-swearing is incurred by the fraud and false-swearing as to the grain, &c., and the insured cannot recover for any part of the loss.

Moore *v.* Fire & Marine Ins. Co., 508
Accord, Same *v.* The Fireman's Fund Ins. Co., 524

14. Fraud on the part of the insured in making the contract of insurance will render it void without any express provision to that effect in the policy, and even though there may be such a provision therein relating only to fraud or false swearing in connection with the preliminary proof.

Idem, 508
Idem, 524

15. The application to an insurance company for insurance upon a building, which is granted, and a policy issued, based upon the application, is a part of the policy.

Southern Mutual Ins. Co. *v.* Yates, 585

16. In such an application, one question is whether there are any incumbrances on the property, to which the answer is, none. This is a warranty, and if there was an incumbrance upon it, the policy is not binding upon the company, unless at the time of issuing the policy they had actual knowledge of the existence of the incumbrance.

Idem, 585

17. If, after the answers to the questions are written in the application, it is signed by the applicant, parol evidence
994 *is not admissible to prove that he did not read the application and no question was asked him as to the existence of incumbrances on the property.

Idem, 585

18. The insured had taken out two policies upon two buildings, which were consumed in the same fire. The company paid one of the policies, but determined to contest the other. In calling for payment on premium notes, the secretary of the company, by mistake, called for the assessment on the note of the

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policy which was contested, instead of upon the other, and it was paid.—HELD:

1. If the company knowingly received the assessment with knowledge of the existence of the incumbrance, this would be a waiver of the breach of the warranty whether so intended or not. Idem, 585

2. But if the company received such assessment under the erroneous idea, on the part of its officers, that it was paid upon another and totally different note, the right to insist upon the forfeiture would not be in the least affected by such payment and receipt. Idem, 585

19. Contracts of insurance entered into before the war, between parties afterwards separated in domicil by the belligerent lines, were not abrogated, but only suspended, by the war. Acc. Ins. Co. *v.* Hendren, 24 Gratt. 546, and cases there cited.

Connecticut Mutual Life Ins. Co. *v.* Duerson's ex'or, 630

20. The suspension extends to the stipulation requiring payment of premiums at dates falling due within the period of such separation. Idem, 630

21. Nor in such case is it material whether tender of such payment was made at the day or not, even though the insurer's agent, resident in the state of the domicil of the insured prior to the war, continued to reside there on the same side with the insured whilst the insurer and insured were so separated. Idem, 630

22. If such tender would in any case be material, it will not be when before the premium in question fell due such agent had publicly proclaimed his purpose not to receive any more premiums, which declaration was probably made known to the insured and was the cause of the failure to tender, and especially when insurer after the war refused to ratify the act of said agent in receiving payment of a premium from another person as much as a month before the premium in question was due. Idem, 630

23. In such case, however, it is the duty of the insured to tender the payment within a reasonable time after the war, if living; and his failure so to do will occasion a forfeiture of the policy. Idem, 630

24. But in case of the death of the insured pending the war, his personal representative would be under no obligation to make such a tender; for then there would be in the hands of the insurer a fund of the insured, out of which he could deduct the unpaid premium. Nothing more would then be necessary on the part of the insured than that the insured should, within a reasonable time from the ending of the war, be informed of such death and its date. Idem, 630

25. Such information will be sufficient though unaccompanied by any formal demand of payment or assertion of right to it. Idem, 630

26. An insurance company chartered by another state, but doing business in this state, in compliance with the statute of 1855-'56, is to be considered, for the purpose of being sued, as domiciled in this state, and is entitled to rely on the statute of limitations, just as if it were a company which had been chartered by the legislature of this state. Idem, 630

27. Though such company had after the war expressly revoked the powers of the resident agent it had before the war, and had never afterwards appointed another in his place, service of process on such agent will nevertheless be effectual under the statutes in that behalf, to give jurisdiction of an account against such company. Idem, 630

28. The provisions of said statute of 1855-'56 were amendatory of the previous law, and extended as well to policies previously issued as to policies thereafter issued; and a foreign company doing business in this state under the same, at the time said amendments were enacted, and continuing to do business afterwards, in compliance with all said statutes, must be taken to have accepted said provisions, and to be bound by them. Idem, 630

995 *INTEREST.

1. Where, during the late war, a creditor resided within the territory of one of the belligerent powers, and his debtor within that of the other of said powers, such debtor would, under the rules of public law, be entitled to an abatement of interest during the time the war lasted.

Roberts' adm'r *v.* Cocke & als., 207
Murphy *v.* Gaskin's adm'r, 207

2. Where the debtor and creditor resided within the same territory, the mere existence of war does not furnish any legal ground for the abatement of interest upon contracts during the time such war lasted. Idem, 207

3. In contract for the payment of a certain sum of money, interest on the principal sum is the legal incident of the debt, and the right to it is founded on the presumed intention of the parties. Idem, 207

4. Wherever there is a contract, express or implied, for the payment of legal interest, the obligation of the contract extends as well to the payment of interest as it does to the payment of the principal sum; and neither the courts nor the juries ever had the arbitrary power to dispense with the performance of such contracts either in whole or in part. Idem, 207

5. The act of the general assembly approved April 2, 1873, entitled "An act to amend and re-enact s. 14, ch 187, of the Code of 1860, in relation to interest," so far as said act confers upon courts and juries, in the suits therein mentioned, power to remit interest, as therein provided, on contracts entered into prior to April 10, 1865, which said courts and juries did not have under the laws in force at the time such contracts were entered into, is repugnant to the constitution of the United States, and of this state, and is so far null and void. Idem, 207

Cecil *v.* Deyerle & als., 775
Kent's adm'r *v.* Kent's adm'r, 840

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6. And so much of said act as empowers the courts to review judgments and decrees, upon motion, and to abate interest, as in said act provided, is repugnant to the constitution of the United Stutes, and of this state, and is therefore void. Idem, 207
Idem, 775

7. On a bond payable on demand, in which there is nothing said about interest, there is an implied contract to pay interest from its date, and the act of April 2nd, 1873, in relation to the abatement of interest, impairs the contract, and is therefore null and void.
Kent's adm'r *v.* Kent's adm'r, 840

INTERPLEADER.

1. How long plaintiff is a necessary party in a suit. See Practice in Chancery, No. 9, and George & als. *v.* Pilcher & als., 299

ISSUES.

1. In a suit in equity, though the evidence is contradictory, if the chancellor is satisfied that the weight of evidence is on one side, he is not bound to direct an issue.
Hood's adm'r *v.* Colfert & als., 49

JUDGMENTS.

1. In 1856 L sells land to T by parol contract, receives all the purchase money, and puts T into possession. In January, 1867, L executes a deed to T, by which he releases all his claim to the land to T, and warrants the title. T then sells the land to W, and W conveys to F. In March 1866 B recovers a judgment against L, which is docketed within the year. In a suit against F, to subject the land to satisfy the judgment against L—HELD:

1. That the registry acts do not apply to a parol contract for land; and T having paid all the purchase money, and having been put into possession, so that he had a valid equitable title to the land, it is not subject to the lien of the judgment against L.
Floyd, trustee, *v.* Harding & als., 401

2. The valid equitable title of T is not so merged in the legal title acquired by the deed of L to him as to subject the land to the lien of the judgment against L.
Idem, 401

3. The principles of the case of Withers *v.* Carter, 4 Gratt. 407, approved.
Idem, 401

2. The docketing of a judgment is an act to be done to preserve or prevent the loss of a civil right or remedy, within the 996 meaning of the acts of *March 4, 1862, Acts of 1861-'2, ch. 81, and of March 2, 1866, Code of 1873, ch. 146, §§ 6 and 7, p. 998-'9. And therefore, in computing the time within which a judgment is to be docketed in order to preserve the lien against purchasers, the period between the 17th of April 1861 and the 2d of March 1866 is not to be computed as a part of such time.
Borst *v.* Nalle & als., 423

3. Judgments docketed, but not properly indexed, are a lien upon land in the hands of a subsequent purchaser without notice.
Old Dominion Granite Co. & als. *v.* Clarke & als., 617
Same *v.* Jones & als., 617

4. Where statute enactments do not interfere, a judgment creditor can acquire no better right to the estate of the debtor than the debtor himself has when the judgment is recovered. He takes it subject to every liability under which the debtor held it, and subject to all the equities which exist at the time in favor of third parties; and a court of chancery will limit the lien of the judgment to the actual interest which the debtor has in the estate.
Shipe, Cloud & Co. *v.* Repass & als., 716

5. Upon a bill by judgment creditors, to subject the land of the principal and his sureties, what must be done before a decree for the sale, and how the decree shall be against the several parties.
See Practice in Chancery, No. 17, 18, 19, 20, and
Horton & als. *v.* Bond, 815

JUDICIAL SALES.

1. Where real estate has been sold under a decree in a cause, and the sale has been confirmed, the purchaser is entitled to the possession of the property, even though the decree confirming the sale does not direct possession to be delivered to him.
Hudgins *v.* Marchant & Co., 177

2. If an appeal in the cause has been obtained and perfected before possession of the property is obtained by the purchaser, he is not entitled to have possession. But if possession is obtained before the appeal, the purchaser is entitled to retain it until the case is decided in the appellate court.
Idem, 177

3. It is error to decree a sale of land before taking an account of the liens upon it, and their respective priorities.
Kendrick & als. *v.* Whitney & als., 646

4. M & L, commissioners under a decree for the sale of land, sold to W a tract called C, described as containing five hundred and three acres, for $25,000. On this tract there were valuable buildings, and attached to it was a fishery in the adjoining river, and the privilege of the free use of a public bridge over the river. The sale was reported to the court and confirmed. W was put into possession; and before the last payment fell due it was ascertained there was a deficiency of thirty-four and one-half acres in the quantity of land stated in the contract. W then applied to the court to have an abatement of the price to the extent of this deficiency; which was resisted, on the ground that it was a contract of hazard.—HELD:

1. While contracts of hazard in such cases are not invalid, courts of equity do not regard them with favor. The presumption is against them; and whilst such

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presumption may be repelled, it can only be done by clear and cogent proof.
Watson v. Hoy & als., 698

2. Upon the evidence in this case held, that it was not a contract of hazard, and W is entitled to an abatement for the deficiency in the land. Idem, 698

3. W retaining the buildings, fishery and bridge privileges, the value of these is to be deducted from the price, $25,000; and the balance of that sum is to be taken as the value of the five hundred and three acres of the land, and from which a pro rata abatement is to be made for the deficiency of thirty-four and one-half acres. Idem, 698

4. Though it is true that in Virginia it would seem to be the general rule that objections by purchasers to judicial sales for defect of title must be made before the sale is confirmed by the court, and that objections afterwards come too late; yet the rule does not apply to the equity of a purchaser arising from after discovered mistake, fraud, or other like matter. And there having been a mutual mistake as to the quantity of land in the tract, W is 997 not *precluded by the confirmation of the sale from obtaining relief. Idem, 698

5. When it is doubtful on the commissioner's report of sale how much of the land decreed to be sold was sold, the report will be set aside.
See Practice in Chancery, No. 27, and
Barger v. Buckland & als., 850

JURISDICTION.

1. When the jurisdiction of a court will be presumed, and when it must be made to appear on the record. See Courts, No. 1, 2, 3, and
Pulaski County v. Stuart, Buchanan & Co., 872

LACHES AND LAPSE OF TIME.

1. A case in which a delay of six years in prosecuting a claim was held to have precluded the claimant from relief.
Carter, trustee, &c., v. McArtor & als., 356

LARCENY.

1. F is indicted for the larceny of $208, of notes of United States currency, the property of R. The proofs refer to F's obtaining the money under false pretences. To sustain the prosecution the commonwealth must prove every fact which would be required to be alleged in an indictment for obtaining money on false pretences. Fay's case, 912

2. What will constitute the offence of obtaining money under false pretences. See False Pretences, passim, and Idem, 912

3. In the absence of proof, that such money as is charged in the indictment to have been stolen, was received by the prisoner, he cannot be properly convicted. Idem, 912

4. QUÆRE: If the rule of evidence which applies to simple larceny, in regard to the effect of the accused being found in possession of the stolen property recently after the larceny thereof, applies to a case of compound larceny, as where larceny is a component part of the offence of burglary or house-breaking.
Walker's case, 969

5. Though the mere possession of the stolen property might not be prima facie evidence of the burglary or house breaking charged in the indictment, yet, in connection with other evidence of such burglary or house breaking, evidence of such possession of the stolen goods is admissible. Idem, 969

LEGACIES AND LEGATEES.

1. There were nine children, tenants in common of slaves, subject to the life estate of their mother. One of them, J, by his will gives to his brother K certain lands, plantation utensils "and all the interest I may have in an undivided dower estate." J's widow marries T; and T buys the shares of six of the children, one of them K, and he buys of the husband of N, one of the children, her share; but her husband dies in the lifetime of N and her mother. K dies and gives his interest under the will of J to Y. T sells two of the slaves to M, and M afterwards sells them and the increase of one of them for $960. T and his wife have removed from the state. After the death of the life tenant, S, who had not sold her interest in the slaves, files her bill against M, making N and Y defendants, setting out the facts, and claiming her interest in the slaves sold to M.—HELD:

1. M not producing the slaves, he must account for the price at which he sold them, with interest from the death of the life tenant.
Moorman v. Smoot & wife & als., 80

2. The husband of N having died in the lifetime of the life tenant, his sale of her interest is invalid, and N is entitled to it. Idem, 80

3. The bequest of K to Y vests the interest of J in the slaves in Y. Idem, 80

4. It is not necessary that N and Y should file a cross-bill in the cause in order to set up their claims against M. Idem, 80

2. See Wills, No. 3, and
Barksdale & als. v. White & als., 224

3. See Advancements, No. 1, and
Lewis v. Henry's ex'ors & als., 192

LIENS.

1. When a lien on real estate, given by an administrator to secure a debt due to his intestate, will be held to be a valid and subsisting lien in favor of creditors 998 *and legatees of the intestate and the sureties of the administrator, as against a party who had obtained a subsequent lien on the same real estate. See Executors and Administrators, No. 4, 5, and
Utterback's adm'r v. Cooper, 233

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2. When a judgment is not a lien upon land. See Judgments, No 1, and

Floyd, trustee, *v.* Harding & als., 401

3. When land sold by verbal agreement not liable to an attachment against the vendor as an absent defendant. See Attachments, No. 2, 3, and

Hicks *v.* Riddick & als., 418

4. A judgment docketed, but not properly indexed, is a lien upon land in the hands of a subsequent purchaser without notice.

Old Dominion Granite Co. & als. *v.* Clarke & als., 617

Same *v.* Jones & als., 617

5. The bond executed under the act of May 28, 1870, entitled "an act to prevent the sacrifice of property at forced sales," Session Acts 1869-'70, ch. 120, p. 162, is a lien on the land of the obligors who are alive, from the return of the bond to the clerk's office; and the surety in the bond paying it off is entitled to be substituted to the lien of the bond upon the land of the principal obligor.

Barger *v.* Buckland & als., 850

6. See Trusts and Trustees, No. 6, and

Lucado & als. *v.* Tutwiler's adm'x & als., 39

LIMITATIONS OF ACTIONS.

1. Where a party presents his claim against a county to the board of supervisors, within the time limited by the statute, and they decline to take it up, and adjourn, and no entry is made of it until a subsequent meeting of the board, after the time of limitation, the statute will not be allowed to bar the claim.

Dinwiddie County *v.* Stuart, Buchanan & Co., 526

2. The several acts of the government of Virginia during the war, suspending the statutes of limitations, were valid to prevent the running of said statutes to 3d March 1866. Acc. Johnson *v.* Gill, 27 Gratt. 587. And the time from 2d March 1866 to 1st January 1869 is to be left out of the computation under said statutes by virtue of the seventh section of the act of March 2d, 1866, commonly known as the stay law. Acc. Danville Bank *v.* Waddill, 27 Gratt. 448.

Connecticut Mut. Life Ins. Co. *v.* Duerson's ex'or, 630

3. See Adversary Possession, No. 1, and

Thomas *v.* Jones, 383

4. Motion to rehear decrees barred after five years, but not petition.

Kendricks & als. *v.* Whitney & als., 646

LIMITATIONS OF ESTATES.

1. See Wills, No. 3, and

Barksdale & als. *v.* White & als., 224

2. Where property is clearly given absolutely by one clause of a will, the right thereto will not be limited or restricted by a separate clause, unless the language of the second clause is as clear and explicit as the terms embraced in the first clause. It is not sufficient to create a doubt from other terms in another part of the instrument. Possibilities, and even probabilities, will not avail. If the benefit is to be taken away it must be by express words or necessary implication.

Idem, 224

LUNATICS.

1. A committee of a lunatic settled his account in 1858, when there was a balance in his hand of $1,761.72. He settled another account in 1863, the only item of charge against him being the former balance, and he was found indebted to the lunatic $1,394.71. In March 1864, upon his petition the judge of the circuit court makes an order authorizing him to invest the amount of $1,000 in Confederate bonds; and he deposits $1,000 with the treasurer of the Confederate States, and receives a certificate that he is entitled to receive a four per cent. bond—HELD: The committee having received good money, the order of the judge was not authorized by the statute, and the committee must account for it in good money.

Coles's committee *v.* Coles's adm'r, 365

2. A bill says: "Your complainant C, who being a person of unsound mind, sues by his next friend and committee A." It will be considered and treated as a suit by the committee. Idem, 365

999 *MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, to warrant a verdict and judgment for damages, it must be proved on the part of the plaintiff: First, that the prosecution alleged in the declaration has been set on foot and conducted to its termination, and that it ended in the final acquittal and discharge of the plaintiff. Second, that it was instigated or procured by the co operation of the defendant. Third, That it was without probable cause. Fourth, that it was malicious.

Scott and Boyd *v.* Shelor, 891

2. Although the allegation of want of probable cause in the declaration, in actions of this kind is negative in its character, yet it must be proved, or the plaintiff must fail.

Idem, 891

3. Probable cause, in a criminal prosecution, is "the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted." Idem, 891

4. Both malice and the want of probable cause must concur and be proved. Malice may be inferred from the want of probable cause, but the latter can never be inferred from the plainest malice. Idem, 891

5. In a legal sense, any unlawful act which is done wilfully and purposely, to the injury of another, is as against that person malicious. Idem, 891

6. Circumstances which will maintain an action for malicious prosecution.

Idem, 891

7. Although an action for malicious prosecution cannot be maintained, unless the plaintiff has been fully acquitted of the criminal

charge, and a nolle prosequi is not sufficient; yet the plaintiff is not obliged to prove that he was acquitted by the jury promptly, without hesitation, delay or deliberation; and the evidence of a juror, to show that the deliberation of the jury was caused by their doubt as to the guilt or innocence of the accused, is inadmissible. Idem, 891

MARRIAGE.

1. A marriage between a white man and a woman who is of less than one fourth of negro blood, however small this lesser quantity may be, is legal.

McPherson's case, 939
Stewart's case, 939

2. A woman whose father was white, and whose mother's father was white, and whose great-grandmother was of brown complexion, is not a negro in the sense of the statute. Idem, 939

MISTAKES.

1. For the principles on which a court of equity will act on an application to correct a mistake in a deed, see the opinion of STAPLES, J., in

Carter, Trustee, &c. v. McArtor & als., 356

2. A case in which by the contract for the purchase of land, certain bonds held by the purchaser was to be transferred in part of the purchase money, and his bond was to be given for the balance, and a deed of trust on the land to secure all the bonds; and the deed of trust only secured the purchasers own bond, it was presumed that the intention to secure the other bonds was relinquished before the deed was drawn and executed. Idem, 356

3. A case in which a mistake of one of the parties to an agreement for the adjustment of a matter of account, clearly proved, was corrected; and the account was adjusted according to what the agreement was intended to be.

Watkins, &c. v. Elliott & al.. 374

4. What mistake of the officer of an insurance company will or will not operate as a waiver of a forfeiture of a policy.

See Insurance, No. 17, and
Southern Mut. Ins. Co. v. Yates, 585

5. When a purchaser at a judicial sale, which has been confirmed, may have relief on the ground of after discovered mistake.

See Judicial Sales, No. 4, and
Watson v. Hay & als., 698

NEGLIGENCE.

1. According to the principles of the common law, the owner of a wharf who receives, or is entitled to receive, wharfage for vessels moored at said wharf, is bound to use at least ordinary care and diligence in keep-
1000 ing the water adjacent *to such wharf, in which vessels lie while moored thereto, free from obstructions, and is liable for any damage done to any such vessel by reason of the neglect of such duty; and the same principles apply whether such owner be an individual or a corporation, whether such corporation be private or municipal.

City of Petersburg v. Applegarth's adm'r, 321

2. The city of Petersburg owns a wharf in the Appomattox river, for the use of which the city is authorized to charge, and does charge, wharfage. In October 1872, the vessel of A not being able to get to the wharf at which she was to deliver her load, on account of an obstruction in the stream by another vessel, drew up to the city wharf and moored to it, and whilst waiting there she sunk in the next low water from a pile going through her bottom. The pile was oak, being about two feet from the wharf, in the stream where a vessel at the wharf would probably lie, and was visible at low water, and was some two feet or more above the bed of the river, and was firmly fixed there—HELD:

1. The allowing such an obstruction in the place where this was negligence; and the city of Petersburg being the owner of the wharf is liable for the damages occasioned by it. Idem, 321

2. The fact that the city had appointed a portwarden, whose duty it was to attend to the removal of obstructions in the stream, and to attend to the duties of the city in regard to the city wharf, does not exempt the city from liability for the damages. The portwarden in this matter is but the agent of the city; and the principal is always bound for the acts and neglects of his agent. The same rule which applies to a private principal applies to a corporation, whether ordinary or municipal, and a fortiori to a corporation which can only act by an agent. Idem, 321

3. The fact that it has been made by statute the duty of the Lower Appomattox company to dredge and remove obstructions from the river below Petersburg, cannot relieve the city from her liability. The city is in fact the company, owning all the stock and appointing the officers of the company. But even if it was an independent organization, its obligation to perform a duty which the city is bound to perform on common law principles, would not relieve the city from its common law liability for the non-performance of such a duty. Idem, 321

4. Nor can it make any difference that the United States have made appropriations to the improvement of the navigation tion of the river, and have occasionally dredged it. This does not relieve the city from its common law liability in regard to the city wharf. Idem, 321

5. Nor does it make any difference, that in this case no wharfage was actually received by the city, and that it does not usually charge wharfage in cases where the vessel mooring at her wharf is not to be unloaded there. It is sufficient that the city was entitled to charge wharfage. Idem, 321

3. The finder of a bank note delivers it to a

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bailee without reward, to be kept for the finder. Such bailee is not bound to use as great care and diligence in the keeping of the note as he would be if he was a bailee for compensation; and if the note was stolen from his possession he will not be liable for it, unless the loss was the result of gross negligence on his part.

Tancil *v.* Seaton, 601

NEGOTIABLE INSTRUMENTS.

1. Delivery is absolutely essential to the transfer by endorsement of negotiable paper; but such delivery may be either actual or constructive.

Howe, Knox & Co. *v.* Ould & Carrington, 1
Bartlett & Robins *v.* Same, 1

2. Whether a purchaser or endorsee of negotiable paper has acquired such possession, actual or constructive, as is sufficient for all the purposes of the transfer, must always depend upon the particular circumstances of each case. Idem, 1

3. S is the owner of the negotiable note of M for $8,000, which he endorses and deposits with the bank as collateral security for a loan of $4,000, obtained upon the discount by the bank of the note of B. S sells the note to O, and gives O an order on the bank to deliver the note to O. On the same day O presents the order at the bank, and is told that the president of the bank is absent 1001 from town. Some *days thereafter O has an interview with the president of the bank, and is then informed that the debt of S is nearly paid, and that he would deliver the note to O but for the service of an attachment upon the bank. The debt of S is afterwards paid in full. Before the sale by S to O, an attachment had been served upon M at the suit of a creditor of S; but of this O had no notice when he purchased the note. After the sale and notice to the bank by O, an attachment was served upon the bank by another creditor of S.—HELD: The sale by S to O is valid, and he is entitled to the note as against the attaching creditors of S. Idem, 1

4. See Checks on Banks, No. 1, 2, 3, 4, and Blair & Hoge *v.* Wilson, 165

NEGRO.

1. A woman whose father was white, and whose mother's father was white, and whose great grandmother was of brown complexion, is not a negro in the sense of the statute.

McPherson's case, 939
Stewart's case, 939

NEW TRIALS.

1. Where the facts proved are not plainly insufficient to warrant the verdict of the jury, the court did not err in refusing to set it aside.

Blair & Hoge *v.* Wilson, 165

2. A verdict will not be set aside and a new trial awarded on the affidavit of one of the jury, made after the verdict was rendered, that he did not consent to it.

Thomas *v.* Jones, 383

NOTICE.

1. How notice to be served on a municipal corporation.

See Corporations, No. 1, and Fairfax *v.* City of Alexandria, 16

2. In a suit in equity, H, a creditor by judgment, charges that C, a creditor by a deed of trust, executed and recorded subsequent to the judgment, had notice of the judgment when he took his deed. C answers and denies the notice. HELD: The charge of notice of the judgment being expressly denied by C, the proof of notice must be very clear and conclusive to establish it.

Hord's adm'r *v.* Colbert & als., 49

PARTIES IN EQUITY.

1. How objection for misjoinder of parties must be made.

See Practice in chancery, No. 6, 7, 8, and Vaiden's & als. *v.* Stubblefield's ex'or, 153

2. Plaintiff in a bill of interpleader, how long a necessary party.

See Practice in Chancery, and George & als. *v.* Pilcher & als., 299

3. What will be treated as the suit of a committee of a lunatic.

See Lunatics, No. 2, and Cole's committee *v.* Cole's adm'r, 365

4. When a creditor in a trust deed a necessary party.

See Practice in Chancery, No. 13 and Kendrick & als. *v.* Whitney & als., 646

5. As to a person holding the legal title to land.

See Practice in Chancery, No. 19 and Horton & als. *v.* Bond, 851

6. As to an assignee in bankruptcy of a defendant.

See Practice in Chancery, No. 29, and Barger *v.* Buckland & als., 850

PARTNERSHIP.

1. In 1860, G, of Washington city, and B, of Culpeper county, in Virginia, form a partnership for grazing and selling sheep, to be conducted by B; and G executes his bond to B for $3,700, for a half interest of the sheep on hand, which is to be paid by G's share of the net profits; and B is to be allowed such compensation for managing the business as they shall agree upon. The partnership is closed in December 1862, when G's share of the profits is $2,428 75. B invests the money in Confederate bonds. HELD:

1. G is entitled to have his bond credited for the $2,428.75, at its scaled value in December 1862.

Garrett's adm'x *v.* Bradford, 609

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2. As the parties were separated by the war, so that they could not agree upon 1002 B's compensation, he is entitled *to have a just allowance made him for his attention to the business.
Idem, 609

PAYMENTS.

1. While the giving of a check by a debtor to a creditor is generally presumed to be only a provisional or conditional payment of the debt for which it was given, yet such check may by agreement of parties be given and received in full payment and absolute discharge and satisfaction of the debt; and whether it was so given or received is a question of fact for the jury.
Blair & Hoge v. Wilson, 165

2. During the late war a debtor in Virginia paid to a minor son of his deceased creditor, who and whose administratrix had been, and was, living in Maryland, the amount of his debt in Confederate money at par, and the son after he came of age, in Virginia and during the war, executed a paper by which he ratified the payment, and undertook that the bond should be charged to him in the settlement of his father's estate; and this was done.—HELD: There being no debts of the father to be paid, the bond must be considered as discharged.
Small's adm'r v. Lumpkin's ex'x & als., 832

PERSONAL PROPERTY.

1. When buildings put up on the land of another are personal property, and when to be, and when not to be, taxed as a part of the real estate. See Taxes and Taxation, No. 1, 2, and
Andrews, Ordway & Green v. The Auditor, &c., 115

PLEADINGS—IN EQUITY.

1. See Legacies and Legatees, No. 1, and
Moorman v. Smoot & wife & als., 80

2. A bill says: "Your complainant C, who being a person of unsound mind, sues by his next friend and committee A." It will be considered and treated as a suit by the committee.
Cole's committee v. Cole's adm'r, 365

PRACTICE—AT COMMON LAW.

1. See Confiscation, No. 1, 2, and
Fairfax v. City of Alexandria, 16

2. Upon the trial of an issue, the deposition of one M, who was then dead, was offered in evidence, whereby it was sought to prove certain admissions made by L, one of the defendants, to the witness in Richmond, in the presence of W, another of the defendants. These two defendants were strangers to M, and on cross-examination describing them, he said—"They were black negroes. I think the brother-in-law (W) had the lightest skin of the two. I think they were not bright mulattoes, but dark mulattoes." It was proved by other witnesses that the brother-in-law, W, was a white man, and that L was so bright that he could hardly be distinguished from a white man. It was further proved that about the time the witness said he had the interview with the two men, they were both in Richmond enquiring for him. —HELD: The evidence of identity was prima facie sufficient to authorize the deposition to go to the jury.
George & als. v. Pilcher & als., 299

3. On a trial before a jury, when the evidence on both sides has been closed, and the argument has commenced, as a general rule no further evidence should be received from either party; but the presiding judge, in the exercise of a sound discretion, may relax the rule and admit additional evidence if the nature of the case and the ends of justice require it; but if the introduction of such additional evidence take the adverse party by surprise he should be allowed time and opportunity, if desired, to meet it with further evidence on his side. Idem, 299

4. Whenever the character of a witness for truth is attacked, either by direct evidence of want of truth, or by cross-examination, or by proof of contradictory statements in regard to material facts, or by disproving by other witnesses material facts stated by him; or, in general, whenever his character for truth is impeached in any way known to the law, the party calling him may sustain him by evidence of his general reputation for truth. Idem, 299

5. In an action of unlawful detainer the jury by their verdict gave to the plaintiff the land claimed in her summons, 1003 *which included a half acre which probably did not belong to her, and it was plainly laid down on the plat; and the judgment was according to the verdict. The defendant moved the court to set aside the verdict and judgment; and the plaintiff, by her counsel, released the said half acre. The court thereupon overruled the defendant's motion, set aside the judgment, but not the verdict, and rendered a judgment for the land claimed except the half acre.—HELD: It was competent for the counsel to release the half acre of land for the plaintiff; and it was proper in the court to set aside the judgment and enter a judgment for the land included in the verdict, except the half acre.
Bartley v. McKinney, 750

6. Instructions asked for, which are not founded on the evidence in the cause, are properly refused. Idem, 750

7. An instruction as to a presumption of fact, when erroneous. See Presumptions, No. 1, and
Dyerle v. Stair, 800

8. The general course of the examination of witnesses is, and must of necessity be, left to the discretion of the trying judge; and the exercise of this discretion will never be interfered with by an appellate court, unless it plainly appears that some injustice has been done.
Scott & Boyd v. Shelor, 891

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PRACTICE—IN CHANCERY.

1. In a suit in equity, though the evidence is contradictory, if the chancellor is satisfied that the weight of evidence is on one side, he is not bound to direct an issue.

Hord's adm'r *v.* Colfert & als., 49

2. When a cross-bill is not necessary to set up the claims of defendants against a co-defendant, their claims against him being the same as that of the plaintiff, and set out in the bill. See Legacies and Legatees, No. 1, and

Moorman *v.* Smoot & wife & als., 80

3. In what cases the court may appoint a receiver to rent out real estate and collect the rents. See Receivers, No. 1, and

Smith *v.* Butcher, 144

4. A receiver may be appointed by a judge in vacation. Idem, 144

5. A receiver may be directed to collect from tenants of real estate rents due, as well as such as may become due. Idem, 144

6. In this country the rule is well settled, that in cases of misjoinder of parties as plaintiffs in equity, the objection must be made by demurrer, if the defect is apparent on the face of the bill, or by plea or answer, if the defect does not so appear; and unless so made, the objection will not avail at the hearing, if a decree can be rendered without prejudice to the rights of parties.

Vaiden & als. *v.* Stubblefield's ex'or, 153

7. In a bill by devisees and legatees against an executor, some of the legatees, who were infants, had been paid their legacies. The executor, of course, knew of these payments; the other plaintiffs probably did not know. It was therefore the more incumbent on him to make the objection in some form and in an early stage of the proceedings. If he had done this, the plaintiffs might have dismissed their suit and commenced a new one in the name of the proper parties, or might have amended their bill by striking out the names of those improperly joined, and making them defendants, if so advised. Idem, 153

8. In such a case, the objection having been first taken in the appellate court, a decree may be made in the case in favor of such of the plaintiff as are entitled to recover, and the bill be dismissed as to the others without costs. Idem, 153

9. The plaintiff in an interpleader suit continues to be a substantial and necessary party, until he has fully rendered the debt, duty, or other thing required of him.

George & als. *v.* Pilcher & als., 299

10. Where a commissioner in settling an account of a committee of a lunatic, makes two statements, the only difference in them being that in one he gives the committee a credit of $1,000, which is omitted in the other, and he refers the question to the court. The court adopts the statement giving the credit. On appeal, held, an exception was not necessary, and the appellate court may correct the decree.

Cole's Committee *v.* Cole's adm'r, 365

11. See Rehearing Decrees and

Kendricks & als. *v.* Whitney & als., 646

12. It is error to decree a sale of land *before taking an account of the liens thereon and their priorities. Idem, 646

1004

13. When a deed of trust has been given upon land by a debtor to protect his sureties on the debt against harm, it is error to decree a sale of the land before making the creditor a party to the suit. Idem, 646

14. Where judgment creditors file their petitions in a suit for the sale of their debtor's land, it is error to enter a decree for sale in their favor before referring the cause to a commissioner, so that the judgment debtor may have an opportunity of showing any payments made, or set-offs to which he may be entitled. Idem, 646

15. Where the plaintiff in equity by his bill calls for a material disclosure from the defendant on oath, and the defendant in his answer on oath makes such disclosure fully and unequivocally, the answer, to the extent of such disclosure, is said to be responsive to the bill, and the statement must be taken as true, unless overcome by the satisfactory testimony of at least two witnesses, or of one witness with clear corroborating circumstances.

Swartz & als. *v.* Johnson & als., 657

16. Where a bill in equity does not, in terms, allege that the plaintiff had no knowledge of an unrecorded deed of trust when he purchased the land, though it might be construed as virtually making such averment; and it is not affirmatively averred in the answer that he had such notice, so as to put the same in issue; proof upon that question by both parties was upon a matter not in issue in the cause.

Nash *v.* Nash & als., 686

17. Upon a bill by a judgment creditor to subject the lands of the principal debtor and his sureties to satisfy the judgment, before there can be a decree for the sale of the lands, it must be made to appear to the court that the rents and profits of the lands will not in five years discharge the judgment. This may be shown by the pleadings, by the admissions of the parties, by evidence taken, or by the report of a commissioner on an enquiry ordered.

Horton & als. *v.* Bond, 815

18. Upon such a bill, it appearing that there are incumbrances under a will upon the land of one of the sureties, and liens by deeds of trust on the lands of others, though the amount of the several liens by deed might be ascertained by the court, yet as the incumbrances under the will are uncertain, it is error to decree a sale of the lands before the incumbrances and liens and their priorities are ascertained by the report of a commissioner. Idem, 815

19. In such a case as to part of the land claimed by one of the sureties, the legal title

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is in K, who is not a party to the suit; and as to the other part of the land, it has been conveyed to the surety and his daughter. Before a decree for the sale of the land, K should be made a defendant, and the title to both parts of the land ascertained and settled. Idem, 815

20. Upon such a bill, after the lands of the principal debtor are sold and applied pro tanto to the satisfaction of the judgment, the portion of the judgment which each surety should pay should be ascertained, and a separate decree should be made against each surety for his said portion, and upon his failure to pay it for a sale of his land. And if either of the sureties should fail to pay the decree against him, and his land when sold does not satisfy the decree, the amount of the deficiency should be apportioned among the other sureties, and there should be a like decree against each of them, and his land for his portion of such deficiency; and so on until the judgment is satisfied, or all the lands of all the sureties are sold. Idem, 815

21. In a suit by judgment creditors against their debtor and others, to set aside a deed of trust, or subject the surplus to the payment of their debts, the trustee in the deed did not sign it and it does not appear that he accepted or acted under it; and he lives out of the state, and is not a party to the suit. The court may decree a sale of the land and appoint a commissioner to make the sale. Barger *v.* Buckland & als., 850

22. A part of the tract of land lies in Virginia and a part in West Virginia.—The court may decree a sale of the whole tract. Idem, 850

23. Where the bill and proceedings specifies the land, a decree for the sale of the land in the bill and proceedings mentioned, or so much thereof as may satisfy the pur-
1005 poses of the decree, is sufficiently *certain. That is certain which may be made certain, applied to the case. Idem, 850

24. Judgment creditors seek to subject land of their debtor which has been conveyed in trust to secure a debt; and in their bill they charge that the deed was intended by the grantor to defraud his creditors, and the trustee and creditor in the deed were cognizant of the fraudulent intent. The creditor answers and denies the fraud and proves his debt.—HELD:

1. It was proper to proceed in the cause and decree satisfaction of the plaintiff's debts out of the surplus of the purchase money of the land after the satisfaction of the debt secured by the deed. Idem, 850

2. It is a proper case for a decree between defendants, and, the debt of the trust creditor having been established, for a decree in his favor for the debt. Idem, 850

3. Though the deed of trust conveys other land lying in West Virginia and personal property, it not being alleged that the creditor has received anything from that source, and no motion made by any of the parties for an enquiry on the subject, which, if made, would no doubt and should have been ordered, the decree will not be reversed for the failure to make the enquiry. Idem, 850

4. As the proofs did not sustain the charge of fraud in the deed and the guilty knowledge of the truss creditor, he is entitled to a decree in the cause for his debt. Idem, 850

25. There are three suits by judgment creditors to subject the land of their debtor which he had conveyed in trust to secure a debt, and the debtor, the trustee and trust creditor are made defendants in each case. The process is properly served on all the parties in two of the cases, and on the trustee and creditor in the third. The court made an order that the causes be consolidated and heard together, and that is done; and the debtor appears and makes defense in all the causes without objecting that the process was not properly served in the third case. He thereby waived the objection on that ground, if he had any. Idem, 850

26. Though the causes were heard together, each plaintiff is entitled to a decree for his separate costs. Idem, 850

27. The report of commissioners appointed to sell land, leaving it in doubt how much or what part of the tract they sold, the sale should be set aside. Idem, 850

28. A defendant gives a written notice to the plaintiffs that he will move the court to set aside a decree made in the cause as a decree by default; and he sets out in his notice, which is signed by counsel, the grounds he relies on for setting aside the decree. If the decree was not a decree by default, it was an interlocutory decree, and his notice may be treated as a petition for a rehearing of the decree, and acted on by the court as such a petition. Idem, 850

29. In a suit by judgment creditors to subject their debtor's land to the payment of their debts, pending the cause the debtor is declared a bankrupt, and he applies for a homestead under the constitution and law of Virginia and the acts of bankruptcy of the United States.—HELD:

1. That the assignee in bankruptcy of defendant debtor should be made a party to the suit. Idem, 850

2. The court should proceed to adjudicate upon the right of the debtor to his homestead. Idem, 850

PRACTICE—IN CRIMINAL CASES.

1. See Criminal Jurisdiction and Proceedings.

PRESUMPTIONS.

1. A presumption of fact does not arise, that a bond for $1,000, executed in September 1863, and payable in two years, when Confederate notes was the prevailing cur-

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rency, is payable in such notes. Whatever presumption there is, if any, is a matter exclusively for the jury.

Dyerle *v.* Stair, 800

PRINCIPAL AND AGENT.

1. As to agents of insurance companies, and what they may do, and how far they may bind their principals. See Insurance, No. 5, 7, 8, and

Geo. Home Ins. Co. *v.* Kinnier's adm'x, 88

2. A principal is always bound by the acts and neglects of his agent. And the same rule which applies to a private principal applies to a corporation, whether
1006 *ordinary or municipal, and, a fortiori, to a corporation which can only act by an agent.

City of Petersburg *v.* Applegarth's adm'r, 321

PROCESS.

1. What is a waiver of defective service of process. See Practice in Chancery, No. 25, and

Barger *v.* Buckland & als. 450

PUBLIC LAW.

1. Where, during the late war, a creditor resided within the territory of one of the belligerent powers, and his debtor within that of the other of said powers, such debtor would, under the rules of public law, be entitled to an abatement of interest during the time the war lasted.

Roberts' adm'r *v.* Cocke, 207

Murphy *v.* Gaskins' adm'r, 207

2. In a foreign or international war, from the time it is declared or recognized, all the people in the territory and subject to the dominion of each belligerent, without regard to their feelings, dispositions, or natural relations, become, in legal contemplation, and so continue until the close of hostilities, the enemies of all the people resident in the territory of the other belligerent; and all negotiation, trading, intercourse or communication between them, unless licensed by the government, is unlawful.

Small's adm'r *v.* Lumpkin's ex'x als., 832

3. Such a war, as between the citizens and subjects of the respective belligerents, ipso facto dissolves all commercial partnerships, and all contracts wholly executory and requiring for their continued existence commercial intercourse or communication; and while it does not abrogate, yet it suspends all other existing contracts, and the remedies thereon, and renders all contracts, with rare exceptions, entered into pending hostilities, illegal and void. Idem, 832

4. These principles of public law regulating conduct in foreign wars, are applicable to the late civil war between the United States and the Confederate States. Idem, 832

5. Limited agencies in the enemy country may lawfully continue, provided they can be and are exercised without intercourse or communication between the citizens or subjects of the contending powers: such as agencies to collect and preserve, but not to transmit money or property. Idem, 832

6. During the late war, a debtor in Virginia paid to a minor son of his deceased creditor, who and whose administratrix had been and was living in Maryland, the amount of his debt in Confederate money at par, and the son after he came of age executed a paper by which he ratified the payment, and undertook that the bond should be charged to him in the settlement of his father's estate; and this was done.—HELD: There being no debts of the father to be paid, the bond must be considered as satisfied. Idem, 832

7. See Insurance, No. 19, and

Connecticut Mutual Life Ins. Co. *v.* Duerson's ex'or, 630

QUO WARRANTO.

1. A party engaged in a duel may be removed from office by a proceeding by quo warranto, or information in the nature of a quo warranto, though he has not been convicted of the offence in a criminal prosecution. Royall *v.* Thomas, 130

RECEIVERS.

1. In a suit by a judgment creditor to subject the real estate of his debtor to pay his debt, where there are deeds of trust on the property and numerous judgments against the debtor, which are to be ascertained and their priorities fixed, and the real estate is not sufficient to pay all the debts, the court may appoint a receiver to take possession of the property and rent it out.

Smith *v.* Butcher, 144

2. A receiver may be appointed by the judge in vacation. Idem, 144

3. A receiver may be directed to collect from tenants of the real estate rents due, as well as such as may become due. Idem, 144

REGISTRY.

1. The statute in relation to the registry of contracts and deeds does not apply to a verbal contract for the sale and purchase of land.

1007 *Floyd, trustee *v.* Harding & als., 401

Hicks *v.* Riddick & als., 418

2. When a mortgage properly recorded. See Trusts and Trustees, No. 6, and

Lucado & als. *v.* Tutwiler's adm'x & als., 39

REHEARING OF DECREES.

1. There is no statutory bar to the time within which a petition may be filed to correct error in an interlocutory decree.

Kendrick & als. *v.* Whitney & als., 646

2. Whether in such case a rehearing shall

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be granted depends upon the sound discretion of the court upon all the circumstances of the case. Idem, 646

3. The motion to correct error in a judgment or decree by default given by ch. 177, § 5, Code of 1873, is barred after the lapse of five years from the date of the judgment or decree. Idem, 646

4. That statutory remedy is, however, cumulative, and has not superseded or abolished petitions for rehearing, which may still be had, according to the course of equity, in the same manner as before the enactment of the statute. Idem, 646

5. Though the motion is barred by the statute, still if the notice of the motion is signed by counsel, is served upon all the parties in interest, is regularly filed, and contains all the requisites of a petition for a rehearing, it will be treated as a petition for a rehearing, and relief given accordingly. Idem, 646

6. A defendant gives a written notice to the plaintiffs that he will move the court to set aside a decree made in the cause as a decree by default; and he sets out in his notice, which is signed by his counsel, the grounds he relies on for setting the decree aside. If the decree was not a decree by default, it was an interlocutory decree, and his notice may be treated as a petition for a rehearing of the decree, and acted on by the court as such a petition.

Barger *v.* Buckland & als., 850

REMOVAL OF CAUSES.

1. P, filed a bill of interpleader in the circuit court of Richmond, against various persons made parties defendants, of whom some were citizens and residents of Virginia, others of Pennsylvania, and others of states other than either Virginia or Pennsylvania. The defendants who were citizens of Pennsylvania answered the bill, and at the same time filed their petition in due form for the removal of the cause from the state to the Federal court. HELD: Whether P is regarded as a substantial or as a mere nominal party, there is no right of removal, either under the act of congress of March 2d, 1867, or of July 27, 1866.

George & als. *v.* Pilcher & als., 299

SPECIFIC EXECUTION.

1. When a parol contract for the sale of land will be enforced. See Vendor and Purchaser, No. 4, and

Rhea *v.* Jordan, 678

2. When a parol agreement between a father and his son, that the son shall have a certain tract of land in consideration of his support of the father and his wife, will be enforced against the fraudulent alienees of the father. See Contracts, No. 8, and

J. W. Lester & als. *v.* F. W. Lester & als., 737

3. The principles on which the specific execution of a parol contract on the ground of part performance will be enforced are: When the parol agreement is specific and definite in its terms; the acts of part performance refer to, result from or are done in pursuance of said agreement; and the agreement has been so far executed, that to refuse to complete its execution would operate a fraud upon the party, and place him in a situation which does not lie in compensation. Idem, 737

STATUTES.

1. The act of April 7, 1858, Code of 1860, ch. 115, p. 557, in relation to aliens inheriting land in Virginia, construed in

Hauensteins *v.* Lynham, escheator, 62

2. The treaty with Switzerland, art. 5, s. 3, 11 U. S. Stat. at Large, p. 590, in relation to aliens inheriting land in Virginia, construed in Idem, 62

3. The act, Code of 1873, ch. 178, s. 13, in relation to appeal bonds, construed in

Cardwell *v.* Allen, trustee, 184

1008 *4. The act of April 2, 1873, in relation to the abatement of interest during the war, declared unconstitutional.

Roberts' adm'r *v.* Cocke, &c., 207
Murphy *v.* Gaskins' adm'r, 207
Cecil *v.* Deyerle & als., 775

5. The act, Code of 1873, ch. 172, s. 22, in relation to parties testifying, construed in

Grigsby & als. *v.* Simpson, assignee, 348

6. The acts of March 4, 1862, Acts of 1861–62, and of March 2, 1866, Code of 1873, ch. 146, s. 6 and 7, in relation to preserving rights and remedies, construed in

Borst *v.* Nalle & als., 423

7. The act of April 2, 1874, in relation to the jurisdiction of the county courts, construed in

Carter's adm'r *v.* Kelly, judge, 787

8. The act of May 28, 1870, Sess. Acts 1869–70, ch. 120, p. 162, to prevent sacrifice of property at forced sales, construed in

Barger *v.* Buckland & als., 850

9. The act, Code of 1873, ch. 38, s. 18 and 19, in relation to the sale of land for taxes, construed in

Nowlin *v.* Burwell, 883

10. The act, Code of 1860, s. 4 and 8, in relation to docketing judgments, construed in

Old Dominion Granite Co. & als. *v.* Clarke & als., 617
Same *v.* Jones & als., 617

SUBSTITUTION.

1. The bond executed under the act of May 28, 1870, entitled "an act to prevent the sacrifice of personal property at forced sales:" Sess. acts 1869–'70, ch. 120, p. 162, is a lien on the land of the obligors who are alive, from the return of the bond to the clerk's office; and the surety in the bond, paying it off, is entitled to be substituted to the lien of the bond upon the land of the principal obligor.

Barger *v.* Buckland & als., 850

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SURETIES.

1. In a suit by judgment creditors against the principal and his sureties to subject their land to the payment of their debts, how the plaintiffs shall proceed to subject the lands of the sureties.

See Practice in Chancery, No. 17, 18, 19, 20, and Horton & als. *v.* Bond, 815

See substitution, No. 1, and Burger *v.* Buckland & als, 850

TAXES AND TAXATION.

1. By agreement between the United States government and the owner of land, the government erects buildings on the land, intended to be and actually used by operatives employed by the government in dressing stone to be employed in the erection of public buildings at Washington; and under the agreement the government has a right to remove the buildings—HELD:

1. The buildings are personal property.

Andrews, Ordway & Green *v.* The Auditor, &c, 115

The Auditor *v.* Andrews, Ordway & Green, 115

2. The buildings being the property of the United States, the state cannot tax them either as personal property or as parcel of the land on which they were built.

Idem, 115

2. Where buildings put up on the land of another are exempted from taxation, they should not be valued with the land, and the owner of it is not to be charged with their value as part of his land subject to taxation. But where such buildings are not exempt from taxation, they should be valued and the tax charged to the owner of the land.

Idem, 115

3. The act, Code of 1873, ch. 38, §§ 18 and 19, in relation to the sale of land for taxes, is only intended to furnish evidence of the identity of the land sold, not only for the information of the former owner, and all others interested, but for the guidance of the clerk in making the deed. When the purchaser offers the plat and certificate for recordation, the sole duty of the court is to consider whether the plat and certificate, or the report of the surveyor, as the case may be, is in conformity to the requirements of the law in respect to the description and identity of the land. It is no concern of the court whether the purchaser has acquired a title, or whether the owner has properly exercised his right of redemption. The proceeding is ex parte 1009 *in its character, and does not in the least affect the rights of third persons.

Nowlin *v.* Burwell, 883

4. The owner of the land sold for taxes cannot in such case make himself a party, to show he had paid the taxes to the purchaser, or to show any other objection to the validity of the tax sale. No such question is affected by the record of the plat and certificate, or the report of the surveyor.

Idem, 883

TRUSTS AND TRUSTEES.

1. As to the portion of his property which a testator gives to his daughter S, he directs that his executors shall hold it in trust, and manage and deal out the proceeds thereof for her and family as their necessities may require.—HELD: The executors, as trustees of S, may use the proceeds arising from sales and collections, as well as from rents and profits, as in their discretion the necessities of said S and her family may require. They may give her possession of the property, or they may purchase for her such property as they may deem necessary for the use of herself an family, or to enable her to cultivate or improve the real estate devised to her, and to erect suitable buildings upon the real estate, so as to enable her to reside upon and cultivate it. And they will not be responsible for any personal property which in their discretion they may put in the possession of said S, and which may be wasted or lost while in her possession. And they may sell and use or reinvest, as in their judgment the necessities of said S and her family may require.

Lewis *v.* Henry's ex'ors & als., 192

2. T, an executor, employs R to sell a tract of land for him, and to facilitate it, T executes a deed to R, but does not deliver it. R makes a sale to B, and B pays the money to T, and then T delivers the deed to R, and at the same time R executes a deed to B. In a suit by a judgment creditor of R against B to subject the land to pay his debt.—HELD:

1. By the conveyance to R there was an implied or resulting trust in favor of B, who had paid the purchase money; and this trust may be proved by parol evidence.

Borst *v.* Nalle & als., 423

2. The trust having been fully executed by R conveying the land to B, before this litigation was commenced, it seems that on that ground parol evidence is admissible to establish the trust. Idem, 423

3. A deed of trust on land to secure a debt, leaving the place of sale to the discretion of the trustee, he has authority to sell the land outside of the state at any place he in his discretion may select. And the question is, whether he exercised that discretion fairly and prudently; in other words, whether he committed a breach of trust.

Shurtz & als. *v.* Johnson & als., 657

4. The deed conveys land subject to a prior lien, the prior lien being certain and ascertained, the trustee may sell the equity of redemption. Idem, 657

5. The deed of trust having been taken without any notice to the trustee or creditor of the existence of judgments recovered against the grantor in a county other than that in which the land lies, and the deed having been recorded before the judgments were docketed in the county, the lien of the judgments were subsequent to that of the deed of trust, and presented no objection to the sale.

Idem, 657

6. A canal boat, which plied between Richmond and a point in Fluvanna county was

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owned by T, who resided in said county. He sold the boat to C, who lived in Richmond, and took a mortgage thereon to secure the purchase money; which mortgage he forthwith recorded in Fluvanna county, and within twelve months thereafter in Richmond. Between the dates of the recordation of the mortgage in the two places, judgment creditors of C issued fieri facias, under which the boat was seized at Richmond. Upon a bill by T's adm'x to assert her (alleged) prior lien.—HELD: That the mortgage in favor of her intestate was properly recorded, and she had priority.

Lucado & als. *v.* Tutwiler's adm'x & als., 39

VENDOR AND PURCHASER.

1. In 1856 L sells land to T by parol contract, receives all the purchase money, and puts T into possession. In January 1867 L executes a deed to T, by which he releases all his claim to the land, and warrants the title. T then sells the land to W, and W conveys to F. In March 1866 B recov-
1010 ers a judgment against L, *which is docketed within the year. In a suit against F to subject the land to satisfy the judgment against L.—HELD:

1. That the registry acts do not apply to a parol contract for land; and T having paid all the purchase money, and having been put into possession, so that he had a valid equitable title to the land, it is not subject to the lien of the judgment against L.

Floyd, trustee, *v.* Harding & als., 401

2. The valid equitable title of T is not so merged in the legal title acquired by the deed of L to him as to subject the land to the lien of the judgment against L.

Idem, 401

3. The principles of the case of Withers *v.* Carter, 4 Gratt. 407, approved.

Idem, 401

2. R by a verbal contract sells a house and lot to M, who pays all the purchase money and is put into possession. R has no interest in the property which may be subjected by attachment against him as an absent debtor to the payment of his debt.

Hicks *v.* Riddick & als., 418

3. See Attachment, No. 3, and

Idem, 418

4. Where a tract of land was conveyed jointly to J and R, and about the same time J agreed to sell his moiety thereof to R for a certain price, and under and in pursuance of said agreement R took and held exclusive and undisturbed possession of said land for twenty-eight years, made valuable improvements thereon, and paid to J the agreed price for his moiety, it was held that a bill filed by J for partition must be dismissed, and that R had acquired a full equitable title, which the court would enforce by compelling J to make a conveyance of the legal title.

Rhea *v.* Jordan, 678

5. Where the vendor's lien is retained in a contract for the sale of land, though the contract is not recorded, the vendor's lien has priority to that of the judgment creditors of the vendee.

Shipe, Cloud & Co. *v.* Repass & als., 716

6. When a parol contract between a father and his son, for the sale to the son of a tract of land, in consideration of the support of the father and his wife for their lives, will be enforced. See Contracts, No. 4, and

J. W. Lester & als. *v.* F. W. Lester and als., 737

WILLS.

1. A paper disposing of property to M and S, sisters of testatrix, is not in the handwriting of testatrix or signed by her. Twenty years after the date of this paper she writes about an inch below the first and signs the following: As M is dead, I give her share to my niece G.—HELD: Neither nor both together can be established as a will under the Virginia statute, Code of 1873, ch. 118, s. 4.

Gibson *v.* Gibson & als., 44

2. See Conditions, No. 1, Advancements No. 1, and

Lewis *v.* Henry's ex'ors & als., 192

3. Testator by five separate clauses of his will gives to each of his five daughters by name, certain personal property, "to her and her heirs forever." By the ninth clause he gave all the balance of his estate, both real and personal, to be equally divided among his children before named, which he lends to them during their lives, and at their death to be equally divided among their children; "but should either or any of his daughters die without an heir of their own body, it is his will that all the property loaned or given them be equally divided among his grandchildren."—HELD: The daughters each take the certain property given them in the five clauses absolutely; and their right thereto is not cut down or restricted by the concluding provision of the ninth clause; that only applies to the property embraced in that clause.

Barksdale & als. *v.* White & als., 224

4. Where property is clearly given absolutely by one clause of a will, the right thereto will not be limited or restricted by a separate clause, unless the language of the second clause is clear and explicit as the terms embraced in the first clause. It is not sufficient to create a doubt from other terms in another part of the instrument—possibilities and even probabilities will not avail. If the benefit is taken away, it must be by express words or by necessary implication.

Idem, 224

WITNESSES.

1. C and W, defendants in a suit, give testimony in their own behalf, H, the other party, to the matters spoken of by them being dead. C is cross-examined on
1011 *all the issues by the plaintiff, with a knowledge at the time of the objection to his competency. After the testimony is ended plaintiff excepts to the competency of

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each of them, on the ground that H was dead.—HELD:

1. The plaintiff having cross-examined C on all the issues in the cause, that was a waiver of the objection to his competency; and it cannot afterwards be made.

Hord's adm'r *v.* Colbert & als., 49

2. Quære: If permitting the examination of W in chief, without objection before it is done, is a waiver of the objection to his competency. Idem, 49

2. Whenever the character of a witness for truth is attacked, either by direct evidence of want of truth, or by cross-examination, or by proof of contradictory statements in regard to material facts, or by disproving by other witnesses material facts stated by him, or, in general, whenever his character for truth is impeached in any way known to the law, the party calling him may sustain him by evidence of his general reputation for truth.

George & als. *v.* Pitcher & als., 299

3. In an action on a bond by the assignee of a deceased obligee, the obligors are incompetent witnesses to testify in their own behalf under the statute Code of 1873, ch. 172, § 22

Grigsby & als. *v.* Simpson, assignee, 348

4. An executor who conveys land with special warranty, who is not a party to the suit, and has no interest in the result of it, or in the record as an instrument of evidence, is a competent witness to prove facts in relation to his sale and conveyance of the land, in a contest between the creditor of his grantee and a purchaser from him.

Borst *v.* Nalle & als., 423

5. T, an executor, employs R to sell a tract of land for him; and to facilitate it, T executes to R a deed, but does not deliver it. R makes a sale to B, and B pays the purchase money to T; and then T delivers the deed to R, and at the same time R executes a deed to B. In a suit by a judgment creditor of R against B, to subject the land to the payment of his debt.—HELD:

1. T is a competent witness to prove that R sold as his agent, that the conveyance to him was that he might convey it to B, and that B paid the purchase money to T.

Idem, 423

2. By the conveyance to R there was an implied or resulting trust in favor of B, who had paid the purchase money; and this trust may be proved by parol evidence.

Idem, 423

3. The trust having been fully executed by R conveying the land to B before this litigation commenced, it seems that on that ground parol evidence is admissible to establish the trust. Idem, 423

4. R being dead, B is not a competent witness on his own behalf as to the sale and conveyance of the property.

Idem, 423

6. The testimony of a witness for the plaintiff is objected to by the defendant, because the witness had sold and rented from the landlord of the defendant the land in dispute by deed under seal; and he cannot disparage the title which the witness had so acknowledged.—HELD: Though that would be good ground for not permitting him to deny the title of his landlord in an action against him for rent or possession, it certainly is not good ground for his incompetency to deny that fact in a controversy between other parties, in which he has no interest.

Bartley *v.* McKinney, 750

7. A witness intended to state the facts according to the best of his knowledge or understanding and belief. It will be so presumed in the absence of evidence to the contrary. Idem, 750

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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT OF APPEALS

OF VIRGINIA.

BY PEACHY R. GRATTAN.

VOLUME XXIX.

FROM SEPTEMBER 1, 1877, TO MARCH 1, 1878.

JUDGES

OF THE

SUPREME COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

R. C. L. MONCURE, PRESIDENT.

JOSEPH CHRISTIAN, FRANCIS T. ANDERSON,

WALLER R. STAPLES, EDWARD C. BURKS.

Attorney General, JAMES G. FIELD.

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CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

*Cecil & Perry v. Hicks.

[26 Am. Rep. 391.]

September Term, 1877, Staunton.

Absent, ANDERSON, J.

1. C and P executed their single bill, dated October 18th, 1871, whereby they promised, "six months after date to pay to H or order the sum of seven thousand dollars, with interest at the rate of 12 *per centum per annum* from date."—HELD:

1. **Interest—Agreed Rate—Constitutionality.***—The contract for interest at the rate of 12 *per cent. per annum* was legal under the constitutional provision in force at the time of the contract, and is not affected by the subsequent abolition of that provision.

2. **Same—Same.**—The obligors in the bond are bound to pay interest after the rate of 12 *per cent. per annum,* not only up to the maturity of the bond, but after maturity and until the payment thereof.

This case was heard at Wytheville, and decided at Staunton. The case is as follows:

On the 18th of October, 1871, a single bill obligatory was executed by the
2 plaintiffs in error, Cecil & Perry, to *the defendant in error, Hicks, in the words and figures following, to-wit:

"($7,000). Six months after date, we promise and bind ourselves, our heirs, &c., to pay to John F. Hicks or order, the sum of seven thousand dollars ($7,000), with interest at the rate of 12 per centum per annum, from date. Value received. Witness our hands and seals, October 18th, 1871.

W. P. Cecil, [Seal.]
W. E. Perry, [Seal.]"

On the 18th of July, 1875, an action of debt was brought on said bill, by said Hicks, against said Cecil & Perry, in the circuit court of Tazewell county, and judgment by default was accordingly entered thereon in said court on the 11th of September, 1875, for the said principal sum of $7,000, with interest thereon at the rate of 12 per centum per annum from the 18th day of October, 1871, till paid, and cost of suit, subject to certain credits endorsed on said bill.

On the 26th of April, 1877, the said Cecil & Perry notified the said Hicks, that "whereas there is error in said judgment in this, that judgment should have been rendered for interest on said bond at the rate of 12 per cent. per annum, only to the date of maturity of said bond, and after that for interest at the rate of 6 per centum per annum till paid, that being the rate of interest allowed by law," and, therefore, that on the first day of the next term of said court, they would move said court to reverse said judgment and to give such judgment as ought to have been given.

Accordingly, on the 29th of May, 1877, the said motion was made; but the court being of opinion that there was no error in the judgment complained of, for which
3 *it ought to be reversed, gave judgment that the said motion should be dismissed, and for the defendants' costs.

To the said judgment the plaintiff in the motion excepted, and tendered a bill of exceptions, which was signed and sealed by the court and made a part of the record; from which it appears that the only evidence introduced in support of the motion was, a copy of the record of the said action on the said bill; and they, thereupon, applied to a judge of this court for a writ of error and supersedeas; which were accordingly awarded.

Stras and Henry, for the appellants.

J. Stras, Sr., and S. C. Graham, for the appellee.

Moncure, P., delivered the opinion of the court.

After stating the case he proceeded:

The only question presented by the case to this court for decision is: Did the circuit court err in rendering judgment for interest on the said principal sum at the rate of 12 per cent. per annum from the date of said bill till payment; instead of interest thereon at that rate from said date till the maturity of said bill, and at the rate of 6 per cent. per annum from such maturity until payment?

It is admitted by the obligors that they are bound to pay interest as well after as before the maturity of the bill, and until payment; but they contend that the rate at which they are liable, after the maturity

*Interest—Agreed Rate.—In Strayer v. Long, 83 Va. 715, the court, citing the principal case, held that where the debtor lawfully agreed to pay interest at the rate of ten per cent., the court will compel the payment though the debtor's lands are placed in the hands of a receiver at the instance of the creditor. See also, McVeigh v. Howard, 87 Va. 605, citing the principal case; Roberts v. Cocke, 28 Gratt. 207, and note; Shipman v. Bailey, 20 W. Va. 147; Barbour v. Tompkins, 31 W. Va. 422, 7 S. E. 1. The principal case is reported in 26 Am. Rep. 391. See also, Martin v. Thayer, 37 W. Va. 40, 16 S. E. 489.

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of the bill, is not the contract rate of 12 per centum per annum, but the general rate prescribed by law of 6 per centum per annum. They admit that if the contract had expressly stipulated for the payment of interest at the rate of 12 per centum per annum, until payment, it would have been
4 recoverable *accordingly, because they admit, very properly, that such a contract would, at the date of said bill, have been lawful. But they contend, that while the contract is express for the payment of interest at the rate of 12 per cent. per annum from the date to the maturity of the bill, it is neither express nor implied for the payment of interest at that rate after such maturity; and, therefore, the general rate prescribed by law, of 6 per centum per annum, then applies to the case. Let us now inquire whether this view of the law be correct or not.

There has yet been no express decision of the question by this court. But principles have recently been decided by this court in regard to the subject of interest which go very far towards the decision of the question, and seem to lead to that as a legitimate result. Roberts' adm'r *v.* Cocke, &c.; Murphy *v.* Gaskin's adm'r, 28 Gratt. 207; Cecil *v.* Barrett, &c.; Linkous, assignee, *v.* Shafer; Garnand *v.* Childress; Kent's adm'r *v.* Kent's adm'r, recently decided, but not yet reported; except that the first two of the said cases have been reported in the Virginia Law Journal for March, 1877, pp. 168-178. See also Chapman's adm'rs *v.* Shepherd's adm'r, &c., 24 Gratt. 377, and Crenshaw *v.* Seigfried, Id. 272, referred to in the opinion of the court in the said first two cases above cited.

In that opinion, which was delivered by Judge Burks, it was declared, that "in contracts for the payment of a certain sum of money, interest on the principal sum is a legal incident of the debt, and the right to it is founded on the presumed intention of the parties;" and that "wherever there is a contract, express or implied, for the payment of legal interest, the obligation of the contract extends, as well to the payment of the interest as it does to the payment of the principal sum, and neither the courts nor the juries ever had the arbitrary pow-
5 er to dispense *with the performance of such contract, either in whole or in part."

This declaration thus made in the two cases was afterwards reaffirmed in the other unreported cases above referred to, and may now be considered as the settled law of the land.

Interest, then, being an incident of a debt due by contract in the absence of a stipulation in the contract to the contrary, is as much a part of the debt as the principal itself; and the only question is, at what rate is the interest, after the maturity of the debt, to be computed in this case, at the rate of 12 per cent. per annum, at which the loan was expressly made for six months, or at the rate of 6 per centum per annum, the general rate of interest prescribed by law for cases in which there is no legal contract to the contrary.

At the date of the contract in this case, to-wit: the 18th of October, 1871, the provision of the new constitution was in force, which declared that, "upon debts hereafter contracted, it shall be lawful to receive any rate of interest, not exceeding 12 per centum per annum, which may be agreed upon by the parties and be specified in the bond, note or other writing evidencing the debt. When there is no such agreement, the rate of interest shall be 6 per centum per annum for the use and forbearance of every hundred dollars." Const. art. X, sec. 22.

This provision of the constitution has been since abolished, but of course its abolition can have no effect upon a contract made under and in pursuance of it.

Now which rate of interest must we consider as an incident of the debt and as part of the contract in this case after the maturity of the debt; 12 per centum per annum, the rate expressed in the contract, at least as to the period between the date and
6 the maturity of the *debt; or 6 per centum per annum, the rate prescribed by law, in the absence of an agreement for another and legal rate?

We are of opinion that interest at the rate of 12 per centum per annum, the rate expressed in the contract, must be considered as an incident of the debt and as part of the contract in this case, as well after the maturity of the debt as before such maturity; and not interest at the rate of 6 per centum per annum only.

It was as competent for these parties to agree upon 12 as upon 6 per centum per annum, as the rate of interest upon the debt until its payment; and we are of opinion that they did agree upon 12 and not upon 6 per centum per annum as the rate in this case. We think their contract ought to be construed precisely as if the words "till paid" had been inserted therein after the words "from date," and that such was their obvious meaning.

They no doubt omitted the words "till paid," because they considered it only necessary to agree on some legal rate of interest and the date from which it should commence, believing that it would, of course, continue to run until payment. They never could have intended that if default were made by the debtor in the payment of the debt at maturity, he should thereafter pay interest at only one-half of the rate he had agreed to pay for the period during which he had a right under the contract to withhold the principal. As it would have been perfectly lawful for the parties to have expressed the words "till paid" in their contract, if they had considered it necessary to have done so, to make their meaning plain to that effect, and as it is perfectly certain that they would have done so, if they had anticipated any default in payment, or any doubt or difficulty in regard to the liability of the debtor for the contract rate of interest till payment in case of such default; can there
7 be any *doubt that such was the mean-

ing, it not the very words of the contract? The use of money is a valuable consideration. In the absence of legislation on the subject, the parties to a loan might fix the rate of interest at their pleasure. The general rate has been fixed by the legislation at 6 per centum per annum; at the date of the contract in question, the parties were authorized to agree upon a rate not exceeding 12 per centum per annum. In this case they agreed on that rate; no doubt because the money, at that time and under the circumstances which then existed, was considered to be worth interest at that rate, both to the lender and the borrower; and they stipulated accordingly, agreeing and expecting, no doubt, that, at the end of six months, the principal and interest would be paid by the borrower to the lender, to be used by the latter as might be most to his interest. The borrower made default and withheld both principal and interest after they became payable. There is no evidence of the extent of the loss on the side of the lender, or gain on the side of the borrower, which has resulted from this default. Is it right to let the borrower, who could not obtain the money for six months, at a less rate than 12 per cent. per annum, have it for an indefinite period thereafter at half that rate against the will of the lender? Would one man in a hundred have supposed that this default in paying his debt at maturity would entitle him to withhold the principal indefinitely thereafter at one-half of the contract rate of interest for the agreed period of the loan? Would not every man expect that in case of default he would be liable for the same rate of interest as long as he continued in default? And must we not consider that to have been the agreement and understanding of the parties in such an event?

A great many cases have been cited by the counsel of both sides, in their printed arguments in this case. They
8 *are conflicting; and it may be doubtful on which side is the preponderance in numbers. But we consider it unnecessary to review them in detail, or even to repeat the citations here. We have examined all or most of them which were accessible to us, and they have not affected the views to which we have been brought by an examination and consideration of our own constitution and statutes, and decisions on the subject.

Upon the whole, we are of opinion that there is no error in the judgment, and that it ought to be affirmed.

Judgment affirmed.

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9 *Simmerman v. Songer & als.

September Term, 1877, Staunton.

Absent, MONCURE, P., and ANDERSON, J.

1. **Wills—Emancipation of Slaves—Validity.**—The emancipation of slaves by will which did not provide for or direct their removal from the state, was valid.
2. **Same—Legacies to a Class.**—Testator gives by his will to his widow four slaves by name during her life; and he emancipates them at her death, and gives to each of them by name a legacy. The widow lives until 1875. Though the slaves were emancipated by the results of the war years before the death of the widow, yet the legacies having been, not to a class, but to the legatees by name, they are entitled to the legacies.
3. **Same—Construction.***—The intention of a testator is not to be collected from any isolated clause, but from the whole will. Nor can clear and unambiguous provisions in one part of the instrument be controlled by mere inference and argument from general or ambiguous provisions in other parts of the instrument.
4. **Undue Influence.**†—For what is meant by the phrase "undue influence," see the opinion of STAPLES, J.

This case was pending in the court at Wytheville, and was argued at that place, but was decided by the court at Staunton.

John A. Simmerman, of the county of Wythe, died in the year 1853, leaving a widow and one child, Mary Ann G., who was then married to John P. M. Simmerman. He left a will which was duly admitted to probate, and Robert Crockett qualified as his executor.

10 *The 2d, 3d, 4th, 5th and 6th clauses of the will are as follows:

"2d. I give to my wife, Margaret Simmerman, during her widowhood, and if she remained a widow during her life, all that portion of my real estate on which I now reside, together with that portion acquired by purchase of my brothers, Wm. Simmerman, Jos. Simmerman, Arehart Simmerman,

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***Wills—Construction.**—In Withers v. Sims, 80 Va. 662, the principal case is cited for the proposition that although the will must be read as a whole, a clear and unambiguous provision cannot be controlled by mere inference and argument from any general or ambiguous provisions in other parts of the instrument. Citing also, Rayfield v. Gaines, 17 Gratt. 1.

†**Same—Undue Influence.**—In Carter v. Carter, 82 Va. 1, the principal case is cited for the definition of undue influence. See also, Nicholas v. Kershner, 20 W. Va. 254.

Testamentary Capacity—Family Physician's Testimony.—In Shacklett v. Roller, 97 Va. 648, the court says of a family physician's testimony as to a testator's capacity, "Physicians, as this court has so often said, are considered as occupying a high grade on such questions, both because they are generally men of cultivated minds and observation, and because, from education and pursuits, they are supposed to have turned their attention more particularly to such subjects, and therefore to be able to discriminate more accurately, especially a family physician who has attended the patient through the disease which is supposed to have disabled his mind." Citing the principal case, and Burton v. Scott, 3 Rand, 399, 403; Parramore v. Taylor, 11 Gratt. 220, 228; Cheatham v. Hatcher, 30 Gratt. 56; Montague v. Allan, 78 Va. 592; C. & O. R. R. Co. v. Mosby, 93 Va. 93.

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Jas. Simmerman, (their deeds to me respectively will more precisely define the boundary.) I also give to my wife, Margaret Simmerman, all my stock of horses, also the following slaves: one named Mathew, one Oliver, Francis, Martha and her three children, Charles, Mary and Adam, and her increase hereafter, if there should be any; also my negro man Ephriam; also my stock of cattle, hogs and sheep, all my household and kitchen furniture and farming utensils. If my wife, Margaret Simmerman, should hereafter marry, I then in that event revoke all that is devised to her by this my last will and testament, and direct that she shall take that portion of my estate to which the statutes of Virginia would entitle her to, except the devise of my following named slaves, Martha and her three children, Charles, Mary and Adam, I give them absolutely to her during her life; and at her death, with their increase, if there be any, I direct that they (Martha and her three children and her increase), be emancipated and liberated as fully as the laws of this state will permit. I also direct that she, Martha, shall have the following property: two horses, worth seventy-five dollars each, and a good two-horse wagon; and I also direct my executor, to be hereafter named, to pay to her, Martha, one thousand dollars, for her own use; also one thousand dollars to her son Charles; also one thousand dollars to her daughter Mary, and one thousand dollars to her son Adam.

11 *"3d. I direct that my wife, Margaret Simmerman, permit my brother Samuel to live with her and be decently supported by her during his life.

"4th. All the remaining portion of my real estate I give and devise to my daughter, Mary Ann G. Simmerman, and her heirs forever. I also give to her, Mary Ann G. Simmerman, the following slaves: Samuel, Thomas, Catherine, Evaline and her two children, (George and James, and their increase, if any,) and her heirs forever.

"5th. I direct my executors, hereafter to be named, to pay to my wife, Margaret Simmerman, two thousand dollars at my death.

"6th. I give to my daughter, Mary Ann G. Simmerman, and her heirs forever, all the money on hand at my death, together with all debts due me by note or account, except the amounts devised to my wife, Margaret Simmerman and my slaves, Martha and her three children, Charles, Mary and Adam. My intention is that the amount devised to my slaves above mentioned shall be paid to them at the death of my wife, at which time they are to be free."

The personal estate including slaves was appraised at $28,134.08; of this there was in money on hand and notes and accounts $13,984.33, of slaves appraised at $9,750, and other personal property $10,149.10. The executor seems to have settled up the estate very promptly. His account is reported in October, 1853; and by it it appears, that he had delivered to Mrs. Simmerman, the widow, the personal property appraised at $10,149.10, and had paid to her the $2,000 bequeathed to her; and that he had delivered to John P. M. Simmerman bonds and accounts amounting to $11,984.33, and

12 slaves appraised at $4,000; *these not including the slaves mentioned in the will and given to Mrs. Simmerman for her life.

Mrs. Simmerman lived on the land given to her by the will of her husband, until her death in 1875. She kept with her the slaves bequeathed to her for her life, and they cultivated the land up to the end of the late war, and they continued for two years after that, to live with her on the same terms; she providing for them as when they were slaves, and they not claiming any other compensation. From that time until her death she contracted with them to rent them certain parts of the land for a share of the crop. At her death there appears to have been little personal property owned by her; the appraisement of her estate amounting to $1,747.08.

In November 1875, Charles Songer, Adam Songer, William Holly and Mary his wife, and Calvin Cox and Martha his wife, instituted a suit in equity in the circuit court of Wythe county, against Robert Crockett, the executor of John A. Simmerman, and John P. M. Simmerman and his wife, to recover the legacies left them respectively by the will of said John A. Simmerman. In their bill they set out the will of John A. Simmerman. They say the plaintiff Martha is the daughter of Samuel Simmerman, the brother of the testator, and that the plaintiffs Charles, Adam and Mary, are the children of the testator and said Martha, and they were always recognized as his children. And they pray that the executor Crockett may be decreed to pay the legacies left to them respectively, and if necessary for an account; and for general relief.

Crockett did not answer the bill; but he admitted assets in his hands sufficient to pay the legacies. John P. M. Simmerman answered. He denied the validity of the bequests to the plaintiffs: 1st. On the ground that they were slaves at the death of

13 the testator, and could *not be emancipated except on condition of removal from the commonwealth; whilst the will affects to emancipate them unconditionally. 2d. The legacies were bequeathed manifestly on the implied condition that said slaves were to serve the widow as such during her widowhood; and this they did not do either as such or otherwise, except for a price, from the close of the war until her death, a period of more than ten years. He further submits that the said legacies are only given to the plaintiffs in case the widow again married, which she did not do. However, in any construction of said will he insists the plaintiffs are not entitled to recover anything on account of their supposed legacies. They were emancipated by the results of the war, ten years and more in advance of the event on which they were to be emancipated by the will. At that time the widow, who by the will was entitled to

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their services for life, had consumed a large portion of the personalty bequeathed to her, and in an equal degree perhaps had wasted the land devised to her for life. This land, however, embracing some six or seven hundred acres with valuable buildings, was yet of an annual value, which could not have fallen short of say five or six hundred dollars; and of personal property embracing horses, cattle, hogs, sheep and supplies, she was still in possession of a large amount. At that time she had then lost in a very large measure, and shortly afterwards wholly lost the use of her mind for all purposes of business, becoming in short and literally an unresisting prey for the plundering schemes and practices of those around her, and especially of her late domestics and servants, and most especially of the plaintiff, Martha, and her children and son-in-law. These latter, it is sober truth to say, fairly rioted in the spoil; pretending to remain in her service and take care of her during her life as contemplated in said will, they in fact took
14 possession of her *property and of herself and appropriated both to their own use during the entire period from the fall of the Confederacy until her death, in the same manner and to the same extent as if both had in fact belonged to them, except only that they allowed the poor old woman food, clothes and lodging—all of the very plainest. And respondent claims that they thus became responsible to her estate either as bailiff or as her trustees ex maleficio, and are liable to a decree of this court for an account of these receipts and payment of the same deducting for wages; or failing to render such account satisfactorily, then to be decreed to pay a fairly estimated compensation for their said use of said property. Estimated either way such decree, respondent is sure, must at least equal the amount bequeathed to them, and he is advised he is entitled in this suit to have the same ascertained and set off against said legacies. And he says that his wife Mary Ann G. Simmerman is the only heir and distributee of her mother and entitled to her estate.

A great mass of testimony was taken having reference to the capacity of Mrs. Simmerman the widow, the treatment of her by the plaintiffs, her contracts with them, and the waste of her property; which it is utterly impossible to state. The view of it taken by this court will be seen in the opinion delivered by Judge Staples.

The cause came on to be heard on the 29th of December, 1876, when the court held that there was nothing in the record to deprive the plaintiffs of their legacies under the will of John A. Simmerman, deceased; and that they were within the character and description of the legatees. And it was decreed that the plaintiffs recover against Crockett, the executor, the several amounts and legacies bequeathed them respectively in said will, out of the estate of his testator in his hands to be administered; that is to say to &c., &c. From this decree John
15 *P. M. Simmerman applied to a judge of this court for an appeal; which was allowed.

Kent, Blair & Crockett, for the appellant.

W. H. Bolling, for the appellees.

Staples, J., delivered the opinion of the court.

The first ground of defence relied upon in the court below by the appellants, is that at the period of the testator's death, it was not competent to emancipate slaves by will or otherwise without at the same time making provision for their removal from the commonwealth. And as no such provision was made in this case, the emancipation did not take effect; and as a necessary consequence the legatees were incapable of taking the legacies bequeathed them. This ground was very properly abandoned by counsel in the argument here, for although, according to the laws then in force, no slave emancipated since 1806, or thereafter, was permitted to remain in the state more than one year after being twenty-one years of age without lawful permission, it was not required that the owner should make provision for the removal of such slaves as a prerequisite to the exercise of a valid act of emancipation. Code of 1849, chap. 104, sec. 9; chap. 107, sec. 2.

The second ground of defence relied upon is, that Martha and her three children were entitled to the legacies given them only in the event that Mrs. Simmerman, the testator's widow, married again, and as that event did not happen, the legacies did not take effect. This argument would equally prove that the testator did not intend to emancipate the slaves in question except upon the contingency of the marriage
16 of his widow. And *the learned counsel has argued that such is the proper construction of the will. It is plain, however, that this is not the meaning of the testator. His intention was that his widow should have control of Martha and her three children during her life; and at her death they should be free. He was willing that she should have such control even though she might marry again, but he was not willing that any other person after her death should exercise dominion over them. The intention of the testator is not to be collected from any isolated clause, but from the whole will. Nor can clear and unambiguous provisions in one part of the instrument be controlled by mere inference and argument from general or ambiguous provisions in other parts of the instrument. Rayfield and wife *v.* Gaines et als., 17 Gratt. 1.

If in this case the second clause of the will presented the slightest difficulty, that difficulty is removed by the sixth, wherein the testator gives to his daughter, Mary Ann G. Simmerman, all the money on hand at his death, together with all debts due him by note or account, "except the amounts devised to my wife, Margaret Simmerman, and my slaves, Martha and her three Children, Charles, Mary and Adam. My intention as that the amount devised to my slaves

above mentioned, shall be paid to them at the death of my wife; at which time they are to be free." It would be difficult to use language more explicit or comprehensive.

Considering this clause in connection with the other provisions of the will, it is apparent it was the purpose of the testator that at the death of his widow, these, his favorite slaves, should have their freedom, and the legacies bequeathed them; and that neither one nor the other should be made to depend upon so uncertain and improbable an event as her marriage.

17 *The third and main ground of the defence relied upon in the court below, is that the legacies in controversy were given to the persons named on the implied condition, that at the death of the widow they should answer the description and character given to them in the will; that is to say they should be persons emancipated by the will, and should have been slaves and serving the widow as such down to the period of her death; whereas the appellees derived their title to freedom from the government of the United States, and did not serve the widow as slaves, but in the capacity of freedmen and tenants under contract.

One of the cases cited in support of this position, is that of Johns *v.* Scott, 23 Gratt. 704. As this case is relied on with much confidence, it becomes necessary to examine it with some care, in order to understand what were the precise points decided. It will be seen that the decision was placed mainly upon the ground that as none of the legatees were named in the will, all idea of mere individual benefit was excluded; and as a class of persons only was provided for by the will to answer a certain description and character pointed out in unmistakable terms by the testator himself, it was incumbent upon the claimants of the legacy to bring that class within these terms before they could successfully assert a title to the legacy. Judge Bouldin, who delivered the opinion of the court, lays marked stress upon the peculiar language of the will, in providing that the claimants of the legacy were to be the testator's freedmen, his slaves emancipated by him under his will, and were to remain slaves, and as such to serve the testator's wife and daughter, until the death of the survivor. So far from answering this description, the appellees claimed their freedom under another and higher power, and against the will. The event on which their claim to the legacy de-

18 pended had *not then occurred. The testator's daughter was still alive, and might live for many years. Before she died any one of the persons then claiming a legacy dependent on that event, might themselves be dead. These citations will sufficiently show the grounds upon which the opinion in Johns *v.* Scott rested.

It is very true that Judge Bouldin, towards the conclusion of the opinion, adverts to another rule of law which he supposes had some bearing upon the case. That rule is, that although the legatees be the person named, yet if he does not bear the character and sustain the relation to the testator set forth in the will, and which induced the bequest, he cannot take the legacy. The principle of the cases cited by Judge Bouldin in this connection, is, that if a legacy is given to a person by name, which has been falsely assumed, or if the testator is in any other way imposed upon and induced by a supposed relationship to make a gift which he otherwise probably would not or might not have done, the court will, upon the ground of fraud, hold the bequest inoperative and void.

It is very obvious that this principle can have no just application to a case like the present, where the legatee is named in the will and answers fully the description given of him therein; but his status is subsequently changed by a power over which he has no control, and which he is unable to resist. All that was said, or intended, in Johns *v.* Scott, was that under the peculiar circumstances of that case, the character in which the legatees should claim was to be regarded as the essence of the bequest; and in that aspect the principle which should control was the same in effect established in the class of cases were the supposed relationship was believed to be the sole motive of the gift. The testator had emancipated all his slaves at the death of his daugh-

19 ter; *but she was entitled to them during her life. He very naturally supposed their services would amply compensate her for the fund set apart out of his estate to pay the legacy bequeathed them at the period of their emancipation. It was therefore a very reasonable presumption that if the testator had known the legatees would not remain his slaves, and render to his wife and daughter the services required of them, but would assert their freedom outside the will, and thus disturb its provisions to the great loss of the first objects of his bounty, he would have made no attempt to provide for them. This view was confirmed by the further fact that the legacy given the slaves in that case was to be expended mainly in their removal to some distant state or country, and only the residue to be distributed among them in their new homes. The primary intent of the testator was therefore defeated by the emancipation under the authority of the Federal government, and the continued residence of the legatees in the state. In Johns *v.* Scott, therefore, it might well be said that the character in which the legatees should claim was the essence of the bequest.

There is, however, another class of cases quite distinct from those cited by Judge Bouldin, which, though establishing a different rule, are entirely consistent with the latter. They are cases in which the legatees being named, errors in the description were determined not to vitiate the legacies, as not being essential, and on the presumption that personal affection might have been ingredients in the bequests; which errors would not have induced the testator to withhold his bounty, had he been acquainted with all the circumstances of the case; a presumption

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which can never be made where the supposed relationship is the sole motive of the bounty.

2 Red. on Wills, 348.

20 *Thus in Kendall *v.* Abbott, 4 Vesey R. 802-808, cited by Roper, Lord Alvanley said, that when a person was supposed to be a child of the testator, and from motives of love and affection to the child conceiving it to be his own, the latter made provision for it, and it afterwards turned out that he was imposed upon, the child not being his own, his honor was not disposed to determine that the provision for the child would totally fail; for circumstances of personal affection to the legatees might be blended with the gift which might entitle the child, although he might not answer the character in which the legacy was given.

The same learned author, Roper, says: It was said in argument in the case of Brett *v.* Rigden, Plowd. R. 340, 344, that if a bequest were made to the wife of J. S., and J. S. afterwards died, whose widow thereupon married J. D., and then the testator died; the wife of J. D. would be entitled to the legacy, although she was not the wife of J. S. at the time the will took effect, and therefore did not answer the description at that period.

In Schloss *v.* Stiebel, 6 Sim. R. 1, the testator being engaged and bethrothed to a lady, and after mentioning her by name in his will, and alluding to his intended marriage with her, he gave £3.000 to his wife. During the engagement, but before the marriage, the testator died. It was held that she was entitled to the legacy, upon the ground it was not given on the condition of the testator marrying her, but that he had described her in reference to his intention of marrying her.

There are other cases to the same effect, cited by the same author; but these are sufficient to show that the courts will often sustain the legacies where personal affection is presumed to be an ingredient in the bequest, although the legatee may not answer the description given of him when the

21 will takes effect. Let us see *how these principles apply to the case in hand. In the first place the legatees are respectively named in the will. The legacies are given to them, not as a class, but as individuals. The testator, after the clause of emancipation, says, "I also direct that she, Martha, shall have the following property: two horses, worth seventy-five dollars each, and a good two-horse wagon; and I also direct my executor to pay to her, Martha, one thousand dollars for her own use, also one thousand dollars to her son Charles, also one thousand dollars to her daughter Mary, and one thousand dollars to her son Adam." These provisions strikingly distinguish the case from that of Johns *v.* Scott.

Again: the testator does not emancipate all his slaves: on the contrary, he bequeathes all of them to his wife and daughter, except the four named, the special recipients of his bounty. Why he thus discriminated in their favor is a matter of some controversy. On the one hand testimony has been adduced tending very strongly to show that the children of Martha are also the children of the testator; on the other hand, evidence has been offered tending to show, very slightly however, that they are the children of Samuel Simmerman, a brother of the testator, and a member of his family. It is not material to inquire which supposition, or whether either is correct. It is apparent that personal affection, or some other equally potent consideration, influenced the testator in making these bequests. This feeling of the testator was fully shared in by his widow; for she is proved to have entertained a strong affection for them as long as she lived. The case comes, therefore, directly within the principles of the decisions already mentioned. We may conjecture, but no one can assert with confidence, that the testator would have withheld these legacies even if he had known the appellees would obtain

22 their freedom *in some other way than under the will. He was possessed of an ample fortune, which was mainly given to his daughter. For his wife he also made abundant provision independently of these four legatees. The loss of their services for a few years, it is hardly to be presumed, would so injuriously affect the condition of Mrs. Simmerman as to induce the testator, had he known all the facts, to withhold a bounty he obviously considered necessary to the comfort and security of the legatees. The appellants, it is true, are to pay the legatees, but they are not entitled to the services of the appellees. It did not concern them whether the latter were emancipated by the act of the Federal government or by the operation of the will. Whatever loss has been sustained fell wholly upon Mrs. Simmerman. She alone had just cause of complainant. The appellees, it appears, remained with her until her death; one of them certainly acting precisely in the same capacity as before emancipation. The services rendered by the others were entirely satisfactory to Mrs. Simmerman. She, no doubt, indulged them in many privileges before and after they were free. So far as she was concerned it is manifest that emancipation effected but little change in the condition and conduct of the appellees; but her losses, whatever they were, resulting from the claim to freedom outside the will, can in that case furnish no just ground of offence to the appellants.

Upon the whole, I think there no fact or circumstance or presumption in the case upon which the court would be authorized to disregard the plain and unambiguous provisions of the will in favor of the appellees.

The fourth and last ground of defence relied on in the court below was that the appellees had lost the right to recover the legacies, because from the close of the war to the death of Mrs. Simmerman, they

23 had, by the *exercise of undue influence upon the feeble mind of Mrs. Simmerman, obtained control of her prop-

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erty and appropriated the same to their own use, to an amount much exceeding the value of the legacies, and to a corresponding extent have diminished the estate, which at the death of Mrs. Simmerman would revert to the appellants; and as the appellees were wholly insolvent, the only remedy of the appellants was by way of set-off against the legacies.

In considering this ground it must be borne in mind that Mrs. Simmerman was entitled absolutely to the personal property, and to the rents and profits of the real estate in her possession. She might, if she pleased, permit the appellees to use and enjoy the land without compensation, and she might give them any or all the personal property, and no one could legally complain or hold her or them accountable. The only question then is, whether the appellants have shown such want of capacity on Mrs. Simmerman's part, or the exercise of such undue influence on the part of the appellees, as renders an account proper in this case. There is not the shadow of a doubt that Mrs. Simmerman, prior to the period of her accidental poisoning, was competent to understand and manage her own affairs. There is more difficulty with regard to her condition subsequent to that period. I think, however, the weight of the evidence establishes that she was of sound mind until within a few months previous to her death. Her intellect was somewhat impaired by the infirmities of age and disease, but she was not an imbecile. She was not a person for whom a committee might properly have been appointed. Dr. Jas. Gibboney, her regular attending physician for many years, who had repeated conversations with her upon matters of business, and who was well acquainted with her condition, uses this emphatic language: 24 "Her mind *was affected at the time she was poisoned, but in a few days she was rational as ever. She so remained up to within a few months before she died." He further says: "I believe that the delirium was the result of the disease at the time and was merely sympathetic, and not idiopathic, as she recovered her mind upon the improvement of her physical condition." Such testimony, that of an attending physician, is always entitled to peculiar consideration. Burton *v.* Scott, 3 Rand. 399-403. In this instance it is sustained by other witnesses, and by the facts and circumstances of the case.

And now as to the undue influence. After a careful examination of the record I have been unable to find any evidence of it. It is important in the first place to consider what is meant by the phrase "undue influence." "The influence to vitiate an act must amount to force and coercion destroying free agency. It must not be the influence of affection and attachment; it must not be the mere desire of gratifying the wishes of another; for that would be a very strong ground in support of a testamentary act. Further, there must be proof that the act was obtained by this coercion, by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear." This is the definition given by an eminent author, Jarmyn on Wills, page 29, supported by numerous authorities, and approved by this court in Parramore *v.* Taylor, 11 Gratt. 220; Redf. Amer. Cases upon the Law of Wills, 280, 725, 735-6-7, 741; Greer *v.* Greer, 9 Gratt. 330.

Without entering into a discussion of the evidence bearing upon this branch of the case, which would be both unprofitable and unnecessary, I repeat the testimony fails utterly to disclose any such coercion or importunity on the part of the appellees 25 as was calulated to constrain *Mrs. Simmerman to do what she was too weak to resist or unable to refuse. There is no doubt that Mrs. Simmerman often permitted her affections to control her judgment in the bestowment of gifts upon others, and that she was for many years before and after the war surrounded by a crowd of worthless and improvident people, who profited greatly by her kindness and ill-judged liberality.

But the appellees were not the only persons in her employ. There were others living upon her land, both white and black; all, no doubt, partaking of her bounty more or less. One of the appellants' witnesses states "that most every lady in the neighborhood went there to see her." These people, of course, partook of her hospitality and helped to consume her substance. The appellants knew all this. They lived very close to Mrs. Simmerman, and yet they very rarely went to see her. They left her to the tender mercies of those around her. Why did they not interfere to relieve her from the unjust and improper influences to which she was exposed? If, as is now alleged, she was non compos mentis, why is it that application was not made for the appointment of a committee? We know that such a committee was appointed within a few months of her death; why was it so long delayed? Every consideration of propriety and self-interest, to say nothing of duty, would have suggested some action of the kind years before it was taken, if the appellants' present pretension be correct. The conclusion is irresistible, that they fully recognized the fact that Mrs. Simmerman was legally compos mentis, with sufficient understanding to manage her affairs; and her disposition of her property, however improvident or wasteful, could not be successfully impeached.

Under circumstances of so long delay on the part of those who ought to have 26 been vigilant, it would require *a very strong case of incapacity or undue influence to justify the interposition of the court. No such case has been proved. If it was proved, the evidence, I think, fails to establish any such appropriation or use of Mrs. Simmerman's property by the appellees as could properly be the subject of an account in this case. It is, however, unnecessary to dwell upon this point, as upon the former ground the appellants are not entitled to any set-off against the legacies.

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For the reasons stated, I am of the opinion the decree of the circuit court should be affirmed.

Decree affirmed.

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27 ***Snavely v. Pickle & als.**

September Term, 1877, Staunton.

Absent, ANDERSON, J.

I. In February, 1841, S conveyed to a trustee a tract of land, in trust to secure a debt of $1,422 he owed to D, with power of sale after four years. In October, 1842, S was taken on two *ca. sas.*, took the insolvent debtor's oath, and conveyed to the sheriff all his right, title and interest in this land. In January, 1843, the sheriff sold the land out and out, when D bought it for $1,500; less than his debt. In December, 1843, S and his wife, the sheriff, and the trustee united in a conveyance of the land to D, and in May, 1845, D and his wife conveyed the land to P. P died in 1873; and in 1874 S filed his bill against the heirs of P, claiming that the deed to P was a mortgage to secure money which P had advanced for him to pay D's debt, and asking to be permitted to redeem. It appeared that before D's purchase he agreed with S that if D bought the land for less than his debt, S might redeem it by paying his debt in twelve months; and it was clearly proved by parol testimony, that before the year was out S applied to P, his brother-in-law, to advance the money to pay the debt of D, and it was agreed that the land should be held by P until he was repaid, and he should have possession of the land, except the house and some lots around it, to keep down the interest of the debt. This agreement was carried out. P recognized the rights of S under this agreement until 1859, and did not dispute them until 1869, when he denied the right of S to redeem; but several times afterwards he admitted S's right in conversations with third persons, and he offered to compromise with S, but never could be induced to carry his agreement into effect—HELD:

1. **Sale by Sheriff—Validity.**—The sale by the sheriff of the land out and out was a nullity, and D acquired no right to it by his purchase.

28 2. **Deeds—Mortgage—Parol Evidence.**—Though the deed to P was absolute on its face, it was competent to prove by parol evidence, that it was intended to be a mortgage or security for a debt; and in this case the proof is full and satisfactory.

3. **Same—Same—Same.**—Whether a deed absolute on its face is a mortgage or conditional sale, is only to be determined in each case by its own circumstances; but in doubtful cases the courts incline to construe the transaction to be a mortgage rather than a conditional sale.

4. **Mortgage—Debts.**—It is essential to a mortgage that there should be a debt to be secured. And the agreement in this case that P should advance for S to D the amount of his debt and interest, and the actual payment of the same by P under the agreement, created a debt, and made S the debtor of P for the amount so advanced.

5. **Mortgage—Conditional Sale.***—For the circumstances which will be looked to, to determine whether a mortgage or conditional sale is intended, see the opinion of BURKS, J.

6. **Mortgage—Lapse of Time—Presumption.†**—The presumption from lapse of time that will bar the right to enforce a mortgage, when the mortgagor is in possession, or will bar the right to redeem where the mortgagee is in possession, is a mere presumption, which may be repelled by any circumstances sufficient to satisfy the mind, that in the particular case it is ill-founded; and in this case the circumstances repel the presumption.

7. **Accounting.**—An account should be settled; S to be charged with the amount paid for him by P to D, and P charged with rents and any timber cut by him, to be credited at the end of each year, first upon the interest, and if more than that, then upon the principal of the debt.

8. **Chancery Practice—Necessary Parties.**—The administrator of P is a necessary party in the suit, and plaintiff must make him a defendant before any further proceedings in the court below.

This case was argued at Wytheville and decided at Staunton. It was a bill filed by John Snavely against the heirs-at-law of Philip Pickle, deceased, in the circuit court of Smythe county, to be permitted to
29 redeem what *he claimed to be a mortgage upon a tract of land in said county. The facts are stated in the opinion of Judge Burks.

The cause came on to be heard upon the 30th of April, 1875, when the court dismissed the bill. And thereupon John Snavely applied to a judge of this court for an appeal; which was allowed.

J. A. Richardson and J. H. Gilmore, for the appellant.

C. B. Thomas and J. A. Campbell, for the appellees.

Burks, J., delivered the opinion of the court.

This is an appeal from a decree of the circuit court of Smythe county, dismissing the bill of the appellant, filed against the heirs of Philip Pickle, deceased, to redeem

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***Conditional Conveyances—Parol Evidence.**—In Edwards v. Wall, 79 Va. 322, the court says: "It is well settled, that a conveyance of land, absolute on its face, may be shown in equity by extrinsic and parol evidence, to be, in reality, a mortgage as between the original parties and those deriving title under the grantee, who are not *bona fide* purchasers for value and without notice. But the presumption of course always is that the deed is what on its face it purports to be, and to repel this presumption the evidence must be clear, unequivocal and convincing," citing the principal case and Phelps v. Seely, 22 Gratt. 573, 3 Pom. Eq. 175, sec. 1196. See also, Miller v. Blose, 30 Gratt. 744, and *note;* Jennings v. Shacklett, 30 Gratt. 765; Warwick v. Warwick, 31 Gratt. 70, and *note*, citing the principal case. See 2 Min. Inst. (2d Ed.) 336, 337; Barton's Ch. Pr. (2d Ed.) 995; Bright v. Knight, 35 W. Va. 40, 13 S. E. 63.

†**Debt—Lapse of Time—Presumption of Payment.**—The rule laid down in the principal case, in regard to the presumption of payment where a debt has been allowed to lay dormant for 20 years, is sustained in Tunstall v. Withers, 86 Va. 892; Jameson v. Rixey, 94 Va. 346, citing the principal case and Booker v. Booker, 29 Gratt. 605; Updike v. Lane, 78 Va. 132. See also, Bowie v. Poor School Society, 75 Va. 306; 2 Min. Inst. (2d Ed.) 357; Barton's Ch. Pr. (2d Ed.) 122.

a tract of land from an alleged mortgage to said decedent.

The appellant being indebted to one Jospeh W. Davis in the sum of $1,422.65, by deed bearing date the 20th of February, 1841, in which his wife united, conveyed this land (his own) to a trustee to secure the payment of this debt, with accruing interest, investing the trustee with power of sale for default of payment after four years from the date of the deed.

On the 18th day of October, 1842, the appellant was taken into custody by the sheriff of Smythe county on two writs of ca. sa., for debts amounting together to a sum not exceeding $331.00; and was discharged from custody on the same day upon taking the insolvent debtor's oath and surrendering in his schedule of property, and by deed conveying to the sheriff "all his right, title, interest, and claim in and to" the tract of land aforesaid.

30 *On the 17th day of January, 1843, the sheriff sold the land by public auction, and the said Joseph W. Davis (the beneficiary in the trust deed aforesaid), became the purchaser, at the price of $1,500.

On the 25th day of December, 1843, the appellant and his wife, the sheriff of Smythe county and the trustee in the said deed of trust, united in a deed of that date, by which they conveyed the land to the said Davis; and afterwards, on the 24th day of May, 1845, the said Davis and his wife, by deed of that date, conveyed the said land to the said Philip Pickle.

Philip Pickle died in the year 1873, and the appellant filed his bill in August, 1874, alleging that, although the deed to Pickle was absolute in its terms, it was in fact and in effect only a security for the payment of the debt aforesaid and interest, which had been advanced by Pickle to Davis, for the appellant and at his request, upon an agreement that the land should be conveyed to Pickle and held by him as a security for the amount thus advanced.

The general rule, that parol evidence is inadmissible to contradict or substantially vary the legal import of a written instrument, in its application to particular cases, is subject to many qualifications or exceptions, real or apparent, now as well established as the rule itself. Some of the more prominent of these are stated and explained by Judge Allen in a well considered opinion delivered in the case of Towner *v.* Lucas' ex'or, 13 Gratt. 705; and amongst the rest, he mentions the exception, if exception it be, that parties to a deed may, by oral evidence, prove that a deed, absolute on its face, was intended to be a mortgage or security for a debt. Whether this be a real exception, or merly apparent and reconciliable with the general rule, as the judge seems to think it is, on whatever ground it rests, it is certainly well established.

31 *It is recognized by the English courts, fully by the supreme court of the United States, in some form or other by the courts of most of the states of the Union, and by none more fully than by this court. Conway's ex'ors *v.* Alexander, 7 Cranch R. 218; Spriggs *v.* The Bank of Mount Pleasant, 14 Peters R. 201; Russell *v.* Southard, 12 How. U. S. R. 139; Babcock *v.* Wyman, 19 How. U. S. R. 289; Morgan's Assignees *v.* Shinn, 15 Wall. U. S. R. 105; Ross *v.* Norvell, 1 Wash. 14; Robertson *v.* Campbell & Wheeler, 2 Call 421; King *v.* Newman, 2 Munf. 40; Bank of U. States *v.* Carrington & others, 7 Leigh 566; Phelps *v.* Seely, 22 Gratt. 573; Thornbraugh *v.* Baker, 2 White & Tud. Led. Cas. in Eq. (ed. 1852), part 2, 433, 434; ed. 1877, pp. 40, 41, part 1, 533 and cases there cited.

While, however, it is well settled, that oral evidence is admissible for the purpose stated, it is equally well settled, that to avail, it must be clear and the proof cogent.

Upon a careful examination of the record in this case I am satisfied that the appellant, notwithstanding the difficulties he has had to encounter, has furnished the proof necessary under the rules of law to entitle him to the relief he seeks.

When he was taken into custody by the sheriff under the ca. sas., he surrendered and conveyed to the sheriff all his interest in the land which had been previously conveyed in trust to secure the debt to Davis. That interest was merely his equity of redemption. It was all that the sheriff took under the deed to him and all that he could sell. And yet it seems that instead of selling the equity of redemption only, he undertook to sell, and did pretend to sell the land in fee, free of the encumbrance of the trust deed. This is apparent from the return he made on the ca. sas. and from other evidence in the cause. The land was

32 bought by Davis, as *before stated, at the price of $1,500. The return states that "the property was sold, but did not bring the amount of a deed of trust upon it, executed before the execution was issued." The same return was made on each execution. The idea of the sheriff seems to have been that it was his duty to exercise the powers of a chancellor, to sell the land out and out, free of the encumbrance of a deed of trust, and apply the proceeds, first to the encumbrance and then to the executions in his hands; and as the land did not bring enough to satisfy the deed of trust, there was nothing for the execution creditors. The sale was a nullity. The sheriff had no power to make it, and Davis took no title under it.

The appellant, and Davis also, seem to have been under the same delusion as to the sheriff's powers and duties in the premises, and both seem to have been of the opinion that Davis, under the sale, had become the owner of the land, and that the $1,500 which he had agreed to pay for the land, was to be credited on his debt; thus leaving still a balance thereupon due him. Previously to the sale, Davis had given to the appellant a writing to the effect that if he became the purchaser of the land at the sheriff's sale at a price less than the amount of his debt, the appellant should have the right within twelve months to redeem the same by paying to Davis the amount of his debt and interest. This writing, although with-

out consideration, seems to have been regarded and treated by the parties as binding, giving a right on the one side and imposing an obligation on the other.

Under these circumstances and this condition of the title, the appellant, anticipating that he would not be able to pay to Davis the amount of his debt and interest within the twelve months, applied to Philip Pickle, who was his brother-in-law, to aid him, 33 and Pickle consented *to do so; and it was thereupon agreed between them that Pickle should advance for the appellant to Davis the amount of his debt and interest, and take the land and hold it until he was repaid by the appellant; that the appellant should retain possession of the house on the land and some lots around it, and surrender possession of the residue of the land to Pickle, to be used by him to keep down the interest on the money advanced, with permission to appellant to cultivate so much of said residue thus surrendered as he might desire, paying rent therefor. This parol agreement is clearly proved, I think, by the deposition of James F. Pendleton, who is corroborated by Joseph W. Davis. Peculiar weight is to be given to the testimony of Pendleton. He was, and had been for many years, clerk of the county court of Smythe, was a lawyer by profession, and, as he states, the general adviser of the people of the county in their law matters. He drew the deed to Davis and was present by appointment with Pickle when the acknowledgments of the deed were taken by the justices. This witness also states that there was some difficulty in getting the wife of the appellant to unite in the deed, and she refused to execute it until assured by Pickle, through Pendleton, that the only object was to secure the land to the appellant and his wife. Under this agreement it was that the deed was made to Davis, and afterwards by him to Pickle; and under the same agreement the appellant retained and still holds possession of the house and surrounding lots, free of rent, and Pickle entered into possession of the residue of the land, held it until his death, taking the rents thereof, and his heirs so hold it now.

The rights of the appellant, whatever they may be, under this agreement, were expressly recognized by Pickle until the year 1859, as shown by the deposition 34 *of Pendleton, and were in fact never disputed by him until the year 1869. When applied to then by the appellant offering to redeem, the right to redeem was denied; but from time to time afterwards he admitted the right to sundry witnesses, and actually agreed to compromise and adjust with the appellant, but could never be induced to carry his agreement into effect. By the original agreement, thus fully proved, it is very clear that it was never intended that Pickle should be the absolute owner of the land. At most, the parties only contemplated either a mortgage or conditional sale. One or the other was designed; but which, is the question to be determined.

There is a well defined distinction between a mortgage and a conditional or defeasible sale, but it is often very difficult to determine whether a particular transaction amounts to the one or the other; and, after all, each case must be decided upon its own circumstances, and in doubtful cases the courts incline to construe the transaction to be a mortgage rather than a conditional sale. Russell *v.* Southard, 12 How. U. S. R. 139; Earp *v.* Boothe, 24 Gratt. 368, 374, et seq. Both are conditional, and in both alike the performance of the condition according to the terms stipulated defeats the estate, and the non-performance renders it absolutely at law, and in case of a conditional sale, in equity also. While, however, the non-performance of the condition in a mortgage, at law vests the estate in the mortgaged subject absolutely in the mortgagee, equity, looking at the substance rather than the form of things, and regarding a mortgage as a mere security, acting upon the principle of granting relief against forfeitures wherever compensation can be made, gives to the mortgagor the right to be exercised in a reasonable time, notwithstanding the breach of the condition, to redeem his property by paying to the mortgagee the amount of his debt and interest, and have 35 his property reconveyed to *him. This right is called the equity of redemption, and is an inseparable equitable incident of every mortgage. It is wholly a creature of equity, and cannot be defeated, restrained, evaded, or in any way impaired by agreement of parties as long as the mortgage continues a security. An irredeemable mortgage is a legal solecism. Hence the expression, "once a mortgage, always a mortgage." What is meant by this is, that whenever and as soon as a mortgage is created by the act of parties, equity at once annexes inseparably a right of redemption, independent of and paramount to the will of the parties. It is not meant, however, that after a mortgage has been once created, the mortgagee may not become the purchaser from the mortgagor of his equity of redemption. He may become such purchaser, thus combining the legal and equitably estates, and his purchase will be valid, if, under the jealous scrutiny of a court of equity, it is shown to be for an adequate consideration, that no undue advantage has been taken of the necessities of the mortgagor, and that it is in all respects fair.

It is essential to a mortgage, that there should be a debt to be secured. It may be antecedent to, or created contemporaneously with the mortgage. If the relation of debtor and creditor exist, or is established between the mortgagor and mortgagee, so that the latter may have his action at law against the former for the amount owing, it does not matter whether the indebtedness is evidenced by a written obligation or not. The absence of a written obligation is sometimes adverted to as tending to show that a conditional or defeasible sale, and not a mortgage, was intended. This circumstance is certainly entitled to some weight, but

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alone has no great significance. The agreement that Pickle should advance for the appellant to Davis the amount of his debt and interest, and the actual payment of the same by Pickle under the agreement,
36 *created a debt, and made the appellant Pickle's debtor for the amount so advanced. There was no necessity that Pickle should take a written obligation for the repayment of this sum, for the amount was fixed and clearly ascertained by the trust deed to Davis. The principal sum was therein accurately specified, and by computing and adding interest till payment, whenever made, the indebtedness of the appellant would be ascertained with convenience and certainty, and id certum est, quod certum reddi potest.

The negotiations between the parties have always been much looked to and regarded as important in determining whether they contemplated a mortgage or sale. Earp *v.* Boothe, supra. In the case at bar, there never was any treaty for sale to Pickle, either absolute or conditional. The negotiation was for an advance by Pickle for the appellant of the Davis debt and interest, and a transfer of title through Davis as a conduit to Pickle as a security for repayment of the sum advanced, and for enlarged indulgence to the appellant to enable him to make payment. If a conditional sale had been contemplated, it would seem natural and reasonable that some time should have been suggested and fixed within which the re-purchase should be completed, or the appellant lose his right. The fact that no time for repayment was fixed, tends to show, in my judgment, that an advance of money and security for it were intended, not a sale. The land as security was ample, the payment of annual interest in form of rents was provided for, and if at any time Pickle desired payment of the principal sum and the appellant were unable to make it, he had his plain remedy by bill to foreclose.

There is another circumstance in this case which has always been regarded as very potent to show that a mortgage was intended and not a sale; and that is, the
37 *great disproportion between the value of the land and the amount of money advanced. Russell *v.* Southard, supra; 2 Minor's Institutes, 306, and cases there cited. The amount of the principal and interest of the Davis debt advanced by Pickle was about $1,700. This was paid mostly in bonds on third parties, and a proportionately small part in money. The deed to Pickle recites the consideration as $2,300, and there is some evidence of declarations of Pickle, not admissible, however, that the bonds taken at a discount and money paid, together amounted to $2,300; but Davis says that the true consideration is not expressed in the deed, and that he only received the amount aforesaid of his debt and interest. The land is proved to have been worth at that time $3,000; so that Pickle paid only a little over one-half its value. It is not reasonable to suppose that he would have been permitted to purchase at so inadequate a price, and Davis says that Pickle would not have been allowed to buy the land at that price, and that he was only permitted to take it for the sum advanced because it was understood that the appellant was to repay and redeem.

The further fact, already noticed, that by express agreement Pickle was to go into possession of the greater part of the land (the residue to remain in the possession and use of the appellant,) and receive and apply the annual rents to the extinction of the annual interest on the money advanced, shows very strongly, if not conclusively, that he was not to be a purchaser, but a mere encumbrancer. This provision of the contract between the parties for the certain and regular payment out of the rents of the interest as it annually accrued on the money advanced, plainly implies a debt on which the interest is to be paid, and as plainly, that the land and the rents and profits issuing from it were to be held as security
38 for the payment of *such debt and interest. It would seem to be wholly inconsistent with the fact of a purchase.

But the great lapse of time is relied upon by the appellees in their answer to the appellant's bill, and insisted upon by their counsel in argument here, as a bar to the appellant's equity, even if the deed in question be a mortgage. The mortgagee and his heirs, who claim under him, have been in possession of the greater portion of the mortgaged premises from the year 1845 until this time, and unless the presumption in their favor arising from this long continued possession is satisfactorily rebutted, it must prevail against the appellant's claim. The true doctrine upon this subject in Virginia has been laid down correctly, I think, by the accurate author of the Institutes of the Common and Statute Law. I cannot do better than to quote from this excellent treatise. After stating that the mortgagor, in equity, has the right to redeem within a reasonable time, the author continues: "The time which shall be deemed reasonable is not definitely fixed. As long as the mortgagor continues in possession no limit is imposed, and if that possession continue adversely a sufficient length of time, it amounts to an extinction of the lien. The right to redeem is liable to be limited or barred by the lapse of time only when the mortgagee has been in the uninterrupted enjoyment of the premises for a considerable period. That period has long been fixed at twenty years, by analogy to the bar of the right of entry by the statute of limitations (21 Jac. I. C. 16), according to the English cases, but according to the view adopted in Virginia, in consequence of the lapse of that time warranting the presumption of an abandonment of the equity, as of all other equities, and as in like manner it warrants even in a court of law a presumption of satisfaction of a debt. 1 Lom. Dig. 454, et seq.; 1 Tuck. Com. 110, B. II; 2 Bl.
39 Com. 159, n. (8); Howard *v. Harris, 2 Wh. & Tud. L. Cas. (Pt. II) 425, et seq., edi. 1877, p. 1042; Hovenden *v.* L'd Annesley, 2 Sch. & Lefr. 607-636; Marquis

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of Cohlmondely *v.* Clinton, 2 Jac. & Walker 1, 151; Ross *v.* Norvell, 1 Wash. 14

* * * * * * * * *

But whatever may be the source and ground of the limitation, it is admitted to be a mere presumption, capable of being repelled by circumstances sufficient to satisfy the mind that in the particular case it is ill-founded. Thus not only will it be repelled by the existence of any of the impediments which would repel the bar of the statute (in Virginia, infancy, insanity, and coverture, V. C. ch. 149, sec. 15), but also by any circumstance of fraud or oppression on the part of the mortgagee tending to clogg or embarrass the redemption, and by even a slight act of the mortgagee or his representative, acknowledging the continued right of the mortgagor, such as by keeping private accounts of the profits of the estate, as if it were still redeemable, especially if kept with the mortgagor, &c., or by conveying subject thereto, or offering to purchase it, or even by a parol recognition in conversation of the mortgagor's right, provided it were clear and unequivocal. 1 Lomax Dig. 455, et seq.; Howard *v.* Harris, 2 Wh. & Tud. L. Cas. (Pt. II), 425, et seq.; 2 Minor's Institutes, 328-329. To the authorities cited may be added Jones' adm'r *v.* Comer's ex'ors, 5 Leigh 350, et seq.; Hughes *v.* Edwards, 9 Wheat. R. 489, 497, 498. See also 2 Wash. on Real Prop. 558, et seq.

Besides the circumstances mentioned above by the learned author of the Institutes as sufficient to repel the presumption raised by lapse of time, there are many others; and, as stated by him, it may be repelled by any circumstances "sufficient to satisfy the mind that in the particular case it is ill-founded." The circumstances are abundant in this case to repel the presumption. The *right of the appellant to redeem was repeatedly recognized by Pickle in conversations with the witness Pendleton between the years 1845 and 1859; by deliberate admissions afterwards made to others, and by strong implication from concessions in efforts at adjustment. There is one circumstance, which of itself, might perhaps be sufficient, under the authorities, to repel the presumption. The learned English annotators of the Leading Cases in Equity, after enumerating the circumstances mentioned in Minor's Institutes, ubi supra, add: "The case would also be taken out of the statute by the mortgagor or his heir remaining in possession of part of the mortgaged estate. (Citing) Rakestraw *v.* Brewer, Sel. ch. ca. 55; 2 P. Wms. R. 511; Mos. R. 189; Burke *v.* Lynch, 2 Ball & Beat. 426-527. Other instances might be mentioned, &c."

40

The undisputed fact in this case is, that the appellant has always been and is now in the actual and exclusive possession of the house and several lots of the mortgaged premises, holding possession under the original contract with Pickle, and not accounting nor bound to account for rents.

Notwithstanding the authorities cited in the Leading Cases, supra, it is said in 1 Lom. Dig. 351, citing 1 Cov. Pow. Mortg. 388, No. 1; 3 Ves. 22, that "it does not appear to be settled, that because a mortgage is redeemable as to part of the premises, that, therefore, in no case, shall the equity of redemption be barred as to another part." The English authorities referred to are not at hand, and, therefore, cannot be examined. It is immaterial, however, what they decide, as, independent of the effect, if any, of possession of part of the premises by the mortgagor, the other circumstances before mentioned are sufficient to rebut the presumption arising *from lapse of time in this case, and it is unnecessary to pursue our inquiries further on this subject.

41

If the bill in this case had been filed to establish a conditional sale under the deed absolute on its face, it would have been a question whether parol evidence would have been admissible to prove such a sale. But as this question does not, in my opinion, arise in the case as stated in the pleadings, or as made by the proofs, it is unnecessary to decide it. See what is said by the American annotators on Howard *v.* Harris, Wh. Tud. Lead. Ca. (ed'n 1852), top pp. 436, 437, et seq., and cases there cited.

I am of opinion that the deed under which the appellees claim, although absolute in its terms, was intended by the parties to be, and is, in fact and effect, a mortgage; and that, under the particular circumstances of this case, notwithstanding the great lapse of time which, ordinarily, would be sufficient to bar the right of redemption, the appellant is entitled to redeem in the usual manner and upon the usual terms; and consequently that the decree of the circuit court of Smythe county is erroneous and should be reversed and annulled, and the cause remanded for further proceedings to be had therein to final decree in conformity with this opinion and the principles herein declared.

If there be any error in the conclusion which I have reached in this difficult case, I yet feel sure that substantial justice will be meeted out to all the parties. The appellees will get back the money their father paid, with interest, and if they lose anything, it will only be the profits of a speculation on a kinsman's necessities, of more than doubtful propriety.

I discover that the personal representative of Philip Pickle is not a party to this suit. There is a general demurrer to the bill, but no cause specially assigned for *want of parties, and no notice was taken of the omission in argument here. He is not only a proper, but a necessary party. In a bill to redeem a mortgage in fee, after the death of the mortgagee, the personal representative of the mortgagee, as well as his heirs or devisees, are necessary parties; the latter because they hold the legal title, the former because he is entitled to receive the debt on redemption decreed, whether on payment or by sale of the mortgaged premises. Story's Eq.

42

Plead. § 18. The objection for want of necessary parties may be made by answer, plea, or demurrer, or at the hearing without its being made in either, or it may be made here for the first time; and whether made or not, the court sua sponte will notice the omission. Armentrout's ex'ors *v.* Gibbons, 25 Gratt. 371; Dabney *v.* Preston's adm'rs, Id. 838.

The decree, however, entered here, settling the principles of the case, will be in no way prejudicial to the interests of the personal representatives, but otherwise. So that when the cause is remanded, as it must be, before any of the accounts in which he is interested are taken, the appellant must be required to amend his bill and make the personal representative a party defendant, unless by his consent he be made a party, as he may be, without formal amendment of the bill for that purpose.

The decree was as follows:

This cause, which is pending in this court at its place of session at Wytheville, having been fully heard, but not determined, at the said place of session: This day came here the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed
43 with *the record, that, although the deed from Joseph W. Davis and wife to Philip Pickle, dated the 24th day of May, 1845, conveying to the latter the tract of land therein mentioned, (a copy of which deed is a part of the record,) is absolute in its terms, yet said deed was, by the agreement of the appellant, the said Philip Pickle and Joseph Davis, intended to be, and was in fact and legal effect, a mortgage upon said land to secure the payment by the appellant to the said Philip Pickle of the amount of the debt and interest owing by the appellant to the said Davis, and by the said Pickle advanced and paid to the said Davis for the appellant at his request.

The court is further of opinion, that although the said Philip Pickle and those claiming under him have been in possession of the greater portion of said land from the date of the deed aforesaid until this time, from which long-continued possession a presumption might arise that the appellant had abandoned his equity to redeem, yet such presumption is fully repelled by the facts and circumstances proved in this cause, and the appellant is still entitled to redeem in the usual manner and upon the usual terms.

The court is further of opinion, that an account should be taken, stated and settled the said Philip Pickle and those claiming between the appellant on the one side, and under him on the other side, in which account the appellant should be charged with the amount of money paid and advanced for him as aforesaid by the said Philip Pickle to the said Joseph W. Davis, and interest should be computed thereon from the time it was so paid and advanced until payment; and he should be credited by the fair rents and profits of said land since it has been in the possession of said Pickle and those claiming under him, and also with the value of any timber cut and removed, or suffered or caused to be cut and removed,
44 *from said land by said Pickle and those claiming under him, the rents to be applied as a credit at the end of each year, first to the annual interest accrued, and if they exceed the interest, then the excess to be applied to the principal sum; and the balance ascertained to be owing by the appellant on the account so stated and settled, he should, by decree for the purpose, be allowed to pay to the personal representative of the said Philip Pickle, within a reasonable time to be prescribed in the decree; and upon such payment being made, the heirs of the said Philip Pickle should be required, at their own proper costs, by deed with covenant of special warranty, to convey said tract of land to the appellant, or said deed may be made on behalf of said heirs and at their costs by a special commissioner to be appointed for that purpose; and said heirs and those claiming under them should thereupon be required to surrender possession of the premises to the appellant; and if the appellant should fail to make such payment within the time so prescribed, the said tract of land should be sold by order of the court, upon a reasonable credit, and the proceeds of the sale, when and as collected, should be applied to the satisfaction of the balance so ascertained to be owing as aforesaid by the appellant; and after said balance shall be so discharged, the surplus of such proceeds, if any, should be paid to the appellant.

The court is further of opinion, that before any further proceedings be had in this case in the said circuit court, after the same has been remanded hereunder, the complainant should be required to amend his bill and make the personal representative of Philip Pickle, deceased, a party defendant in the cause, unless such personal representative shall be made a party by his consent, as he may be, without filing a formal amended bill for that purpose.

45 *The court is further of opinion, that the said decree of the circuit court of Smythe county is wholly erroneous; and it is therefore decreed and ordered that the same be reversed and annulled, and that the appellant recover against the appellees his costs by him expended in the prosecution of his appeal aforesaid here; and this cause is remanded to the said circuit court for further proceedings to be had therein to final decree in conformity with the opinion and principles herein expressed and declared; which is ordered to be certified to the said circuit court.

It is further ordered, that this decree be entered on the order book here, and forthwith certified to the clerk of the court at its place of session aforesaid, who shall enter the same on his order book and certify it to the said circuit court of Smythe county.

Decree reversed.

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46 *Crockett v. Sexton & als.

September Term, 1877, Staunton.

Absent, ANDERSON, J.

1. **Judicial Sale—Absent Parties—Right to Except.**—The court of appeals having reversed a decree of the court below for the sale of land, and another confirming the sale and distributing the proceeds, in the absence of the owners of one moiety of the land, and having sent the case back, that they may be made parties and have an opportunity to defend their interests; though the decree is in other respects confirmed, these absent owners, when made parties, have the right to except to the sale and its confirmation; and are not precluded by the affirmation of the decree in other respects than those on which it was reversed.

2. **Commissioner's Report—Exceptions.**—A commissioner appointed to sell land, makes a report of his sale in 1863, and whilst he states the amount for which the land sold, he does not say anything of the kind of money for which it was sold. Some of the owners of the land not having been parties in the cause when the decrees for the sale and its confirmation were made, are afterwards made parties; and they except to the sale, if it was made for Confederate currency. The commissioner then presents a supplemental report, stating that the land was sold for good money, and the report is not excepted to, but is received and acted on by the court. It cannot be objected to in the appellate court.

3. **Same—Amended Report.**—A commissioner for the sale of land, is required to make report of his proceedings. If his report be incomplete, insufficient, or in any way imperfect, he may be required to make a further report; and so, if after he has made his report, and it has been received and accepted, at any time before final action upon it, he dircovers any material mistake, or omission, or ambiguity in it, he may, by leave of the court, and it would be his duty, to file an amended, additional or supplemental report, correcting 47 *the mistake, supplying the omission, or explaining the ambiguity.

4. **Same—Exceptions—Time to Save.***—In such a case the report may be excepted to. But in all cases where exceptions are necessary, they should specify with reasonable certainty, the particular grounds of objection, so as to enable the opposite party to see clearly what he is to meet, and the court what it is to decide.

5. **Confederate Bonds.**—An ante-war creditor refuses to receive from a purchaser of property sold for payment of debts in 1863, Confederate currency in payment, and the purchaser obtains an order of the court to invest the amount in Confederate bonds. It is the purchaser's money which is invested, and he must bear the loss.

This case was argued at Wytheville, and decided at Staunton. It is the sequel of the case of Sexton *v.* Crockett & als., reported in 23 Gratt. 857. The subsequent proceedings in the cause are stated in the opinion delivered by Judge Burks. There was a decree in the circuit court against the defendant, Crockett; from which he obtained an appeal.

Crockett & Blair and J. B. Sheffey, for the appellant.

R. C. Kent, for the appellees.

Burks, J., delivered the opinion of the court.

This is the sequel of the case of Sexton *v.* Crockett and others reported in 23 Gratt. 857, et seq., where a statement of the case by the reporter, as it then stood, may be seen. After the case had been reached again the circuit court of Wythe county, to which it was remanded by the decree of this court, it was duly revived against the heirs of Robert I. Crockett, pursuant to said decree, and Joseph W. Caldwell, the commissioner who made sale of the Wytheville hotel property under a former decree, filed a report supplemental to his former report of 48 the sale, to *which supplemental report S. S. Crockett, a defendant in the cause, and the purchaser of the property at the sale, filed exceptions; and the heirs of Robert I. Crockett (defendants) and David Sexton, and Laurence, Myers & Co. (complainants) united in exceptions to the confirmation of the sale. By the last mentioned exceptions, the exceptors objected to the sale "unless it should be confirmed upon the express condition that the purchaser, S. S. Crockett, should pay the sum of ten thousand dollars in money lawful then (the date of the exceptions) to be received in payment of debts."

The cause came on to be heard the 13th of March, 1875, on the papers formerly read, the decree aforesaid of the court, the said supplemental report of Commissioner Caldwell and the exceptions aforesaid, and the court pronounced its decree declaring its opinion that the said supplemental report was properly filed; that the said sale was for good money and not for Confederate money; and, in that view, considering the heirs of Robert I. Crockett, David Sexton, and Laurence, Myers & Co., as making no objections to the sale, overruling the exceptions of S. S. Crockett, and decreed that the sale was for $10,000 in good money, payable as in the proceedings mentioned, and that said sale be confirmed, and sanctioning as valid the payment by S. S. Crockett of Confederate States treasury notes to such of the creditors as accepted them in satisfaction of their respective debts, but holding that the said David Sexton and Laurence, Myers & Co. had never accepted nor agreed to accept such notes in payment of their respective debts, and that said debts, with the costs of these parties in the circuit court and in this court, remained wholly unpaid, further decreed that unless payment thereof be made within thirty days, the said Wytheville hotel property should be rented out and payment 49 be made out of the *rents, &c. The case is now before this court on an ap-

*Commissioner's Report—Exceptions.—The rule laid down in the fourth headnote in regard to exceptions to a commissioner's report is affirmed in Robinett v. Robinett, 92 Va. 128; Baldwin v. Baldwin, 76 Va. 353, and Simmons v. Simmons, 33 Gratt. 451, and *note*.

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peal allowed to the said S. S. Crockett from this decree.

The first assignment of error is in these words:

"1st Error. The court should have simply, after R. I Crockett's heirs were before the court, reaffirmed the decrees of the 13th May, 1863, and of 10th October, 1863, as your appellate court, 'without therefore deciding any other question in the case,' ordered a reversal of cause for want of R. I. Crockett's heirs as parties, and directed said circuit court to proceed 'in accordance to the principles herein above declared.' But said court of its own accord, and not by direction of appellate court, overturns and disturbs on their merits, the said two decrees of ten years' standing, and that too in the face of Commissioner Caldwell's reports and the decrees of the court of the year 1863. It was manifestly contrary to the law and evidence of the case."

The objection intended to be presented by this assignment, as would seem from its terms, and as I understand from the argument of counsel, is, that the circuit court misunderstood and misconstrued the meaning and effect of the decree of this court reversing and annulling the decrees of the 13th of May, 1863, and the 10th of October, 1863; that the only purpose and effect of that decree was to reverse and annul said decrees of the circuit court so far only as to require the heirs of Robert I. Crockett to be made parties, and as soon as that was done, that said decrees should be reaffirmed, and that no other nor different decrees should be rendered.

This, I think, is a total misconception of the meaning and legal effect of the decree of this court. Robert I. Crockett was owner in common with S. S. Crockett of
50 *the property ordered to be sold. He was a defendant in the cause and a necessary party. He died before the sale. His title descended to his heirs, and they thus had the same interest in the property that he had. They were necessary parties, therefore, and should have been before the court in any further proceedings to be had. No decree of the court could bind them or prejudice their rights without an opportunity given them of being heard. In their absence, the court had ordered a sale of their property, made and confirmed it, collected the purchase money and disbursed it, had ordered and caused to be made to the purchaser a deed of conveyance of their property, and had actually made final disposition of the cause by striking it from the docket. This court, by its decree, wholly reversed and annulled the decrees under which these proceedings were had. They were not partially reversed. They were wholly swept away.

By an inspection of the decree, it will be seen that this court decided: First. "That the circuit court erred in confirming the sale of the real estate in the proceedings mentioned, distributing the proceeds thereof, and striking the case from the docket without having before it all the heirs-at-law of Robert I. Crockett, dec'd." Second. That "the heirs aforesaid should now be brought before the court by proper proceedings and allowed the privilege of resisting or assenting to the confirmation of the sale aforesaid before any action shall be had thereon." The decree then proceeds: "Without therefore deciding any other question in this case," (that is, any other than those questions already decided, to-wit: first, that the circuit court had erred in the particulars before stated, which embraced the whole of the decrees of the 13th of May and the 10th of October, 1863, and second, that the heirs of Robert I. Crockett should be brought before the court and allowed the privilege of resisting or assenting to
51 the *confirmation of the sale before any action be had thereon,) "it is decreed and ordered that the decree of the 13th May, 1863, confirming the sale of the real estate in the proceedings mentioned, and disposing of the proceeds, and the decree of the 10th day of October, 1863, finally disposing of the case and striking it from the docket, be reversed and annulled." &c. * * * "It is further ordered that this cause be remanded to the said circuit court of Wythe county, to be further proceeded in according to the principles hereinabove declared." What "principles above declared?" Why plainly, that the decrees rendered in the absence of the heirs were for that reasons wholly erroneous, and were therefore wholly reversed and annulled, and that said heirs should now be brought before the court and be allowed the privilege of resisting or assenting to the confirmation of the sale before any action be had thereon; that is, that they shall not only be brought before the court, but when they get there they shall stand as if the decrees of the 13th of May and the 10th of October, 1863, had never been rendered. So far therefore from their being precluding from resisting the confirmation of the sale, they were expressly allowed to resist it, and they had the right to do so upon any grounds which would have been admissible at the time the decree of the 13th of May was pronounced had they then been parties. They did resist it, and objected to its confirmation unless by the confirmation the purchaser should be held liable for the purchase price of the property in good money. This objection and exception of the heirs necessarily presented for decision the question, whether the sale had been made for Confederate currency or for lawful money; if for the former, the court had nothing to do but by further decree to affirm what had already been done; if for the latter, it had to provide for the collection and disbursement of such money as
52 the *purchaser had contracted to pay, except so far as Confederate currency had been paid by the purchaser and accepted by the creditors in satisfaction of their debts.

The second, third and fourth assignments of error are based on the refusal of the court to sustain the appellant's three exceptions to Commissioner Caldwell's supplemental report. The first two are easily disposed of.

Exception No. 1 is, because, as alleged, the report is incomplete in not showing the amount of money received by the commissioner from the appellant; and No. 2, because the report is further incomplete in not showing what disposition the commissioner made of the money so received. Both exceptions are fully and satisfactorily met and answered by the original report of the commissioner and statement therewith filed, together with exhibit "X," filed with the appellant's third exception. These papers, a part of the record, show fully and accurately all the money collected by the commissioner and the disposition made of it.

Exception No. 3 presents more difficulty. It is an objection to the confirmation of the report, unless the appellant "be held and recognized as having fully paid the purchase money, $10,000, the amount of his bid for the property, as per commissioner's original report, and further, that there is no liability on him for any of the debts enumerated in said report, among which is the judgment of David Sexton for $1,088, and that the issue should be one between the commissioner and said Sexton's debt."

This exception is substantially to the confirmation of the sale, unless held to be for Confederate currency, and is the converse of the exception filed by the heirs of Robert I. Crockett, the two exceptions of the respective parties presenting for determination the main question in this case, to-wit: whether the sale was made for lawful
53 *money, or for Confederate States treasury notes, or with reference to such notes as a standard of value. This question must be determined by the evidence in the case, of which Commissioner Caldwell's supplemental report, relied on by the appellees, is a most important part. This report is objected to by the appellant, and his objection is embodied in his fifth assignment of errors, which is in these words: "Said report (supplemental) was not ordered by either appellate or circuit court, nor asked for by any party to the suit, but was voluntary on the part of the commissioner, and should not have been received or considered."

A commissioner appointed by decree of court to make sale of property, is an officer and special agent of the court, and his powers and duties are conferred and imposed solely by the decrees and orders under which he acts. He is required, among other things, to make report of his proceedings under the decree by which he is appointed to the court from which he derives his authority, as a basis for the further action of the court. If his report be incomplete, insufficient, or in any way imperfect, he may be required to make a further report; and so, I apprehend, if, after he has made his report, and it has been received and accepted, at any time before final action upon it, he discovered any material mistake, or omission, or ambiguity in it, he may, by leave of the court, and it would be his duty, to file an amended, additional or supplemental report, correcting the mistake, supplying the omission or explaining the ambiguity. Such is the common practice, and it seems convenient, conducive to justice and free from objection. These reports are filed with the papers in the cause, become a part of the record, and are open to inspection, examination and exception by all the parties.

54 *After the decrees of May and October, 1863, had been reversed and annulled by this court, the heirs of Robert I. Crockett were made parties, and had the liberty, under the express directions of the decree of this court, to file exceptions, if so advised, to the sale made by Commissioner Caldwell and his report thereof. They accordingly filed such exceptions, which raised directly the question whether the sale was made for lawful money or Confederate currency, or with reference to such currency as a standard of value. In the report excepted to, the commissioner had merely stated that the appellant had bid $10,000 for the property, and that being the only bid, the property was knocked down to him at that price. He did not state for what kind of money or currency the property was sold, nor any of the particulars of the bidding and sale.

The supplemental report filed by him was intended, it would seem, to supply the omissions in his former report, not to contradict it, and to furnish to the court and the parties such additional facts that came to his knowledge in the discharge of his official duties, as were deemed by him material in considering the questions arising upon the exceptions. I can see no objection to this. The court might have required such additional report for its own information and guidance, and although there seems to have been no order, at least none in the record, for such report, yet the court received it when tendered as if it had been ordered, and approved and acted upon it, no exception being filed by any party to its reception, and none of the statements contained in it. These statements, if they had been denied, might and doubtless would have been proved by taking the deposition of the commissioner and perhaps by other evidence. The objection, made here for the first time, comes too late. The exceptions filed did not raise it. Exceptions to a
55 master's *report are said to be in the nature of special demurrers, and the party objecting must point out the error; otherwise the part not excepted to will be taken to be admitted. 2 Dan. Ch. Prac. (4th American ed'n), 1316, note 4, and cases there cited. The same principle would seem to apply to all reports of officers made in a chancery cause, at least to such a report as the one now being considered. In all cases, I take it, where exceptions are necessary at all, they should specify with reasonable certainty the particular grounds of objection, so as to enable the opposing party to see clearly what he has to meet, and the court what it has to decide.

Considering this report, then, as evidence,

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it would seem well nigh conclusive of the prime question in this cause.

In his report, the commissioner says:

"Said sale was pretty largely attended by persons seeming to contemplate bidding for said property. The sale was in progress at the door of the hotel, on Main street. Mr. S. S. Crockett bid $10,000, and the sale started with this bid. After it had been cried once or twice Mr. Jos. Cloyd McGavock, from the crowd of bystanders, called out to your commissioner that there were several persons desiring to be bidders, who, before bidding, wished to know whether the price could be paid in Confederate currency. Your commissioner thereupon mounted the horse-block near by, and proclaimed 'that he would not undertake to say in what currency payment would have to be made or would be received; that the decree of sale was silent on the subject and directed merely a sale for money generally; that, perhaps, the court might choose to receive a payment in currency, but the purchaser must risk that.' After this the sale proceeded, but no more bids were
56 made, and the crowd *having mostly dispersed, the property was knocked down to S. S. Crockett, and the other proceedings were had which have been already reported. Mr. Crockett understood his purchase to be for lawful money, and not for Confederate money, as your commissioner understood from him at the time, and has since so declared in his answer to a bill exhibited against him in this court by R. I. Crockett's administrator, in which answer he says, in reference to said decree to sell and said sale: 'In pursuance whereof, on the 9th February, 1863, such sale was made at public auction to respondent for the sum of $10,000 in lawful money, and not in Confederate money, and was reported and confirmed at the May term of the court next following.'

"Your commissioner understood said sale to be for good money, otherwise he should have reported that it should not be confirmed. He thought and thinks $10,000 in good money a fair price for the property at that time, and the same sum in Confederate money grossly inadequate."

There is other evidence besides this report, which tends strongly to show that the sale was not for Confederate States treasury notes, nor made with reference to such notes as a standard of value. The price at which the property sold was not more than it was worth in a sound currency in ordinary times. It was proved in 1860, that its annual rental value, according to the estimate of different witnesses, was from $1,000 to $1,800. The decree for sale was made on the 13th day of October, 1860. It was first offered for sale under that decree on the 12th day of March, 1861, and was purchased by Robert Gibboney and William Gibboney, at the price of $8,400. The sale was excepted to by the complainants and also by S. S. Crockett (the appellant here) and
57 *Robert I. Crockett. The first exception of the Crocketts is in these words: "Because it (the property) sold for a grossly inadequate price and at a ruinous sacrifice, the price for which it sold being only $8,400." The other two exceptions are evidently grounded on the first. The sale was set aside, and two years afterwards, and when the property had undergone repairs, it was bought by the appellant at an advance of $1,600 on the price bid at the first sale, which was, indisputably, a sale made for gold, or its equivalent, and pronounced by the appellant to have been "for a grossly inadequate price and at a ruinous sacrifice."

The main reliance of the appellant is upon the presumption arising from the consent of the parties to a sale given in the decree of the 11th of October, 1862. Certainly this fact deserves consideration, and if it stood alone, would be sufficient perhaps to warrant the conclusion that the sale which afterwards took place in 1863, was made either for Confederate currency, or with reference to such currency as a standard of value. It has been held by this court that it will take judicial notice of the fact, that in 1863 the only currency in circulation in this state was Confederate States treasury notes, and that decrees for sales of property, as late as 1863, and judicial sales under such decrees, must be taken, unless the contrary plainly appears to have been rendered and make for the currency which then constituted the only circulating medium of the country. Walker's ex'or & als. *v.* Page & als., 21 Gratt. 636; Poague *v.* Greenlee's adm'r & als., 22 Gratt. 724.

The question, however, is at last, one of intention, or, in the language of the statute, "what was the true understanding and agreement, express or to be implied, of the parties;" and the presumption based upon the date of the decrees and the time of sale therunder, is one, not of
58 *law, but of fact, not conclusive, but prima facie only, and therefore susceptible, as other like presumptions, of being repelled by any evidence which convinces the mind that it is not well founded in the particular case.

In this case the decree for sale was made in October, 1860, and must, therefore, be taken to have been then intended to be for a sound currency. The attempted sale under that decree, in March, 1861, must have been intended to be for a like currency; and in the decree of October, 1862, it is worthy of notice, that the consent of the parties was, and the order of the court was, "to carry into effect said decree of October term, 1860, so far as the same orders a sale of the property therein mentioned, in the manner and on the terms therein prescribed," &c. The price which the property brought was not greater than the value of the property on the day of sale, in a sound currency; not a great deal more than the price bid for it at the first sale two years before, when the appellant, who became the purchaser at the last sale, excepted to the first, because it was "for a grossly inadequate price and at a ruinous sacrifice." The sale was not for cash, nor for any part of the price in cash, but wholly on a credit,

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and a long credit of one, two and three years, for equal instalments of the purchase money, carrying interest from the day of sale. The "true understanding and agreement" of the parties immediately contracting, the commissioner who made the sale on behalf of the court and the purchaser who bought, was, that the sale was not made for Confederate States treasury notes, nor with reference to such notes as a standard of value, but for lawful money. The purchaser admitted this on the day of sale, and afterwards in solemn form in his answer to a bill in chancery.

59 *Nor is there any evidence that the appellee, Davis Sexton, ever consented to the collection of the purchase money from the appellant in Confederate currency. The contrary is rather to be inferred; for the commissioner reported that he refused to take this currency for his debt. At what precise time the tender was made does not appear. It may be that the appellant ascertained, after the sale, that most of the creditors would accept Confederate currency in satisfaction of their debts, but that some would not; and this may account for his haste in offering to make payment before the purchase money became due. At all events, it distinctly appears by the decree of May, 1863, that it was in deference to his wishes that the commissioner was empowered to collect the whole of the purchase money, at once and in advance, in Confederate States treasury notes; and there must have been some intimation or apprehension, that perhaps some of the creditors would refuse to receive these notes, and this may serve to account for the extraordinary proposition made beforehand for investment of the notes in Confederate bonds, in case of refusal by any creditor to receive them. A creditor might have been constrained perhaps to accept a war currency rather than hazard war securities. The notes invested were the property of the appellant. After the refusal of Sexton to receive them, he might, by order of the court, obtained for that purpose, have had them paid back to him, or, after investment, had the securities delivered to him. He either neglected or refused to have this done, and he must bear the loss.

In the last assignment of error there is no merit. Laurence, Myers & Co., were nonresidents, and they at least consented to nothing. The voluntary payment by the commissioner of the nominal amount of their gold debt in Confederate States

60 treasury notes to the *sequestration receiver of the Confederate States was no bar to their claim. The notes thus paid were no more the property of Laurence, Myers & Co., than the notes invested in Confederate bonds were the property of David Sexton. In both instances they perished the property of the appellant.

Looking at the whole case, I am of opinion there is no error in the decree of the circuit court, and that it should be affirmed.

Decree affirmed.

61 *Lamberts v. Cooper's Ex'or & als.

September Term, 1877, Staunton.

Absent, MONCURE, P., and ANDERSON, J.

1. **Appeal—Exceptions—New Trial.***—On the trial of an issue of *devisavit vel non*, if one of the parties object to the admission of a person to testify on the ground of interest; or if objection is made to the admission of evidence of the character of a witness who had testified, on the ground that no proper foundation had been laid for its introduction; and the objections are overruled, and the witness and the evidence is admitted; and the objector does not except at the time, or give notice of his intention to except before the verdict is rendered, he waives the objection, and cannot rely upon it upon a motion for a new trial. The same rule applies upon the trial of such a verdict as applies on a trial at common law.

2. **Same—Same—Evidence.**†—Upon a motion to set aside the issue on the ground that the verdict was contrary to the evidence, the court overrules the motion and makes a decree according to the verdict, and the party moving files a bill of exceptions to the refusal of the court to set aside the verdict, and all the evidence is set out in the bill of exceptions. The appellate court will reject all the parol evidence of the exceptor which is in conflict with that of the other party; and if upon the evidence of the appellee and written evidence of the appellant, the case is in favor of the appellee, the decree will be affirmed.

3. **Wills—Attesting Witness—Evidence.**‡—The attesting witnesses of a will who are intro-

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***Appeal — Exceptions — New Trial.**—The rule laid down in the first headnote is affirmed in Core v. Marple, 24 W. Va. 355, citing the principal case, and Telegraph Co. v. Hobson, 15 Gratt. 122; Perry v. Perry, 26 Gratt. 320.

†**Appeal — Exceptions — Evidence.** — The principal case is cited in Nease v. Capehart, 15 W. Va. 304, for the rule laid down in the second headnote. Citing also, Henry v. Davis, 7 W. Va. 715. See also, Dower v. Church, 21 W. Va. 63, citing the principal case, and Nicholas v. Kershner, 20 W. Va. 251. See Coffman v. Hedrick, 32 W. Va. 131, 9 S. E. 69.

‡**Wills Attesting Witnesses—Evidence.**—Upon the question of receiving in evidence the testimony of attesting witnesses tending to invalidate the will, see Cheatham v. Hatcher, 30 Gratt. 56 and *note*.

Issue out of Chancery—Discretion of Court.—In Miller v. Wills, 95 Va. 350, the court says: "A court of equity has the right to order in a proper case one or more issues to be tried by jury, either in a court of common law or at its own bar. The issue, except where it is directed by statute, is a mere incident to the suit in chancery. It is directed merely to satisfy the conscience of the chancellor, and if he is not satisfied with the verdict, he may set it aside and award a new trial of the issue, or he may disregard it and proceed to decide the cause without the intervention of another jury," citing the principal case. See also, Fisnburne v. Ferguson, 84 Va. 87, citing the principal case, and Johnson v. Harmon, 94 U. S. 271; Watt v. Stare, 101 U. S. 826; Reed v. Axtell, 84 Va. 236; McCully v. McCully, 78 Va. 162; Almond v. Wilson, 75 Va. 626. See Barton's Ch. Pr. (2d Ed.) 430.

Devisavit Vel Non.—In Hartman v. Strickler, 82 Va. 233, the court held that in ordering an issue *devisavit vel non*, the chancellor does not exercise

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duced to prove the will was not properly executed, or the incapacity of testator, will not be excluded; but their evidence will be received with much suspicion.

4. **Same—Statute—Witnesses.**—Though the statute requires at least two witnesses to a will, it may be proved by one of them, he proving the attestation of the other.

62 *This case was heard at Wytheville, but was decided at Staunton. It was a suit in equity in the circuit court of Bland county brought in May, 1871, by Isaac P. and A. D. Lambert to set aside a will of Mary Cooper, deceased, which had been admitted to probate in the county court of Tazewell county in May, 1861. The grounds on which they assailed the paper were, first, that it had not been properly executed; second, that Mary Cooper was not of sound and disposing mind and memory at the time she executed the paper; and, third, that she was practiced upon and hoodwinked into the execution of the same. The legatees under the will answered, and denied the truth of all or any of the grounds stated in the bill for setting aside the will; and an issue devisavit vel non was directed to be tried at the bar of the court.

On the trial of the issue the jury found a verdict in favor of the will; and thereupon the plaintiffs moved the court to set aside the verdict and grant a new trial of the issue, on the ground that it was contrary to both the law and the evidence. This motion the court overruled; and the plaintiffs excepted. The bill of exceptions contains all the evidence, and of course it is contradictory. The plaintiffs in the issue to sustain the will introduced William M. Bishop as a witness. He was the executor named in the will, and had qualified as such. His testimony went to prove the due execution of the will, and that Mrs. Cooper was of sound disposing mind and memory at the time.

There were two other subscribing witnesses to the will, who were introduced by the contestants. They said they did not think Mrs. Cooper capable of making a will. The plaintiffs in the issue then introduced two witnesses—Elizabeth Lambert, who was objected to as incompetent on the ground of interest; but the court 63 overruled the *objection, and no exception was taken to the ruling of the court; and James Cundiff, whose testimony as to the character of one of the contestants' witnesses was objected to by them; but the court overruled the objection and admitted the evidence; and again no exception was taken to the ruling of the court.

In May, 1876, the cause came on to be heard, when the court dismissed the bill with costs. And thereupon the plaintiffs applied to a judge of this court for an appeal; which was allowed.

Crockett & Blair and R. C. Kent, for the appellants.

D. S. Pierce, for the appellees.

Staples, J., delivered the opinion of the court.

This was an issue devisavit vel non. The jury having found in favor of the will, the appellants, who were the defendants below, moved the court to set aside the verdict, as manifestly contrary to the law and the evidence, and grant them a new trial; which motion was overruled; and the appellants excepted. And thereupon the court certified all the evidence given on both sides.

In this certificate it was stated that the appellees, who were the propounders of the will, introduced Mrs. Elizabeth Lambert as a witness (the widow of Joseph Lambert, one of the legatees under the will) to whom the appellants objected as incompetent; but the court overruled the objection and permitted the witness to testify.

This ruling of the court is one of the errors assigned in the petition for an appeal. It does not appear, however, that the appellants excepted to the opinion of the court permitting the witness to testify, or intimated a purpose or desire to save the point. The fact that objection 64 *was made at all to the witness only appears from the certificate of the evidence given by the judge upon overruling the motion for a new trial. Conceding that the court erred in its decision, can the appellants rely upon it here as ground of reversal? In Peery's adm'r *v.* Peery, 26 Gratt. 324, the latest case upon this point, it was held to be the established rule of the court, that notice must be given at the time of the ruling, or at least before the verdict, that the point will be saved, although the bill of exceptions may be drawn up and signed at any time during the term. See the cases there cited in support of this view.

It is said, however, that upon an issue out of chancery, it is unnecessary to take a bill of exceptions; that upon the trial all the proceedings are part of the record in chancery; that the court which tries the issues only certifies the verdict, and that carries with it all the proceedings belonging to the verdict, the empanelling of the jury, the points ruled by the court at the trial, and, in short, anything which is regularly made a part of the record. In support of this position the counsel rely upon the case of Watkins and wife *v.* Carlton, 10 Leigh 560. That case does not, however, decide that a bill of exceptions is not necessary upon the trial of an issue out of chancery. It merely decides that when exceptions are

any of the ordinary powers of a chancery court, but acts in obedience to the express mandate of the statute; the object of the issue being to ascertain, by means of a jury trial, whether or not the will admitted to probate is, in whole or in part, the will of the decedent. And when that question is decided the function of the suit is exhausted, and the verdict is binding upon the court, unless for good cause shown it is set asiue, either at the trial, or afterwards, on a bill of review, citing the principal case, and Malone v. Hobbs, 1 Rob. 346; Coalter v. Bryan, 1 Gratt. 18. See also, Kirby v. Kirby, 84 Va. 629, and Connolly v. Connolly, 32 Gratt. 657, and *note*, citing principal case. See Barton's Ch. Pr. (2d Ed.) 603.

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filed to opinions of the court and made a part of the record, and the court of law certifies the verdict, although it does not expressly certify the exceptions, yet all the proceedings upon the trial of the issues spread upon the record thereof, constitute part of the certificate of the verdict, and with it becomes part of the chancery record. No case has been cited in which it is held that upon the trial of an ordinary issue out of chancery it is unnecessary to take a bill of exceptions to an objectionable ruling of the court with respect to the ad-
65 missibility of *evidence, or at least in some form to indicate a purpose to insist upon the point as ground of error.

In Fitzhugh's ex'ors *v.* Fitzhugh, 11 Gratt. 210, it was held that upon an issue out of chancery the verdict of the jury is conclusive, unless there is an exception spreading the facts upon the record. If in an action at common law a party is held to have waived his objection by his failure to save the point in due season, it is difficult to see why he should not be held equally to have done so in a like case upon the trial of an issue out of chancery. The very same principles, it would seem, must apply in both cases. However this may be, and without undertaking to decide the point, it is sufficient to say that the rules which govern upon an issue out of chancery for the trial of a disputed fact to satisfy the conscience of the chancellor, are very different from the rules which govern upon an issue devisavit vel non. In the former case the issue is a mere incident to the suit in chancery. It is directed merely to satisfy the conscience of the chancellor. If the issue is tried before a court of common law, the latter court is but ancillary to the court of chancery, it has no jurisdiction except what is conferred by the chancellor. It may certify against the verdict, if, in its opinion, contrary to the evidence; but it cannot grant a new trial. If the chancellor is not satisfied with the verdict, he may set it aside and award a new trial of the issue, or he may proceed to decide the cause without the intervention of another jury; and although there may have been a misdirection by the common law court, the verdict will not be disturbed if it appears to be right upon a consideration of the whole case. The principles of law governing in this class of cases are fully discussed in Watkins and wife *v.* Carlton, 10 Leigh 560; Brockenbrough's ex'or *v.* Spin-
66 dle's *adm'r, 17 Gratt. 21; Powell and wife *v.* Manson, 22 Gratt. 177.

On the other hand, the issue devisavit vel non is a statutory proceeding. "It is the sole object, and not the mere incident of the suit." It is not intended to inform the conscience of the court, which is bound to decree according to the verdict, unless for good cause shown a new trial is granted. It is a probate jurisdiction exercised by the jury in order to the final probate of the will.

In Coalter's ex'or *v.* Bryan and wife, 1 Gratt. 18, 85, Judge Baldwin, delivering the opinion of the court, said: "The equitable becomes for the occasion a legal forum, and the proceedings are according to the course of the common law. In practice, the mode of saving question decided by the judge during the trial is the same, to-wit: by bill of exceptions. * * Errors committed on the trial of the issue cannot be reached directly by an appellate forum, but must form the subject of a motion to the chancellor in the chancery cause for a new trial, and if improperly refused by him, an appeal lies from his decree." (See also Malone's adm'r and others *v.* Hobbs and others, 1 Rob. R. 346, 389.

According to these principles it would seem to be clear that upon the trial of an issue devisavit vel non, the mode of proceeding upon the trial is substantially the same as upon the trial of common law actions. In this case, therefore the appellants having submitted to the ruling of the court against them without exception, cannot now be heard to insist upon the error, if such there be, as ground of reversal. What is here said equally applies to the testimony of another witness, James Cundiff, which was objected to upon the ground that a proper foundation had not been
67 laid for its introduction; *but no exception was taken to the ruling, nor any purpose expressed to save the point.

The last assignment of error to be considered, is in the refusal of the court below to set aside the verdict as against the evidence. As already stated, the bill of exceptions contains the testimony, and not the facts. The application to this court for a new trial is therefore subject to the rule which forbids an appellate tribunal to reverse the judgment, unless by rejecting all the parol evidence for the exceptors and giving full force and credit to that of the adverse party, the decision of the court below still appears to be wrong. Bull's case, 14 Gratt. 621.

The appellees introduced as a witness, Wm. M. Bishop, the scrivener of the will, the executor named therein and an attesting witness, who proved the execution of the instrument by the testatrix and her capacity to make a will; and there rested their case. The appellants then read to the jury the depositions of the other two subscribing witnesses, who testified that the will was not duly executed, and that the testatrix was not at the time of sound disposing mind and memory. Other witnesses were introduced by both parties upon the question of testamentary capacity, and, as is usual in such cases, their testimony is conflicting. If all the evidence of the appellant in conflict with that of the appellee be rejected, there cannot be a question as to the correctness of the verdict. If all the evidence adduced on either side be considered, it still appears there is such conflict in the opinion and recollection of the witnesses in regard to the capacity of the testatrix and the due execution of the instrument as would preclude this court from any interference with the finding of the jury.

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Although in a court of probate it has been held to be necessary to examine all the
68 attesting witnesses to a will, *or the number required by law, if to be had, it is not necessary that the material facts shall be proved by more than one. Any one of them may prove the due execution of the will and its attestation by himself and the others; and if his testimony be satisfactory, it is sufficient. Pollock and wife *v.* Glassell, 2 Gratt. 439-460. In Dudleys *v.* Dudleys, 3 Leigh 436, it was held that where the testimony of one of the attesting witnesses is directly contradicted by another, and the county and circuit courts both give credit to the witnesses for the will, this court, upon a mere question of credibility, will always presume that inferior courts which saw and heard the witnesses examined, decided correctly. A person who signs his name as a witness to a will, by his act of attestation solemnly testifies to the sanity of the testator. If he should afterwards attempt to impeach the will upon the ground of the want of sufficient capacity, his evidence will not be positively rejected, but it is received with the utmost caution. If the jury in this case viewed the testimony of the adverse witnesses with some degree of suspicion, and gave credit rather to the witnesses sustaining the will, upon the score of intelligence or integrity, this court cannot say from anything contained in the record, they erred in their conclusions; more especially as their finding is approved by the judge presiding at the trial. Ford *v.* Gardner, 1 Hen. & Munf. 72; Jesse *v.* Parker, 6 Gratt. 57.

Upon the whole, we are of opinion the decree of the circuit court must be affirmed.

Decree affirmed.

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69 ***Crawford v. Shover & als.**

September Term, 1877, Staunton.

Absent, ANDERSON, J.

I. C died in 1858, leaving a will by which he gave to S $8,000, and appointed W his executor. J qualified as guardian of S. M owed to C, for land purchased in his lifetime, $8,000, secured by the vendor's lien. The legacy to S was reduced to $5,500, and M paid $1,000 to W, who paid it over to J. And M having died in June, 1863, his executor proposed to pay to W a part of the debt of M to C. W declined to receive it but it was understood between them, that if J, as guardian, would receive it, and J's receipt was brought to W, he would credit the amount on M's bond. J, having consulted counsel, and being informed that the judge would authorize the investment of the money in Confederate bonds, J and the executor went together to the agent of the Confederate government and gave him $4,500 to be invested in a bond, which was afterwards obtained. And at the same time J filed his petition to the judge for leave to invest, which was authorized by an order in vacation, and J gave a receipt for $4,500 to W, and W credited the bond of M with the amount. On a bill filed by S by his next friend, against J and his sureties—HELD:

1. **Trusts—Confederate Money.**—J was guilty of a breach of his trust in receiving the Confederate money in discharge of an ante-war debt well secured on land.

2. **Same—Same—Order of Court.**—That the money was not received in the due execution of his trust, and the judge had no authority to order the investment.

II. By an amended bill by S, W and the executors of M were made defendants, and were charged
70 with participating in and instigating *the act of J. But the decree is against J and his sureties, and the amended bill is dismissed. On appeal by J—HELD:

Appeal.—That the plaintiff, S, being satisfied with the decree, and J in his answer, both to the original and amended bill, having averred that he had acted on the advice of his counsel and with the approval of his own judgment, J cannot complain of the decree as not holding W and M's executor liable with him to S.

George W. Crawford died in 1858, leaving a will, which was admitted to record in the county court of Augusta, and William Crawford qualified as his executor. The testator was unmarried, and had in his lifetime provided for two orphan boys, and by his will gave to them legacies. To George T. Shover, one of these boys, he gave a legacy of $8,000, and directed that it should be put out to interest for his benefit. And he directed his executor to place said Shover at some suitable place to be raised, and to pay particular attention to his education and training. By the last clause of his will the testator says: "I wish my friend Wm. Crawford, Sr., to act as executor and take charge of my estate and my two orphan boys, and do the best for them you can, for they will be left in this world without a friend to protect them."

The executor, Wm. Crawford, seems to have attended to these boys until October, 1860, when, at his request, John H. Crawford qualified as guardian of George T. Shover, with James Crawford and Rudoiph Turk as his sureties.

After the death of George W. Crawford, in a suit instituted for the settlement of his estate, it was ascertained that it was not sufficient to pay his debts and legacies in full, and the legacies were therefore scaled, that of Shover to about $5,500. Of
71 this sum the executor *paid to the guardian $1,000 in March, 1861; and the guardian obtained from the county court two orders authorizing him to expend a part of the principal of his ward's estate in his support.

The guardian settled his account in February, 1863, showing a balance in his hands of $434.11 of principal, and $30 of interest. In March, 1865, he settled another account, when he was stated to be indebted to his ward on the 25th of October, 1864, in the sum of $4,590.40. This was made by a charge of the guardian with the sum of $4,559.77, as amount received of William Crawford, executor, on the 25th of June, 1863. And he settled a third account in which he is credited with the amount of a seven per

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cent. bond of the Confederate States, dated the 25th of June, 1863, for $4,500, with interest from that time, $735; and allowing him this credit he was in advance to his ward on the 25th of October, 1865, in the sum of $613.18. It was this credit which was the material subject of controversy in this case; and the facts in relation to it, as gathered from the evidence, seem to be as follows:

After making his will, George W. Crawford sold his tract of land in the county of Augusta to Edward G. Moorman, but did not make him a deed, and after his death William Crawford, by the directions of the court, executed the deed, reserving the vendor's lien for the purchase money, which amounted to upwards of $7,000. The $1,000 before mentioned, was paid by the executor to the guardian by an order on Edward G. Moorman, who seems to have died soon after its payment. After his death his son, John S. Moorman, who was his executor, applied to William Crawford, the executor of George W. Crawford, to receive a portion of the purchase money due on the land, when William Crawford told him to pay the
72 money to the guardian of Shover, *as he could not receive it unless the guardian would take it from him, and that would be the shortest way to settle it. Subsequently John S. Moorman requested him to apply to Judge Thompson, who was the judge of the circuit court of Augusta county, to permit the investment of the money due from Moorman's estate to Crawford's estate in Confederate bonds. He replied that he did not know whether or not he was the proper person to receive it, but he would consult his counsel and let him know. He did see his counsel, and was advised by him that it was not his place to make the application, but it was that of the guardian; and this advice William Crawford communicated to Moorman. It then being understood between William Crawford and Moorman that upon his bringing to said Crawford the guardian's receipt to himself for the amount, he would credit the amount on the bond of Edward G. Moorman, John S. Moorman so informed the guardian. The guardian thereupon consulted his counsel to know whether Judge Thompson would authorize the investment, and being advised that the judge would do it, Moorman and guardian went together to the agent of the Confederate government in Staunton, and putting into his hands the sum of $4,500, obtained from him a certificate of the fact, and he afterwards delivered to the guardian the bond, and the guardian executed a receipt to William Crawford, the executor, for the amount, and delivered it to Moorman, and he took it to the executor, who credited the amount upon Edward Moorman's bond.

At the time the money was delivered to the said agent, the counsel of the guardian filed the guardian's petition to the judge for permission to invest the money in Confederate securities, stating that the fund came into his hands in the due courts
73 of his trust; and the *judge made the order according to the prayer of the petition. At the time this investment was authorized and made Confederate currency was as eight to one of gold.

In April, 1870, George T. Shover, by his next friend, instituted a suit in equity against John H. Crawford and James Crawford and Rudolph Turk, his sureties, for a settlement of the guardian's account. He protests against the account settled by the guardian, and asks that the account between himself and the said John H. Crawford may be settled from the beginning. He surcharges and falsifies all the items of payments in these accounts, and especially the credit to the guardian of the Confederate bond for $4,500 and the interest upon it.

John H. Crawford answered the bill. After speaking of some other minor objections to his accounts, he comes to the item of $4,500. Of this he says: The estate of Edward G. Moorman was indebted to the estate of George W. Crawford, and Moorman's executor was anxious to pay the amount. Respondent understood that Moorman's executor applied to G. W. Crawford's executor to receive payment of the money in currency, and that the executor replied that he would not receive the money unless he could use it in payment of legacies, &c. Moorman's executor said that Crawford's executor could invest the money; but the executor, upon consultation with counsel, was advised that he had nothing to do with the investment of funds; and so he refused to receive them, unless respondent, as guardian, would consent to receive the money on account of his ward. Respondent then applied to, and declined, for the reason that he could not use or invest the money; but he was assured that the circuit court was approving of the investments of fiduciary funds in Confederate and state bonds, and he was as-
74 sured if he would accept the *money there would be no difficulty on the subject; or if there should be any, Moorman would take back the money. Under these circumstances respondent consulted his counsel, and was advised that he could, by applying to the judge of the circuit court, get an order to invest the funds. On this advice respondent filed his petition, asking the instruction of the judge, who made a vacation order authorizing the investment. He avers that he acted in perfect good faith in the matter upon the advice of his counsel, and had no interest except to do his duty as well as he knew how.

Under an order of the court made in the cause, Commissioner Ranson returned his report in 1872 upon the accounts of the guardian. Charging him with the $1,000 received from the executor in March, 1861, but not charging him with the amount of the Confederate Bond, and scaling the payments made for the ward, he reported the guardian indebted on the 25th of October, 1865, in the sum of $801.67. He however made several alternate statements, in the second of which he charged the guardian with the said sum of $4,550 on June 23d,

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1863; and found the guardian indebted on the 25th of October, 1865, in the sum of $5,656.49.

The plaintiff by his counsel excepted to the report of the commissioner, because in his first and approved statement he failed to charge the guardian with the sum of $4,500 invested as before stated; and because in all his statements he stops the compounding of interest against the guardian on the 25th of October, 1865, instead of continuing it until the 9th of March, 1872, when the ward came of age. On the commissioner's own principle, it should have been continued to April, 1866, when the guardian's resignation was accepted by the court.

In June, 1873, the plaintiff Shover having come of age, he filed an amended and
75 supplemental bill in the *cause, in which he made William Crawford, the executor of George W. Crawford, John S. Moorman and Mary L. Moorman, executor and executrix of Edward G. Moorman, parties defendant. In his amended bill he sets out the relationships between the executor, and guardian and Moormans. He charges that his necessities did not require the collection of the money from Moorman's estate; that the guardian had no use for it, and could not lend it out or pay it over. He charges that John S. Moorman, William Crawford and the guardian, John H. Crawford, confederated and conspired together, and that they intended and designed to secure the acquittance of the Moorman estate from liability cotemporaneously with the investment of the Confederate funds paid over, so as to relieve the trusted fiduciaries from all personal risk and loss; that these acts should be considered as a part of the same transaction, dependent upon and concurrent with each other, and that said John S. Moorman and John H. Crawford were both present and consenting together in carrying out the arrangement that had been agreed upon in pursuance of the advice and direction of William Crawford, the executor. He insists that neither William Crawford, the executor, nor John H. Crawford, the guardian, received the money in the due course of the administration of his trust, and that John S. Moorman not only knew that such was the case, but urged that such course should be pursued as a matter of accommodation to him and his co-representative of E. G. Moorman's estate.

William Crawford and Moorman severally answered the bill, and John H. Crawford also answered it. They deny all confederation or fraud, and set out the circumstances attending the transaction. John H. Crawford says, in receiving the Confederate
76 money he acted solely *with the view of promoting the best interests of his ward; he had never doubted the goodness of the then currency, but had received and payed it out in his own transactions as freely and with as little resitation as he now receives the present currency. When Moorman's executor proposed to pay the money due to respondent's ward, it struck him as the very best thing that could be done with complainant's funds to have it invested in seven per cent. bonds, furnishing, as he thought, a safe investment, yielding a regular income; but being wholly inexperienced in such matters he was not willing to take any step without the advice of counsel. And it was upon the advice and information of his counsel, and with the full approbation of his own judgment, he had acted in receiving the money and making the investment. He denies emphatically the charge of confederacy and conspiracy with William Crawford and Moorman to injure the plaintiff. Respondent received the money on the advice of his counsel, and upon his own judgment that it was right and proper he should receive it.

The cause came on to be heard on the 20th of June, 1874, when the court being of opinion that Commissioner Ranson's second alternate statement constituted the proper basis for a decree, confirmed the same and decreed that John H. Crawford and his sureties, James Crawford and Rudolph Turk, should pay to the plaintiff, Shover, five thousand six hundred and eighty-two dollars and twenty-seven cents, with interest thereon from the 25th of October, 1865, until paid, and his costs. And the amended and supplemental bill was dismissed as to William Crawford and the executors of E. G. Moorman. And thereupon John H. Crawford applied to a judge of this court for an appeal; which was allowed.

Cochran and William M. Robertson, for the appellant.

77 *Michie and Sheffey, for the appellee Shover.

Harrison and Stuart, for William Crawford and Moorman's executors.

Moncure, P. The court is of opinion that the appellant, John H. Crawford, as guardian of the appellee, George T. Shover, committed a breach of trust, by receiving of the appellee, William Crawford, executor of George W. Crawford, deceased, on the 25th day of June 1863, four thousand five hundred dollars in Confederate States treasury notes in payment and discharge of so much of the legacy of eight thousand dollars, bequeathed by the will of the said testator to his adopted son, the said George T. Shover.

The said legacy, to the extent of the amount thus paid, was, at the time of such payment, perfectly secure; and it would have so remained until actual payment in good money, but for the payment in Confederate money as aforesaid. The estate of the said testator had been ascertained, by judicial inquiry, to be ample for the payment of at least that portion of the said legacy which was thus paid in Confederate money. The said estate being insufficient to pay the legacies in full, the amount thereof entitled to payment was respectively scaled according to the value of the estate which was applicable to such payment. The executor, therefore, whose pecuniary ability

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has not been questioned in the case, and the securities in his official bond, were liable for the payment of the amount ascertained to be due to the legatee Shover as aforesaid. And there was, if possible, a still firmer and more permanent, or at least a great additional security of the said amount, arising from the fact that the estate of the testator consisted almost exclusively of a debt of upwards of seven thousand dollars, 78 balance *still remaining due of the purchase money of a very valuable tract of land in the county of Augusta, which had been sold by the testator after making his will and shortly before his death, on which land there had been retained, and there still existed, a vendor's lien for the payment of the purchase money, which rendered such payment, in good money, perfectly secure. Of all these facts the appellant, the guardian of the legatee Shover, was fully informed and cognizant.

Under these circumstances it was a palpable breach of trust in the said guardian to receive payment of the said sum of $4,500 in Confederate money on account of said legacy as aforesaid. Such money was, at the time of such payment, very heavily depreciated; that is, depreciated to the extent, in comparison with gold, of eight dollars in Confederate money to one dollar in gold. So that the scaled value of the $4,500, received by the guardian as aforesaid in Confederate money at its nominal amount, was but $562.50 in gold!

Certainly nothing short of the most overruling necessity could have warranted the guardian in making so great a sacrifice as is thus apparent. And certainly no such necessity existed in this case.

It is not sufficient to say that many, and, indeed, most of the southern people had strong faith in the ultimate triumph of the Confederate cause, and in the ultimate payment of the Confederate debt; that while Confederate money was never made a legal tender, yet it was receivable in payment of taxes, and its currency was encouraged as much as possible by legislation, and it was considered by many, and perhaps most of the southern people as their patriotic duty, in the management of their own individual transactions, to accredit Confederate money as much as possible, and to receive it without question in payment of debts.

79 *But what a man, sui juris, may do in the management of his own individual affairs, and what he may do as guardian of an infant in the management of the affairs of his ward, are two very different things. He may be as partriotic as he pleases in giving away his own, and it will be often meritorious for him to do so. But he cannot be patriotic at the expense of his ward, and cannot give away his ward's estate or any part of it.

There was certainly no necessity for making such a sacrifice as appears to have been made in this case. The guardian had received of the executor on account of the legacy to his ward, one thousand dollars in good money, or its equivalent, and received it about the time of the commencement of the war. This sum, judiciously applied, would, it seems, have been amply sufficient for the support of the ward during the war. And if more had been required, no doubt it would have been small in amount, and could have been obtained of the executor in further part of the said legacy. It appears that the ward was very inexpensive, and his wants very small. In fact neither the executor nor the guardian expressed, or seem to have felt, any desire to receive Confederate money at par for good money, and each refused at first to do so in regard to the debt due to Moorman to the testator's estate. They both knew that debt to be perfectly secured, in any event of the war; while they knew that Confederate money and Confederate bonds would only be good in the event of the success of the Confederate cause, if even then; and it is not strange, therefore, that their first impulse was, notwithstanding their hope and belief in regard to the result of the war then flagrant, and to the ultimate payment of Confederate notes and bonds, not to embark the ward's estate in the venture of the revolutionary struggle which was then in progress. And it was not until they were informed 80 and advised, as they *seem to have been, that the transaction could be legalized by an investment in Confederate bonds, made by the guardian under the sanction of a judge of a circuit court in vacation, under an act passed March 5, 1863, entitled "an act authorizing fiduciaries to invest funds in their hands in certain cases and for other purposes," (Acts of Assembly 1862 and 1863, p. 81, ch. 46,) that they consented to the payment of Confederate money in discharge of the legacy due to the ward.

Certainly that act was not designed to authorize, and did not authorize a fiduciary to receive payment of a well-secured good money debt in Confederate money at par when greatly depreciated in value, unless there was some overruling necessity for such a sacrifice, nor a judge to sanction such a proceeding by ordering such Confederate money to be invested as mentioned in the act. On the contrary, its only purpose, as expressly declared in the act, was to make it lawful for a fiduciary having in his hands money received in the due exercise of his trust, which, from any cause whatever, he was unable to pay over to the parties entitled thereto, to apply by motion or petition, to any judge of a circuit court in vacation for leave to invest, &c., in interest bearing bonds or certificates of the Confederate States, &c. That act was certainly not designed to create the very necessity for which it was intended to provide; that is, to authorize the receipt of depreciated Confederate money in payment of a good money debt in order that such Confederate money might be invested in a Confederate bond; but only to authorize such an investment of Confederate money which might be already in the hands of a fiduciary, having been received by him in the due exercise of his

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trust, and he being unable from any cause to pay it over to the parties entitled thereto.

81 *Therefore the order obtained from Judge Thompson in this case affords no sanction to the act of the guardian in receiving the Confederate money and making the investment thereof as was done in this case. The judge had no jurisdiction to make such an order, and would certainly not have made it if the facts of the case had been set out in the petition, or otherwise made known to him. This is a very clear proposition according to several decisions heretofore made by this court. Campbell's ex'ors *v.* Campbell's ex'or, 22 Gratt. 649; Crickard's ex'or *v.* Crickard's legatees, 25 Id. 410; Kirby *v.* Goodykoontz &c., 26 Id. 298.

It is not a good defence to the guardian in this case that he did not actually intend to injure the ward by the act complained of, if such injury was the necessary or actual result of such act; nor that he derived no profit from the act complained of. Jennings *v.* Jennings, 22 Id. 313; Crickard's ex'or *v.* Crickard's legatees, supra; Moss &c. *v.* Moorman's adm'r &c., 24 Id. 97. In 2 Perry on Trusts, sec. 847, it is said that "in awarding compensation to the cestui que trust for a breach of trust, the court does not regard it as material that the trustee has made no profit nor advantage out of the estate. If there is a breach of the trust, and an inevitable calamity destroy the property, the trustee must account for it. If he varies from his duty, he must account for the property at all events." Citing Clough *v.* Bond, 3 M. & C. 496.

Much was said in the pleadings and proofs, if not in the arguments in this case, in regard to the facts that John H. Crawford is the first cousin of John S. Moorman; that William Crawford, the executor of George D. Crawford, is second cousin of John H. Crawford and John S. Moorman, and first cousins of Mrs. M. L. Moorman, widow and executrix of E. G. Moorman; that John H. Crawford's father and

82 Mrs. M. L. Moorman were *brother and sister of George W. Crawford, and would have been two of his heirs-at-law if he had died intestate, and that the ward and appellee, G. T. Shover, was a stranger in blood to the family. But these facts are not sufficient to warrant the inference that there was any conspiracy between these near relations to practice a fraud upon the said ward and legatee, and there was doubtless no such conspiracy. My opinion is based upon the conduct of the parties, in the absence of any such imputation.

Besides the cases cited, supra, the following, which were also cited in the argument, have an important bearing on the subject: Bennett *v.* Claiborne &c., 23 Gratt. 366; Ammon's adm'r *v.* Wolfe &c., 26 Id. 621; Tosh &c. *v.* Robertson &c., 27 Id. 270; and Omohundro's ex'ors *v.* Omohundro &c., Id. 824.

I am, therefore, of opinion that the said guardian is chargeable as for good money, with the amount received by him in Confederate money of the said William Crawford, executor of the said George W. Crawford, on account of the said legacy to the said G. T. Shover; and that there is no error in holding the said guardian and his official sureties liable for the balance due by said guardian on the basis of his being so chargeable. But it appears by an inspection of the record that such balance on the 25th day of October, 1865, was $5,656.49, according to Commissioner Ranson's alternate statement No. 2, adopted and confirmed by the circuit court as the basis of its final decree in this case, instead of $5,682.23, the principal sum decreed for in favor of the said George T. Shover, against the said guardian and his sureties, with interest thereon from the said 25th day of October, 1865, till paid, and the costs of said Shover in this suit in the said court. But that small mistake in the principal of the said balance, being plainly apparent

83 *on the record, can be corrected by this court without reversing the said decree for that purpose. And if there be no other error in the decree, and it be correct and complete in all other respects, it will only be necessary to amend it by correcting the mistake aforesaid and to affirm it as so amended, with damages and costs.

But a very serious question yet remains for decision, which was discussed by counsel in the argument of this case, both in the court below and this court, and that question is, whether the said E. G. Moorman's executors, and the said William Crawford, executor of George W. Crawford, or any or either of them, are also liable on account of the said breach of trust of the said J. H. Crawford.

This question was not put in issue by the original pleadings in this case, the bill, answer and replication to the answer, and it could not, therefore, have been decided in this case if it had come on to be heard in that state of the pleadings. But the question was put in issue by the amended and supplemental bill and answers thereto and replications to the answers; and the cause came on to be heard on all the said pleadings, and the decree appealed from was rendered thereon, and must be construed and have the same effect as if the matter of the subsequent pleadings had been embraced in the original pleadings in the case. The suit, then, must be considered as a suit not only against J. H. Crawford as guardian of the plaintiff Shover, and the official surties of such guardian, seeking a recovery against them for a breach of trust committed by the guardian, but also against the executors of E. G. Moorman and William Crawford, executor of George W. Crawford, seeking a recovery against them for having aided and participated in the commission of such

84 breach of trust. *If they, or any of them did so, and participated, they, or such of them as did so, are liable accordingly.

In my opinion they did aid and participate in said breach of trust.

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In the first place, the executors of E. G. Moorman did so aid and participate. On the 25th day of June, 1863, they paid to the guardian of the plaintiff, on account of his legacy under the will of G. W. Crawford, $4,500 in Confederate States treasury notes at par, said payment being made out of an ante-war debt due by E. G. Moorman to G. W. Crawford, secured by a lien on real estate of much greater value than the amount of the debt, and with full knowledge that said notes were to be immediately invested by the said guardian, as they actually were on the same day, in a bond of the Confederate States, bearing seven per cent. interest. At the time of such payment said notes were depreciated in value, as compared with gold, in which the said debt was payable, to the extent and in the proportion of eight to one. In other words, the $4,500 thus paid in Confederate notes were worth but $562.50 in gold, and being invested in a Confederate bond as a permanent investment, it thus remained until the end of the war, when it became utterly worthless. But William Crawford and J. H. Crawford refused to receive the said payment in Confederate notes, until at length they were persuaded to do so by E. G. Moorman's executors, or one of them, J. S. Moorman, who assured them that Judge Thompson would make an order for such an investment. And accordingly on the same day, the whole arrangement was made and executed. Moorman's executors paid the notes to the guardian, J. H. Crawford, took his receipt therefor to William Crawford, executor of G. W. Crawford, on account of the *legacy, handed the said receipt to the said executor, who entered a credit for the amount thereof on the bond of E. G. Moorman to G. W. Crawford, a petition was filed by the guardian to Judge Thompson praying for and order for the said investment, which was accordingly thereupon made. By this operation, supposing it to have effect, the estate of E. G. Moorman was benefited to the extent of the difference between $4,500 and $562.50; that is, to the extent of $3,937.50, and the ward was injured to the same extent; in fact was injured to the whole extent of $4,500 in good money! This was a palpable breach of trust on the part of the guardian, in which the executors of E. G. Moorman, or one of them, J. S. Moorman, not only participated, but which he advised and instigated, and actively brought about by his agency, and which enured only to the benefit of E. G. Moorman's estate.

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In the second place, William Crawford, executor of G. W. Crawford, also aided and participated in the said breach of trust. He co-operated in the perpetration of the same, and without such co-operation it could not have been perpetrated. He alone had a right to receive payment of the debt due to his testator's estate by E. G. Moorman, or any part of it. It was absolutely necessary, therefor, to obtain his consent and co-operation to the arrangement whereby the payment was made in Confederate notes as aforesaid. The act of J. S. Moorman in paying $4,500 in Confederate notes to J. H. Crawford, the guardian, and taking his receipt as for so much money paid to him on account of the legacy to his ward by William Crawford, executor of G. W. Crawford, was in fact as well as in law, the act of the said executor through the agency of the said J. S. Moorman, and as much implicates and binds the said executor as if he had done it by his own hand. It was done by his *advice and instigation and authority. He was under peculiar obligations to conserve and take care of the interest of the infant legatee of his testator, who uses in his will this strong language on the subject: "I here wish my friend William Crawford, Sr., to act as executor, and take charge of my estate and my two orphan boys (George T. Shover being one of them) and do the best for them you can, for they will be left in this world without a friend to protect them, and my prayer is," &c. He had before said in his will, "I direct my executor, who will hereinafter be named, to place the said George T. Shover at some suitable place to be raised, and to pay particular attention to his education and training," &c. William Crawford was thus constituted testamentary guardian of this orphan and adopted child of his testator, and accordingly acted as such for several years, though he probably never qualified by giving bond and security according to law. At his instance John H. Crawford consented to act as guardian of the said infant, and was appointed and qualified as such. He had it in his power completely to guard and protect the estate of the said infant by refusing to receive the well-secured debt out of which his legacy was payable in anything but gold; and certainly not in Confederate treasury notes, so greatly depreciated in value as they then were. And that was certainly his duty. But he did not do it. He was guilty of a breach of trust in that respect. And he advised and instigated and aided in the breach of trust committed by the guardian, which could not in fact have been committed without his co-operation.

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These parties, J. S. Moorman and William Crawford, thus participated in the breach of trust committed by J. H. Crawford, guardian of G. T. Shover, and are liable therefor on principles which have been well settled by this court in several cases. See Cocke &c. *v.* Minor &c., *25 Gratt. 246; Jones' ex'ors *v.* Clark &c., Id. 642; and the cases cited in those two cases. See also Tosh &c. *v.* Robertson &c., 27 Id. 270.

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I am therefore of opinion that the said J. H. Crawford, J. S. Moorman and William Crawford are jointly and severally liable in this case, and that the decree ought to be against them all and the sureties of the said guardian, instead of against the said guardian and his sureties only. But as my brethren differ with me in regard to the liability of the said J. S. Moorman and William Crawford, and concur with me only in my opinion in regard to the liability of the said guardian and his sureties, it follows,

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therefore, that the decree appealed from must be amended as aforesaid and affirmed.

Christian, J. If the suit in this case had been brought for the purpose of fixing liability upon the executor of Moorman and the executor of Crawford, as well as upon the guardian and his sureties, and if it had been charged in the bill that the guardian and his sureties were insolvent and that he had committed a breach of trust, in which the executor of Moorman and the executor of Crawford had participated, upon such a bill, sustained by the proofs, a very different question would be presented, involving very different considerations. That is not the case before us, and need not be decided here. But in this case the ward has recovered his decree against his former guardian and his sureties. He is satisfied with that decree and does not appeal from it. The question is, therefore, whether the guardian (not the ward) upon the pleadings and proofs in the cause, can be heard to complain now, for the first time in the appellate court, that the decree of the circuit court is erroneous because he, having committed a breach of trust, ought not alone be held responsible therefor, but that *others who participated with him in such breach of trust ought to be held equally liable with him. This is a position which the ward might properly take, but which the guardian, certainly in the pleadings in this cause and in the face of his sworn answers, ought not to be permitted to assume. So far as Moorman's executor is concerned it is sufficient to say, that, it being his duty to pay the debts of his testator, he had the right to pay in a depreciated currency if there was the hand of a party, sui juris, who was willing to receive it, and a discharge by such an one was a full and complete discharge and satisfaction of the debt. The debt was due to Crawford's executor; he agreed to receive it if Moorman would bring to him a receipt from the guardian, to whom the money was to be paid over by Crawford's executor. Upon the production of this receipt Crawford's executor credited Moorman's bond by that amount. In the absence of all proof of fraud, or participation in any breach of trust, this was a valid payment of Moorman's debt which could never afterwards be questioned.

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Now, as to Crawford's executor, the record abundantly shows that he acted with the utmost prudence and good faith. When the proposition was made to him to receive the Moorman debt, well secured upon real estate, he (after taking the advice of an able and distinguished lawyer, the lamented Baldwin,) peremptorily refused to receive it; but said in substance to Moorman, that if the guardian was willing to receive it and would take all the responsibility of receiving a gold debt so well secured, in a depreciated currency, he would accept the guardian's receipt and credit it on Moorman's bond. The guardian, both in his answer to the original and amended bills, affirms positively that he received on his own responsibility and on his own judgment the Confederate money from Moorman, and defends himself in the court *below in all the pleadings and evidence which he has taken, upon the ground that it was the best arrangement he could make for his ward; that what he did in the premises was done in good faith, from which he received no profit or advantage, and that, therefore, he ought not to be held responsible for a collection and investment which he thought at the time was for the advantage of his ward, and which he could not then foresee would be worthless. He nowhere affirms, or even intimates, that he was induced or instigated to the course he pursued by Crawford's executor or Moorman's executor, but on the contrary, emphatically affirms in the last paper filed in the cause (his answer to the amended bill), that he acted upon his own authority and his own judgment, and seeks to justify his action in this respect as one made in good faith and for the best interest of his ward.

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After this, he cannot now, for the first time in the appellate court, shift upon the shoulders of others the burthen which he deliberately took upon himself. It is clear that but for the conduct of the guardian in this case, the investment for the ward, as left by the testator, would have remained intact. The loss was occasioned not by Crawford's executor, but by the act of the guardian, and he and his sureties alone are responsible. The pleadings and evidence in the cause do not, in my opinion, justify this court in saying, what the appellate has never pretended or said, that in collecting Confederate money for a gold debt well secured, and investing the same in Confederate bonds, he was instigated, aided, and advised by Crawford's executor and Moorman's executor.

I am for fixing the liability in this case where it has been fixed by the parties as well as by the law, and am for affirming the decree of the circuit court without any change or modification whatever.

*Staples and Burks, J's, concurred in the opinion of Moncure, P., except as to the liability of William Crawford and Moorman's executors. On that point they concurred with Judge Christian.

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Decree amended and affirmed.

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91 *Sitlington v. Kinney's Adm'r.

September Term, 1877, Staunton.

Absent, ANDERSON, J.

Negotiable Paper—Sureties—Release.—In 1856 G made his note for $775, which was endorsed by J, S and K, and which being protested was taken up by K. G then made a deed by which he conveyed in trust certain personal property, and among it a slave named Jenney, in trust to secure these endorsers and five others, equally for all their suretyships for him. At the same time he conveyed to the same trustee on the same trusts certain real estate, all subject to liens. G being

insolvent, K, who was his father, undertook to obtain a release of the slave Jenney, and the other parties except S signed a release on the consideration that the wife of G would release her right of dower in the land conveyed in trust. To induce S to sign the release, K promised to release him from his liability on the said note, and upon that promise S signed the release. K's administrator afterwards recovered a judgment upon the note, and S enjoined it. The trust fund of G was insufficient to pay the claims upon it, and J and S had to pay large amounts for G. Pending the injunction, both J and K became insolvent; and these facts are shown by an amended bill. Upon demurrer to the bills—HELD: The agreement of K to release S, whether an executed or executory contract, is a good ground of relief against the judgment, and S might properly go into equity for relief.

In March, 1861, A. K. Sitlington filed his bill in the circuit court of Highland county, to enjoin proceedings on a judgment recovered against himself and John Sitlington in that court by the administrator of Nicholas C. Kinney, deceased, and also the sale of a slave named Henry, ordered to be sold by a decree in a cause depending
92 *in the same court. In his bill he states that on the 7th of May, 1856, one George N. Kinney, made his note for $775 to John Sitlington, negotiable and payable at the office of the Bank of the Valley, at Staunton, one hundred and sixteen days after date, which was endorsed successively by John Sitlington, A. K. Sitlington and Nicholas C. Kinney; that this note, so far as complainant was concerned or knew, was an accommodation note; that when it fell due on the 3d of September, 1856, it was protested for non-payment, it having been left at the bank by Nicholas C. Kinney for collection.

He further states that on the 1st of October, 1856, George N. Kinney conveyed to William C. Jones certain personal property embracing three slaves, one of them named Jenney, who was about ten years old, in trust to secure and indemnify John Sitlington, A. K. Sitlington, Nicholas C. Kinney and five others named, in any and every debt in which they, or any of them, were bound for said Kinney or Kenney & Bruffy, and so secure any debt that was due to them individually. And if a sum sufficient was not realized from this trust fully to indemnify all of said endorsers, they were to share the proceeds pro rata; and on the same day the said George N. Kinney conveyed to the said Jones certain real estate, subject to the liens thereon, upon the same trusts; that the amount raised under these trust deeds was $4,426.07, on the 9th of March, 1858, as appeared by the commissioner's report made in the case of Scott, Baker & Co. *v.* G. N. Kinney & others, then pending in said court; but all the property conveyed in said deeds was not sold, and among that not sold was the girl Jenney. As to this girl, complainant says that, about April, 1857, George N. Kinney having determined to leave Virginia with his family, and being in very needy circumstances, de-
93 sired to take with *him the negro girl Jenney, and his father, Nicholas C. Kinney, desired to advance the interest of his son, undertook the office of getting from the trustee and beneficiaries in said deeds of trust a release of their interest in the said girl Jenney. He procured the consent to a release of their interest from all the creditors in said deeds except the complainant, who refused on any manner whatever to release his interest in said girl, acquired by said deed of trust. The said Nicholas C. Kinney then proposed to the complainant that he would release him from all liability as endorser of said negotiable note if complainant would sign the following release, to-wit: For and in consideration of the release of Elizabeth W. Kinney, of all her dower interest in the real estate of her husband, George N. Kinney, we, the undersigned, do hereby release for her use and benefit the within slave Jenney, aged ten years, and will not hold the trustee, William C. Jones, in any manner liable or responsible for the same. Witness our hands, this 7th day of April, 1857. Which release complainants avers he, with some of the other creditors, signed, under a promise and with the express understanding, that he, the said Andrew K. Sitlington, should be forever released from all liability as endorser of said negotiable note or otherwise; and without such consideration he never would have signed said release. And he avers that the said negro was worth seven or eight hundred dollars, and was taken possession of immediately by the said George N. Kinney, and was either conveyed beyond the limits of the state or sold by said George N. Kinney to a negro trader, and has not been heard of since. He avers that the dower interest of Mrs. Kinney was of small value, and never could have availed him anything, as said trust property was all consumed in paying liens older that the deed of trust.

94 *Complainant further says that all the slaves were given by John Sitlington to George N. Kinney, and that Nicholas C. Kinney not only engaged that said Andrew K. Sitlington should be released from all liability as endorser on said note, but intended that the said John Sitlington was also to be released, and that said note was to be forever satisfied and discharged. But that in the spring of 1858, the said Nicholas C. Kinney instituted an action on said note in the circuit court of Highland, and on his death it was, in 1860, renewed in the name of his administrator, and at the October term, 1860, judgment was rendered against John Sitlington and complainant for the sum of $775, with interest and costs, the writ having abated as to George N. Kinney by the return of "no inhabitant."

Complainant refers to a suit in said court by William H. Brown & Co. against himself and his wife, in which all of his property had been sold except a negro man named Henry; and that the proceeds of said sales are sufficient to pay all his debts except this debt of Kinney, without the sale of

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this negro Henry; but that the court at its last October term, anticipating said Kinney debt, had made a decree directing the sale of said negro Henry. He charges that there is no necessity for the sale, except to pay said debt. And making the administrator of Nicholas C. Kinney and John Sitlington parties defendants, he prays for an injunction to stay all proceedings upon the judgment, and also to stay the sale of the negro man Henry; and for general relief. The injunction was granted.

The administrator of Nicholas C. Kinney answered the bill, contesting the agreement set up in the bill; but it is unnecessary to say anything more of the answer.

In September, 1873, A. K. Sitlington filed an amended bill. After stating in sub-
95 stance the averments of the *original bill, he says: The release of Mrs. George N. Kinney was gotton up by Nicholas C. Kinney and is in his handwriting. The other beneficiaries in the deed of trust signed said deed upon the consideration therein expressed except complainant, who refused to sign it until after Mrs. George N. Kinney had made her deed relinquishing her right of dower. And he repeats that he never did agree to sign said release until Nicholas C. Kinney promised and agreed, &c., as before stated. He says that on the same day that Nicholas C. Kinney prepared the release, he wrote a deed of relinquishment of the contingent right of dower of Mrs. George N. Kinney; which she executed on the 10th of April, 1857, and it is made upon the consideration "that all the securities and endorsers, except A. K. Sitlington and John Snyder, had released to her their rights under said deeds to the negro girl Jenney, in consideration of her said dower right."

Complainant further states that George N. Kinney resided in Highland county until the spring of 1857, when he removed to Texas; that he professed to practice medicine, and was engaged at the same time in merchandising in connection with one Jason N. Bruffy; and in 1856 he finally failed, leaving John and A. K. Sitlington to pay large sums of money for him as security and endorsers. His other endorsers paid little or nothing for him, and said Nicholas C. Kinney paid nothing but this note, because John Sitlington and A. K. Sitlington were first on his paper. That John Sitlington had paid at least $8,000 as endorser and surety, and A. K. Sitlington at least $2,600 for said George N. Kinney. That John Sitlington was considered solvent on the 7th of April, 1857, and up to September, 1857. After that time he was entirely insolvent. That George N. Kinney has been insol-
96 vent since 1856, and the estate of Nicholas *C. Kinney has turned out to be insolvent, though he in his lifetime and his estate until the end of the war was considered solvent.

Complainant further charges, that at the time Nicholas C. Kinney promised and agreed to release complainant from liability on account of said note, he intended not to hold any of the parties bound; and this is made more apparent from the fact that being a party to the suit of Scott, Baker & Co., and an observer of the proceedings therein, and by which the property of the Sitlingtons as well as that of George N. Kinney was sold, and the proceeds applied to the debts therein reported, he stood by and never set up any right or privilege to report said debt; nor did he sue thereon until it became apparent that John Sitlington was insolvent. And he further charges that after the exhaustion of the funds in the suit of Scott, Baker & Co., complainant was compelled to pay a number of debts of George N. Kinney in which John Sitlington was the prior endorser, and also a number of debts of his father, John Sitlington, as would appear from the report of debts in the suit of William H. Brown & Co., he being his surety and endorser. And he insists that Nicholas C. Kinney having been a party in the suit of Scott, Baker & Co., and having failed to claim said debt as against the George N. Kinney fund in said suit for his share of the proceeds of said deeds of trust, would operate as a release of said debt in favor of complainant and the first endorser, if not for the whole at least in part. And as the estate of said Nicholas C. Kinney is insolvent, and a judgment at law against his administrator upon his agreement would be fruitless, he insists that equity has jurisdiction to relieve him.

The administrator of Nicholas C. Kinney demurred to both the original and amended bill. And the cause coming on to be heard upon the demurrer and also upon
97 *notice of a motion to dissolve the injunction, the court sustained the demurrer, and dissolved the injunction with costs. And thereupon A. K. Sitlington applied to a judge of this court for an appeal; which was allowed.

William J. Robertson, for the appellant.
Sheffey & Bumgardner, for the appellee.
Christian, J., read the decree of the court.

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion that the circuit court of Highland county erred in sustaining the demurrer to the appellant's original and amended bill.

Whether the agreement set out in the original bill between the appellant and the appellee's intestate (N. C. Kinney) be regarded as an executed contract or one that was executory only, it is plain that the allegations of the original and amended bills taken together, contain such averments of facts as, if true (and upon demurrer they must be taken as true) constitute sufficient ground of relief in a court of equity, and which could not be set up by plea in an action at law, so as to afford to the appellant a complete and adequate remedy.

The court is therefore of opinion, and it is decreed and ordered that the said decree of said circuit court be reversed and an-

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nulled, and that the appellant recover against the appellee his costs by him expended in the prosecution of his appeal here; and the cause is remanded to said circuit court to be determined and decided upon the bill and answers, and depositions now in the cause, or other evidence which may be hereafter taken by either
98 *party upon the issues made by such bill and answers. All of which is ordered to be certified to said circuit court for further proceeding to be had therein in conformity with the opinion of this court herein declared.

Decree reversed.

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99 *Robinson v. Shacklett.

September Term, 1377, Staunton.

Absent, ANDERSON, J.

In 1853, S and wife sold and conveyed to B land for $2,100, retaining a vendor's lien. B paid $1,500, and gave three bonds, each for $200, two of which were assigned to H and one to T. B conveyed the land to T in trust to secure a debt of $627 to W. In May, 1858, B and T made a private sale of this land to A and his wife for $2,100, payable $700 on the 1st of August, 1858, and the balance in payments extending to 1863; and A and wife paid of the purchase money $592, which was applied to the debt of W. In 1860, H and T filed a bill against A and wife and others for specific execution of the contract, and to sell the land to pay the vendor's lien held by H and T. In May, 1860, before a decree in the cause, T, B and A and wife made a private sale of the land to R for $2,100, payable $1,000 October 1st, 1860, and three annual payments. R paid to T $1,000, and gave his bonds to T for the balance. This sale was confirmed by the court at the October term, 1860, and T was appointed a receiver to collect the money and pay it out to the persons entitled. But he was directed not to pay H until he filed the bonds held by him among the papers. T paid the debt of W, retained enough to pay H, and paid balance to B. The bond of R, due in 1862, was assigned by B and T to S, who recovered a judgment upon it, and then R filed a bill against S to enjoin the judgment. The injunction was granted and afterwards dissolved. And then R filed a bill of review, on the ground that the wives of B and A were entitled to a contingent right of dower in the land, and that H had a lien on the land. The bill of review was dismissed; and R appealed—HELD:

1. **Bonds—Lien on Land.**—As the bonds of R were left in the hands of T, the receiver, to pay the debt of H, and were sufficient for
100 that purpose, *if R has paid them to T, H can have no lien on the land.

2. **Dower.**—A's wife having been a party to the suit, she cannot claim dower in the land; and the proceeds of the sale having been exhausted by the prior liens upon it, there is no surplus out of which she may be endowed.

3. **Same—Surplus after Satisfaction of Liens.**—The land having been sold to satisfy the liens of H and T, the wife of B can have no right of dower in the land in the hands of the purchaser R; any right she may have must be in the surplus of the purchase money, after satisfying the prior liens. Whether she has an interest in this surplus, must depend upon the true construction of the statute, Code of 1849, ch. 110, § 3; Code of 1873, ch. 106, § 3. That is a question between the assignee S and the wife of B, in which R, the purchaser, is not concerned. But to avoid the hazard of a contest with her, he may bring them before the court to have their respective rights settled by the court.

4. **Appeal—Amendment.**—R allowed to amend his bill and make Mrs. B a party. And, if the other suit is still pending, to make all the parties to it defendants, and the two cases may be heard together, and a final decree entered adjudicating the rights of all the parties.

In November, 1871, William Robinson filed his bill in the county court of Rockingham to enjoin a judgment recovered against him by Samuel Shacklett, for $350, with interest from the 1st of October, 1862. In his bill he states that he purchased of John Applegate and Hannah Applegate his wife, a tract of land in the county of Rockingham. This land was originally owned by John Blain, or perhaps by E. T. H. Warren, as trustee for Blain's wife and by them was sold to John Applegate, or to Hannah his wife. Complainant never knew whether Applegate or his wife owned the land, but both signed the article of agreement for the sale to the complainant. The said Applegates were, at the date of the sale, largely indebted to John Blain, or to his wife,
101 *for purchase money on said land. These bonds or for $200 each, were executed about fourteen or fifteen years ago, and are now held by Eugene Anderson.

Complainant paid $1,000 down, and has since made other payments. He executed one bond for $350 to E. T. H. Warren, trustee, on the 14th of February, 1861, payable on the 1st of October, 1862, which has been assigned by Warren and Blain to Shacklett & Gibbons; on which Shacklett, as surviving partner, has recovered a judgment, and an execution thereon is in the hands of the sheriff.

He says further, that by the agreement he was to have a good and perfect title to the land upon his making the cash payment, but he has never received it, and he understands that the wife of John Blain has already announced her determination to assert her dower rights in said land, and he fears that the wife of Applegate may set up a similar claim.

The land being thus encumbered by the Applegate debt, and the title to the same not being clear, complainant is not willing to pay the remaining purchase money until these matters have been cleared up, the incumbrance removed and the title perfected.

Deed of Trust Executed on Same Day as Deed of Conveyance.—In Hurst v. Dulaney, 87 Va. 445, the principal case was cited for the proposition that the wife of a vendee cannot claim dower in land where the vendee executed a deed of trust on the land on the same day that the deed of conveyance was executed, the two transactions being considered as one in equity. Citing also, Gilliam v. Moore, 4 Leigh 30; Wheatley v. Calhoun, 12 Leigh 264; Wilson v. Davisson, 2 Rob. 384; Summers v. Darne, 31 Gratt. 791; Coffman v. Coffman, 79 Va. 504.

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And, making Shacklett and the sheriff defendants, he asks for an injunction to the judgment, and for general relief.

Shacklett answered the bill. The facts appear to be as follows: In 1853 John Blain purchased from Samuel Wheelbarger the tract of land in the bill mentioned; and as a part of the consideration executed three bonds each for $200 to Wheelbarger, payable respectively in 1856, '57 and '58; to secure which bonds a lien was retained on said land. Two of these bonds were assigned by Wheelbarger to A. W. and J. G. Brown, and by them assigned to George H. Anderson, now a resident of Iowa. The other
102 bond was assigned to F. K. *Speck, and by Speck to E. T. H. Warren. In February, 1857, Blain conveyed the land to said Warren to secure a debt of $627.92, due to William R. Warren. In May, 1858, John Blain and E. T. H. Warren made a private sale of said land to John Applegate and wife for $2,100 payable $700 on the 1st of August, 1858, and the balance in payments extending down to September, 1863; and Applegate and wife paid of this purchase money $592. In 1860, Applegate and wife being in default, a chancery suit was instituted in the circuit court of Rockingham in the name of Harvey Anderson and E. T. H. Warren, against Applegate and wife and others, to enforce a specific execution of said contract, and to provide a sale of said land to pay the vendor's lien held by Anderson and Warren. In May, 1860, before a decree was made in the cause, E. T. H. Warren, trustee, John Blain and John Applegate and his wife, united in making a private sale of the land to William Robinson at the price of $2,100 payable $1,000 on 1st of October, 1860, and the residue in three annual payments. Of this Robinson paid to Warren $1,000, and to Applegate $50; and executed his three bonds each for $350, falling due October 1st, 1861-'62-'63, payable to Warren. This sale was confirmed by the court at the October term, 1860, and Warren was appointed a receiver to collect the money and pay it out to the persons entitled. But he was directed not to pay Anderson until he should file the bonds held by him among the papers of the cause.

The bond of Robinson due in October, 1862, was assigned to Shacklett & Gibbons by Blain and Warren. And it appears that Warren having paid the debt secured by the deed of trust of Blain to him, and reserved in his hands $522 to pay Anderson's liens, paid over the balance of the purchase money to Blain.

103 *The cause came on to be heard on the 5th of March, 1873, when the court dissolved the injunction and dismissed the bill.

At the July term of the court, 1873, the plaintiff by leave of the court filed his bill of review; and for grounds of error insisted: 1st. That the wife of John Blain not having been a party to the deed of trust to E. T. H. Warren, nor to the sale to the complainant, nor to the cause of Anderson, &c. *v.* Applegate &c., she was entitled to dower in the land. 2d. That the complainant should not be required to pay said debt until the liens of Harvey Anderson are discharged. His were vendor's liens upon the property, and have priority to any interest that John Blain had therein, and no act of Blain, or Warren, or both, could deprive Anderson of his right to look to complainant for payment of his debts having such priority out of any sum which complainant might owe; or to proceed against the land in the hands of complainant. The cause seems to have been transferred to the circuit court of Rockingham. And Shacklett demurred to and answered the bill of review. He insists it was no ground of error that the wife of John Blain did not unite in the sale; that Robinson did not contract for her contingent dower interest; but bought the land in a chancery suit, subject to any rights the wife might have. And he insisted that if Robinson paid the bonds reserved to pay Anderson to an authorized person, Anderson must look to that person, and not to the land or to Robinson. If he paid them to a person unauthorized to receive the payment, then it was at his own risk and in his own wrong. If he has not paid them he owes them still, and they are ample to pay Anderson.

The cause came on to be heard on the 1 day of February, 1875, when the court held that there was no error in the decree of the 5th of March, 1873, dissolving the
104 *injunction and dismissing the bill; and the injunction was dissolved and the bill of review and original bill were dismissed. And thereupon Robinson applied to his court for an appeal; which was allowed.

John E. Roller, for the appellant.

William B. Compton, for the appellee.

Staples, J., delivered the opinion of the court.

It appears to the court that the appellant paid the sum of one thousand and fifty dollars in October, 1860, toward the purchase money of the land in his possession. This left a balance of one thousand and fifty dollars, for which he executed three bonds of three hundred and fifty dollars each, payable the 1st of October, 1861, 1862 and 1863. One of these bonds, that maturing in 1862, was assigned to Shacklett & Gibbons, and is the subject of controversy here. The other two were retained, or so much of them as was necessary, to discharge the lien held by Harvey Anderson. It was, however, provided in the decree of November, 1860, that Anderson should not be paid until the bonds held by him were filed among the papers of the cause. Whether they were ever filed, or whether Anderson has been paid, does not distinctly appear, nor is it important now to inquire. The amount due him was to be paid out of the appellant's bonds executed to Warren as trustee, and left in the hands of the latter for that purpose. If the appellant has made the payment to Warren, such payment protects him against Anderson's claim, whether the latter received the money or not, because Warren was fully authorized to collect and pay over the amount due
105 by the appellant. If Warren *has misapplied the money, Anderson must look to him and not to the appellant.

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It is worthy of notice, however, that neither in his original bill nor in his bill of review, does the appellant directly assert that he has paid to Warren, or any one else, the bonds set apart for the benefit of Anderson. Nor has he offered any proof of such payment. The record contains no evidence even tending to show the fact. If the appellant has not paid his bonds, then he has in his own hands ample security against Anderson's lien. The amount still due by him and which cannot be diverted, is sufficient to discharge that lien, which has priority over all other encumbrances.

The court is therefore of opinion that the appellant has no claim to relief against the judgment of the appellee by reason of the existence of the lien, if such there be, to which Harvey Anderson, or those claiming under him, are entitled.

It further appears to the court that Mrs. Hannah Applegate is not entitled to dower in the land held by the appellant, or in the proceeds of the sale thereof. She was a party to the suit in which the decree of November, 1860, was rendered, and whether she is or is not bound by that decree, it seems that she, or her husband, only paid the sum of five hundred and ninety-two dollars, which was applied to the deed of trust executed by Blain to secure the debt due William Warren. After satisfying the liens upon the land paramount to any claim which she or her husband might assert, there was no surplus upon which her claim of dower could attach. If there was any such surplus it was too small in amount to be taken into account either for the benefit of Mrs. Applegate or as affording just ground for complaint on the part of the appellant.

106 *The court is therefore of opinion that the appellant is not entitled to relief against the judgment by reason of any supposed claim of Mrs. Applegate to dower in the lands or in the proceeds of sale thereof.—

It further appears to the court that in September, 1853, Samuel Wheelbarger and wife sold and conveyed the land now held by appellant to John Blain, at the price of twenty-one hundred dollars; of which seven hundred and fifty dollars were paid in hand. To secure the residue of the purchase money, a lien was reserved on the land by Wheelbarger, and the bonds of the purchaser given, one for $250 payable on demand, two for $200 each, payable 1st of March, 1854 and 1855, one for $100, payable the 1st of September, 1855, and three others for $200 each, payable the 1st of March, 1856, 1857 and 1858. It seems that the three last mentioned bonds were assigned, two of them to Anderson, and the other to E. T. H. Warren, and were the subject of the suit brought by Anderson and Warren, in which the decree of November, 1860, was rendered. It does not appear what has become of the other bonds executed by Blain to Wheelbarger. It is very probable they have been long since paid. At all events, no question touching them is raised by this record. The appellant does not say they are still due; nor does he make any complaint that they constitute a lien on the land, or in any manner affect his title. If they have been satisfied, and it must be so assumed for the purposes of this case, Blain has paid about fifteen hundred dollars of the purchase money; to that extent he had a perfect title to the land, subject only to the liens of the bonds held by Anderson and Warren. The question is whether his widow is entitled to dower, either in the land or in the proceeds of sale remaining after satisfying the amount due Anderson and Warren, she not having been a party to the suit in

107 *which the appellant became the purchaser, and so far as this record shows, not having relinquished any claim or interest she might have.

Under the decision of this court in the case of Wilson et als. *v.* Davisson, 2 Rob. R. 384, it is clear that she would not be entitled to dower in the land nor in the proceeds of sale, as against the purchaser at a judicial sale. At the revisal of 1849, the legislature, in view of the decision in Wilson *v.* Davisson, adopted the following provision (Code of 1849, chap. 110, sec. 3): "Where land is bona fide sold in the lifetime of the husband to satisfy a lien or encumbrance thereon, created by deed, in which the wife has united, or created before marriage, or otherwise paramount to the wife, she shall have no right to be endowed in said land. But if a surplus of the proceeds remain after satisfying the said lien or encumbrance, and a court of equity have jurisdiction of the case, it may make such order as may seem to it proper to secure her right." It seems that this section was reported by the revisors without the last clause; so as to conform the law to the opinion of the majority of the judges in Wilson *v.* Davisson. The legislature added the last clause, which conforms to the opinion of Judge Allen, who dissented in that case. Code of 1849, chap. 110—note. The object of the statute seems to be to provide for a case in which the land is sold in the lifetime of the husband, when the wife has a mere contingent right of dower. Whether the wife ought not to be a party to the suit brought to enforce the lien or encumbrance, and if so, whether she is concluded by the decree; whether the court is bound to make an order at all events for the protection of her rights, or whether it has a discretion on the subject; and whether, if the court fails to make such order and directs the surplus to be paid to the husband or distributed among his creditors, the

108 *wife has, after the death of the husband, any remedy, and if so, what it is, are difficult questions which do not arise in the present aspect of the case, and ought not now to be passed upon. One thing would seem, however, to be very clear, that the land is not liable in the hands of the purchaser, nor is he bound to see to the application of the purchase money, or that an order is entered for the protection of the rights of the wife in the event of her surviving the husband. Daniel *v.* Leitch, 13 Gratt. 195, 211; Jones *v.* Tatum, 19 Gratt. 720.

In the suit brought by Anderson & Warren against Blain and Applegate and wife, to enforce their lien as assignees of Wheel-

barger, Mrs. Blain was not made a party; nor does it appear that any order was entered for the protection of her contingent right of dower. The decree merely directs that Warren, who was appointed receiver, should collect the purchase money from the appellant, and after paying the costs of suit, he should pay the plaintiffs according to their priorities —pay the amounts due from John and Hannah Applegate, and the remainder to be distributed according to the rights of the parties. It would seem, as already stated, that the appellant has paid all the purchase money except the bond in controversy, and the amount set apart to discharge the Anderson lien. It may be that he has also satisfied the latter. Whether he has or not, Anderson's claim has priority over all others, and the appellant may safely so apply the reserved fund. So that the only part of the proceeds of sale unpaid, to which the dower claim of Mrs. Blain can attach, is the bond in controversy. Whether she has any valid claim to that fund, is a question between her and the appellee Henry Shacklett, and not between her and the appellant. Whether the appellant, knowing that she is still surviving her husband, and may assert her claim to
109 the fund in controversy, is bound *at his peril to take notice of that claim, is a question we are not called on to decide. He is certainly not bound to incur the hazard of a controversy with Mrs. Blain, after having paid the appellee. He has the right, if he pleases, to bring the respective claimants before the court, that they may litigate the question between them, and that the court may decide who has the preferable right to the fund. Mrs. Blain being interested in the subject of controversy, a due regard for her rights required she should be heard before the payment to the appellee.

It can make no difference that the appellant was a purchaser at a judicial sale. By the terms of the contract between him and Warren and Applegate, the appellant was entitled to a deed with general warranty from Applegate and wife. This contract was confirmed by the court, none of the parties making objection. The appellee in taking an assignment of the bond must of course take it subject to all the equities attaching to it in the hands of the original parties, but if there had been no contract for a general warranty deed, the appellant would be entitled to have it judicially determined which of the parties has the best right to the subject of controversy.

He has, however, failed to make Mrs Blain a party to his suit, as it was incumbent upon him to do. This omission can be remedied by an amended bill bringing her before the court, and containing such averments as will properly present the issue between her and the appellee. The record of the suit of Anderson and Warren *v.* Blain, Applegate and wife, is filed as an exhibit in this case. It is not certain it is a completed record. If it is, no final decree has ever been rendered in the cause, and it is yet pending in the court below.

110 *The more regular course for the appellant to have pursued would have been to file his petition in that cause and to have brought his case to a hearing in connection with it. This defect is, however, not a radical one; the difficulty, if such it be, can be obviated by treating the present bill as a mere adjunct of the original cause and in the nature of a petition. The decree of the circuit court must be reversed and the case remanded to that court for further proceedings in conformity with the views herein expressed. The appellant has leave to amend his bill by making Mrs. Blain and the parties to the original cause also parties to this suit, so that the two cases may be heard together and a final decree entered adjudicating the rights of all the parties.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that John Blain, by the deed of conveyance from Samuel Wheelbarger and wife and payment of part of the purchase money, acquired such title to the land held by the appellant, as may entitle his widow to dower in the proceeds remaining after satisfying the lien of said Wheelbarger, or those claiming under him, stipulated to be paid by the appellant. She is, therefore, interested in the subject matter of controversy, and ought to have been before the court before a final adjudication of the questions raised by the appellant's bill. And the said circuit court, instead of dismissing said bill, ought to have required the appellant to amend the same by mak-
111 ing her a party to his suit, and *the said bill so amended ought to have been treated as a petition in the case of Anderson & als *v.* Applegate & wife, and heard in connection therewith, and as a part of said cause.

The court is further of opinion, that the errors aforesaid were properly the subject of the bill of review filed by the appellant, and the said circuit court, instead of dismissing said bill, ought to have retained the same, and upon a final hearing to have reversed the decree dismissing the said original bill, and thereupon proceeded to adjudicate the rights of the parties according to the principles herein announced.

Wherefore, for the error aforesaid, it is decreed and ordered that the said decrees of the circuit court dismissing the bill of review and the original bill, be reversed and annulled, and that the appellee, Shacklett, recover against the appellant his costs by him expended in the defence of the appeal aforesaid here, he being the party substantially prevailing.

And this court, proceeding to render such decree as the said circuit court ought to have rendered, it is ordered that the appellant have leave to amend his bill by making Mrs. Blain, as also the persons who were parties in the case of Anderson and others *v.* Applegate and others, parties to this suit, and said amended bill be treated and held as a petition in the case aforesaid, and heard in

connection therewith; and the said circuit court, upon the case as presented, will adjudicate the rights of the parties and render such decree as may be just in the premises; which is ordered to be certified to the said circuit court of Rockingham county.

Decree reversed, with costs to the appellee.

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112 *Snavely v. Harkrader & als.

September Term, 1877, Staunton.

Absent, MONCURE, P., and ANDERSON, J.

I. **Equity Pleading—Multifariousness.***—Infants by their next friend file their bill against their guardian, first to surcharge and falsify the settled account of their guardian, and to have him removed; and second, to have a sale of their lands. The guardian demurs to the bill, on the ground that it is multifarious—HELD: That, as the court cannot sell the infants' land on a bill filed by them, and no relief on that part of the bill can be given, the court will consider the case as if that part of the bill was not in it; and the demurrer was properly overruled.

II. **Same—Same.**—Pending the case, some of the plaintiffs come of age, and they all unite in an amended bill asking the same relief against the guardian; and the plaintiffs who have come of age ask for a partition of the land and a sale of it, on the ground that it cannot be divided in kind without injury to all. The guardian demurs to the amended bill on the same ground—HELD: The court cannot decree a partition and sale of the land on this bill; and therefore it will be treated as if this part of the bill was not in it; and the demurrer was properly overruled.

III. Pending the suit all the plaintiffs go off to their relations, in the state of Illinois, and one of these qualifies in that state as guardians of the infants; and they then amend their bill, stating these facts and filing a copy of the proceedings in the Illinois court with a copy of the guardian's bond, and asking that their property may be turned over to their Illinois guardian. The account of the guardian having been settled, showing the amount due to each of his wards, the cause came on to be heard, when the court made a decree removing the first guardian, and that he should pay over to the Illinois guardian the amounts severally reported be due to his wards—HELD:

113 *1. **Guardian and Ward—Removal of Guardian.**—Under the large discretion vested in the courts in the appointment and removal of guardians, and the circumstances of this case as developed by the evidence, the court did not err in removing the guardian.

2. **Same—Statute.**—It was error to decree the payment of the money of the wards to the Illinois guardian, without proceeding in the mode prescribed by the statute. Code of 1873, ch. 125, § 5.

3. **Same—Same.**—The Illinois guardian may file his petition in this cause for the removal of personal property of his wards, and the proceedings prescribed by said statute may be had therein.

4. **Same—Same—Partition of Infants' Land.**—The sale or partiti n of the infants' land cannot be made in this case; but the proceeding to effect this object must be as prescribed by the statute. Code of 1873, ch. 124, §§ 2 to 8.

IV. **Same—Accounting—Interest.**†—A guardian who receives the money of his wards and does not invest it, but retains it in his own hands, is to be charged interest thereon from the date of its receipt, and not from the end of the thirty days allowed by the statute to the guardian for making investments.

V. **Same—Same—Same—Guardian's Own Bond.**—A guardian receiving from the administrator of the father of his wards, his own bond bearing twelve *per cent.* interest, as a part of his ward's estate, and not investing the same, is to be charged the same rate of interest upon it to the termination of his guardianship.

VI. **Same—Same—Same.**—In the stating of a guardian's account, his commissions on the money received by him should be credited at the time of the receipt of the money, and interest only charged on the balance.

This case was argued at Wytheville and decided at Staunton.

In October, 1871, James H. Harkrader, of the county of Wythe, died intestate, leaving seven infant children, the eldest of which, Frances E., was non compos. His wife had died a year or two before him. He was an industrious and successful farmer, owning two small tracts of land near to each 114 other, on one of which he *lived. He had kept his children with him, and expressed a strong wish that they should be kept together B. D. Harkrader, the brother of the deceased, qualified as his administrator, and Dr. Aaron Snavely qualified as guardian of the children, and committee of Frances. The administrator sold the personal property; and there being very few debts, he paid these, and transferred the bonds taken at the sale made by him, as well as bonds held by his intestate at his death, and some money, nearly all of it in specie, to the guardian; the whole amounting to near $5,000.

Dr. Snavely employed B. D. Harkrader to live on the farm and take care of the children. He remained there about a year, and when he removed to Illinois, the children continued to live on the farm under the care of a young woman who had lived in their father's family for a year or two before the death of their mother, and had continued to live with them. Dr. Snavely cultivated the land on his own account; and on the settlement of his accounts before the commissioner, he was charged for the rent at the rate of $300 for the first year, and he was allowed for the board of the wards at the rate of four dollars a month for each of them. This ac-

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*Equity Pleading—Multifariousness.—In Jordan v. Liggan, 95 Va. 619, the court discusses at some length the plea of multifariousness, citing the principal case and Yates v. Law, 86 Va. 123; Belton v. Apperson, 26 Gratt. 207; School Board v. Farish, 92 Va. 160; Gains v. Chew, 2 Howard 619. See also, Barton's Ch. Pr. (2d Ed.) 270, 272; U. S. Blowpipe Co. v. Spencer, 40 W. Va. 698, 21 S. E. 769.

†Guardian's Accounts.—For form of guardian's account and manner of charging interest, etc., see 1 Min. Inst. (4th Ed.) 464, 476, 480, 486, 500; Barton's Ch. Pr. (2d Ed.) 747, 750, 759.

See Snavely v. Harkrader, 30 Gratt. 487, for sequel of principal case.

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count came down to January, 1873, and included no charge to the guardian for interest on the bonds or money turned over to him. The money and some of the bonds were received in January, 1872, and the others in October and November of the same year. Among the first was Dr. Snavely's own note, which with interest at twelve *per cent.* amounted to $224, and among the last was his note for $1,416.75, for articles bought at the sale, principally of furniture and other articles about the premises, and left there for the use of the family.

In August, 1874, the seven children of James H. Harkrader, all of them in-
115 fants but Frances E., who was *non compos, by their uncle and next friend, Henry E. Harkrader, instituted a suit in equity against Dr. Snavely, their guardian, and his sureties. In their bill they seek to surcharge and falsify the account settled by the guardian. Among other objections to the account is one to the charge for board. They say they were required to work on the farm for their guardian, and he certainly was not entitled to charge more than the actual cost of their keeping; and that they should be allowed to set off against any such charges what their services were reasonably worth. They also objected to the rent of $300. They say the rent was fixed by men of his own selection, and that the valuation was made under the impression of these valuers that the guardian would not charge board for his wards. There are other objections to charges for small sums, which it is unnecessary to mention. They pray that the account of the guardian may be settled, that he may be charged a fair rental value of the lands; that in view of the gross mismanagement of their estate and care of the wards, the guardian may be removed, and that their uncle, H. E. Harkrader, might be substituted as their guardian.

The bill states that Charles D., one of the children, had been taken my their said uncle to his home in Illinois, with the consent of Dr. Snavely, and that Robert C., another of them, had gone to Illinois to his said uncle, who had duly qualified as their guardian. And they unite with their plaintiff, Frances E., in asking for a sale of the real estate for a partition, since the lands are incapable of partition in kind, and they believe that it will be greatly to the interest of all of them that the land should be sold.

Snavely demurred to the bill, and also answered. He denies that he ever required his wards to work upon the land; and he says
116 that when the boys were not at school *he gave them regular wages for labor they did perform for him. He says that in considering the estate, instead of renting out the land to the highest bidder, with the great deterioration of value which would follow that course, he thought it better to keep the land himself, give it proper attention and pay for it a reasonable rental, as he did; that the rent charged to him was its full value, and the property had been kept up better than when he received it; and he insists that the persons who fixed the rental were good judges of the value of said land; that he allowed $350 the second year; that the reason why his wards were brought in debt to him the first year was, that the personal property was sold on twelve months' credit, and no interest came to his hands during that year. He replies to the specific charges made by the bill as to items in the account. He insists that this uncle and next friend is a very unfit person to be the guardian of these children; and that the lands are capable of easy partition, and a sale is neither necessary or proper.

An immense amount of testimony was taken by both parties, and of course it was contradictory and differed widely as to a fair rent for the land. It is but just to Dr. Snavely to say, that every witness who spoke of him, spoke highly of him as a man of integrity, and there was no question but that he, and certainly he and his sureties, were amply responsible for all the estate in his hands. It appeared that he did not invest all the personal fund in his hands, including the amount he himself owed to James Harkrader at his death, and his purchases at the sale made by the administrator, but retained it as a borrower.

The cause came on to be heard on the 24th of December, 1874, when the court overruled the demurrer and directed a commissioner to take an account of the
117 guardianship *of the defendant, giving him instructions as to the mode of charging the guardian for the moneys received by him. And as to the real estate, it was directed that if, from the evidence, the commissioner could estimate the profits derived by the guardian from the real estate of his wards, above expenses and permanent improvements, to so charge him; and if not with the full rental value thereof to be derived from the evidence. And the court being of opinion that the guardian was entitled to demand reasonable labor of his wards and to charge them for board, directed the commissioner to so conform his account. "And the court being further of opinion that the errors of the account have not been intentionally made by the guardian, and that cause has not been shown, doth decline to remove him."

In February, 1875, Commissioner English returned his report, bringing down the guardian's account to January 1st, 1875. To this report both plaintiffs and defendant excepted. The plaintiffs, among others things, excepted: 1st. Because it did not charge the guardian annually with $200 for excess of his estimated profits from the use of his wards' lands beyond his expenses on their account. And they insisted the evidence would enable him to make the estimate. And 2d. Because in every case of receipt by the guardian the commissioner allows him thirty days for investing, and during this thirty days charges no interest against him. And they insisted that such a rule applies only where the fiduciary shows he has made an investment, and never applies when he leaves it to be understood that he has used the money himself.

The defendant excepted: 1st. Because he had been allowed but four dollars a month

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for the board of each of his wards. 2d. Because the guardian, being entitled to five per cent. on receipts of money of his
118 wards, when *the same came into his hands, the commissioner does not deduct guardian's commissioners as of the date of receipts of funds, but charges him interest on the whole after thirty days from the date of receipts to the end of the year and then deducts commissions. 3d. Commissioner charges guardian $500 a year rent of wards' lands. This is more than the average estimate of plaintiffs' witnesses, over $200 a year more than the average estimate of defendant's witnesses, and more than $100 per year over the average estimate of both together; the rent charged being about ten per cent. on the assessed value of the land. There were other exceptions by both parties which need not be stated.

The cause came on to be heard on the 22d of December, 1875, when the court sustained the second exception above stated of the plaintiff's, and overruled all others, and sustained the second and third exceptions above stated, of the defendant, and overruled the first. And the report was recommitted, with directions to reform the same accordingly, and to fix the annual rent of the lands at $400. And in January, 1876, the commissioner returned his report reformed, as directed by the decree; and to this report there was no exception.

It appears that after decree made in the cause in December, 1874, in which it was held that the guardian should account for the profits derived from the cultivation of the land, if such an account could be taken, the guardian employed a manager and cultivated the land for his wards, keeping an account of expenses, and in October, 1875, he rented out the land at public out-cry. He submitted these accounts to C. B. Thomas, the commissioner of accounts for the county, who returned his report to the county court in June, 1876. This account embraced the transactions for the year 1875, and
119 made *the expenditures of the year, for each ward, considerably more than the profits.

The plaintiffs excepted to this report on the ground that the guardian had been a renter of the land himself from the time he took possession of the estate as guardian in September, 1871, his rent commencing in October, and he had been held by the decree of December, 1874, accountable as such lessee, and having held over after the 1st of October, a new year had commenced and he had no right, to the prejudice of the plaintiffs, to change the mode of holding the land on the 1st of January following.

In August, 1876, the judge of the county court being counsel for the plaintiffs, and the commissioner counsel for the defendant, by consent of parties the said settlement was removed to the circuit court, to be considered as a part of the cause pending in that court.

On the 23d of September, 1876, the cause came on again to be heard, when the court confirmed the recommitted report of Commissioner English, sustained the exceptions of the plaintiffs to the report of Commissioner Thomas and committed that report to Commissioner English, with directions to restate the same, in conformity with the instructions under which his own report above affirmed was made, charging the guardian the same rent for the lands, whilst he was not receiving rent from others, as was charged in the report above confirmed. And it was further ordered that Aaron Snavely, guardian and committee as aforesaid, do, within thirty days, file in the clerk's office, among the papers in this cause, to be used before the commissioner in retaking said account, a statement in writing, under oath, showing in detail what several investments he has made of the moneys of the plaintiffs which have come to his hands, in what several sums, at what several
120 dates, at *what several rates of interest, and on what several securities. And since it appears that the plaintiff, Robert C. Harkrader, has attained full age since the last order in this cause, and has given H. E. Harkrader, the next friend in this cause, a power of attorney to demand and receive from said Snavely any moneys due from said Snavely to said Robert, and it also appears that said H. E. Harkrader has duly qualified as the guardian of the plaintiff, Charles D. Harkrader, in the courts of the commonwealth of Illinois (where the said Charles has been residing since this suit commenced), and has filed a certified copy of the bond there taken of him as guardian, it is further * * decreed that said Snavely pay over to the said H. E. Harkrader such several sums of money as are ascertained by Commissioner English's report, above confirmed, to be due from him to said Robert and Charles respectively; and so soon as the report hereby recommitted to said commissioner is confirmed, to pay over to said H. E. Harkrader such further sums as by said report may appear to be due to said Robert and Charles respectively, said several payments to be made to said H. E. Harkader in his character as attorney for said Robert and Illinois guardian of said Charles respectively. And all other questions were reserved.

In September, 1875, all of the plaintiffs who were then in Virginia went off to Illinois; and H. E. Harkrader was there appointed the guardian of the infants, and conservator of Frances; and executed a bond in the penalty of $14,000 as such guardian, with security satisfactory to the court there.

In November, 1876, the plaintiffs, the infants, by their guardian and next friend, H. E. Harkrader, and Frances by the same next friend, filed their amended bill in the cause.

They state that finding their condition
121 with their *guardian beyond adequate remedy otherwise, even by the aid of this court, they have quitted him, and repaired of their own motion to their friends in Illinois, and there have since continued and now are resident; and that H. E. Harkrader had qualified as the guardian of the infant plaintiffs. They charge that Snavely instead of waiting to give the plaintiffs the option provided by the decree, of taking an account of the profits or a rent of the

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land, has gone out of this court where his accounts were pending, to settle his account in his own way, and so as to charge his wards with a large pretended loss by the report of the county commissioner of accounts, who is at the same time his counsel in this cause. They charge that the conduct of said Snavely evinces such a state of mind towards the plaintiffs, and such incompetency in the management of their lands as to unfit him to be their guardian, and they ask for his removal, and that their property may be turned over to their said uncle and next friend.

Robert C. Harkrader, who was of age, Charles D. Harkrader, who had been taken to Illinois by H. E. Harkrader in 1874, probably with the consent of Dr. Snavely, and for whom H. E. Harkrader had been appointed guardian in that state, and Frances E., further show to the court that as they are advised, they are entitled to a partition of said lands, if the same can be conveniently made, and possession of their shares of the same, or in default of such partition and in case none of those interested would be injured thereby, to a sale of the entire lands and distribution of the proceeds; and that a partition of said lands cannot be conveniently made, whilst a sale will be in all probability highly advantageous to all of them. They therefore pray for such sale, and that their estate may be placed in a condition to be transferred to the state of Illi-
122 nois, to which *they have already gone; and for general relief. They file with their amended bill the proceedings in the Illinois court on the appointment of H. E. Harkrader, the guardian of the infants, and a copy of his bond.

Snavely demurred to, and answered the bill. He says it is true that the plaintiffs are now in the state of Illinois; but it is not true they repaired thither of their own motion; but their removal was accomplished through the fraud and contrivance of these children's next friend, Henry E. Harkrader. He says there are no facts developed in the cause since the decree of the court refusing to remove him as guardian, which would justify the court in reversing said decree, and appointing H. E. Harkrader. On the contrary he thinks that the conduct of said Harkrader, as it developes itself from day to day, only the more shows his unfitness for the position.

With reference to the settlement of his account before Commissioner Thomas, he says he acted in perfect good faith and in accordance with the construction placed upon said decree by his counsel. That he did not continue to occupy the land, but as soon after said decree as the crops which were upon the land could be gathered, he had the land rented after due notice to the highest bidder; and the accounts he settled with Thomas, he was advised he was compelled to make. as his construction of the decree referred to only embraced settlements formerly made; 'he period at which he made his annual ts had passed, and the period was ap- when limitation would bar his compensation unless settlement was made without a decree directing the commissioner of the court to make such settlement. This was the whole of his offending, if offending it be, and was done by him under the advice of counsel; and he is at a loss to understand in what way he has or could have gained an advantage. He says
123 Robert C. *Harkrader is entitled to have his share of the realty laid off to him, as he has attained his majority; and that the same can be done, as in shown by the evidence in the cause, in kind as to the interest of Frances E. Harkrader, from whom he is committee. He submits the question of a sale of the land to the consideration of the court.

Snavely made the report directed by the decree as to his investment of the money of the wards that came to his hands. From this report it appears that all the bonds turned over to him had been collected, except perhaps one for $48, and that he retained the money in his hands generally. In explanation, he says: That at the time these funds came into his hands there was much doubt and uncertainty in reference to the exemption allowed to debtors under the homestead and bankrupt laws, and that he felt there was great risk in loaning the money so as to have it in the hands of reliable persons; and further, that he believed that all was required of him was to make his fiduciary settlements promptly at the end of each current year, and to pay over to his said wards as they severally became of age or married the several amounts found due them with compound interest, which he is striving honestly and faithfully to do, and for the accomplishment of which he has been maturing his plans.

In December, 1876, Commissioner English returned his report. He brought down the account to the 1st of January, 1876, charging the guardian with the same rent for the land and disallowed his charges for carrying on the working of the farm. And the defendant excepted to the report; insisting that after the decree of December, 1874, in which it was held that the guardian could not occupy the wards' land for himself at a rent, he had from January 1st, 1875, up to the time he rented the land at public auction in September, 1875, kept a particular
124 *and itemized account of his receipts and expenditures on account of his working his wards' lands, using and working the same for them, which he maintains it was lawful and proper he should have done; and therefore that the account for the year 1875 should have been stated on the principle upon which it was stated by the commissioner of accounts.

The cause came on again to be heard on the 21st of December, 1876, when the court overruled the exception of the defendant Snavely to the commissioner's report, and decreed that the said Snavely be removed from his office of guardian of the infant plaintiffs, and from that of committee of Frances E. Harkrader, and that he pay over to H. E. Harkrader, attorney in fact of Robert C. Harkrader and foreign guardian

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of the infant plaintiffs, and conservator of Frances E. Harkrader, the several sums respectively found due to them by the said report of Commissioner English, and all and any further sum which may be found due from him upon the settlement of his fiduciary accounts up to the date of this decree; and he is hereby directed at once to make such settlement before Commissioner English, who will report his proceedings to court. And the said H. E. Harkrader has leave to serve his fieri facias against the said defendants for the amounts thus decreed him.

And the court being further of opinion that the lands belonging to the plaintiffs are impartible in kind, without loss and disadvantage, and that it is to their interest to sell the real estate, doth * * decree that the said real estate be sold; and commissioners named were directed to sell the same at public auction, &c., &c. And thereupon Snavely applied to a judge of this court for an appeal; which was allowed.

Crockett & Blair and C. B. Thomas, for the appellant.

125 *W. H. Bolling, for the appellees.

Christian, J., delivered the opinion of the court.

The first question we have to determine in this case arises upon a demurrer filed by the defendant Snavely, both to the original and amended bills.

The ground of demurrer asserted is, that the original bill was multifarious, and that the same objection applies to the amended bill. If the demurrer be sustained as to either it must be sustained as to both.

The bill was filed by the children of Jas. H. Harkrader, all of whom were infants, (except one, who was of age, Frances E. Harkrader, but she being non compos mentis,) by their next friend, against the appellant Snavely, as guardian of the infants and committee of said Frances. The object of the bill seems to be two-fold: First, to surcharge and falsify the ex parte account of the guardian already settled, and for cause alleged in the bill to have him removed from his guardianship; and, second, to have a sale made of the wards' real estate. It is insisted that the bill thus seeking two distinct and independent objects, wholly disconnected with each other, is multifarious. According to Lord Cottenham (and in this he has been followed by courts and text-writers), it is utterly impossible, upon the authorities, to lay down any rule or abstract proposition as to what constitutes multifariousness, which can be made universally applicable. The cases upon the subject are extremely various, and the courts in deciding them seem to have considered what was convenient in particular cases rather than to have attempted to lay down an absolute rule. The only way of reconciling the authorites on the subject, is by adverting to the fact that although the books speak generally of demurrers for multifarious-

126 ness, yet in truth such *demurrers may be divided in two distinct kinds. Frequently the objection raised, though termed multifariousness, is in fact more properly misjoinder; that is to say, the cases or claims united in the bill are of so different a character, that the court will not permit them to be united in one record. It may be that the plaintiffs and defendants are parties to the whole of the transactions which form the subject of the suit, and nevertheless those transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct records. But what is more familiarly understood by the term multifariousness, as applied to a bill, is where a party is able to say he is brought as a defendant upon a record with a large portion of which and of a case made by which he has no connection whatever. 1 Dan. Ch. Pract., 4th ed. 334-335, and cases cited in note.

Now, according to these principles thus declared, the bill in this case would be undoubtedly multifarious, if each of the causes of action as stated was sufficient to sustain the bill. The bill certainly contains two distinct and independent alleged grounds of suit: one for surcharging and falsifying the guardian's ex parte settled accounts, and for his removal, for causes alleged; and the other for the sale of the infants' real estate. If each of these are sufficient to sustain the bill, it is multifarious. But if upon the statements of the bill, each cannot stand alone; if the relief sought upon one ground, distinct and independent of the other, is such that a court of equity cannot grant, either for want of jurisdiction, or because of the form in which it is sought, this latter will be treated as a nullity; and the court may proceed to act upon that ground of suit stated in the bill which is well stated. In such a case the bill will not be declared multifarious, but the court will treat

127 the bill as *if it did not contain the allegations setting up the second ground of relief, because by itself no such case could be maintained. This exception to the general rule as to multifariousness is well established, and is thus laid down in Story's Equity Pleadings: "And to support the objection of multifariousness, because the bill contains different causes of suit against the same person, two things must concur: first, the different grounds of suit must be wholly distinct; secondly, each ground must be sufficient as stated in the bill." Story's Eq. Pl., 8th ed., p. 267-8, §§ 275-6, and cases cited in note.

The case before us, therefore, comes within the execption above stated, rather than within the general rules referred to. For while the object of the bill is two-fold, and the grounds of relief sought are separate and independent, yet the second ground as stated in the bill, to-wit: that which seeks a sale of the infants' lands, must be treated as a nullity, because it does not present such a case as a court of equity can entertain. If, upon the allegations of the bill in the second ground of relief stated, the bill be taken as one for the sale of the wards' real estate, it is plainly defective. In such a case the bill must be filed by the guardian, and be verified by his oath. The infant must be made defendant by guardian ad litem, and all who would be his heirs, if he were deceased, must also be defendants. The guardian ad litem, as well

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as infants over fourteen years, must answer the bill on oath, and no deposition can be read in such a suit, unless taken in the presence of the guardian ad litem, or on interrogatories agreed on by him. None of these requisites of the statute are complied with.

So, too, if the bill be treated as one for partition, it is equally defective, for here the infants are all made plaintiffs and the guardian defendant. With such a bill the guardian has no interest or connection what-
128 ever, and *should not be made a party, either plaintiff or defendant. So that it is clear that in considering the demurrer to the bill for multifariousness, the court will treat as a nullity so much of said bill as seeks for a sale or partition of the wards' land; and so treating it, the court must pronounce the bill as not multifarious.

The court is therefore of opinion that there is no error in the decree of the court below in overruling the demurrer to the plaintiffs' bill, both original and amended.

The court is further of opinion, that there is no error in the decree of the said circuit court removing the guardian. The court does not deem it necessary to comment on or consider in detail, the voluminous evidence taken on this subject, and covering many pages in the printed record before us, It is sufficient to say that after a careful examination of this mass of testimony, the court is satisfied that the court below, in the exercise of that large discretion which must, of necessity, be vested in that court, (vide Reynolds *v.* Zink, 27 Gratt. 29), was fully justified in removing the guardian. He had received about $5,000 of his wards' money; not a dollar of which he had invested, but used it himself as a borrower of the fund, and offsetting the interest pro tanto by charges for board of his wards, at the same time receiving valuable services from some of them as laborers for himself. He rented himself the farm (a valuable and productive one) left the wards by their father, not at public auction, but at a rental fixed by his friends of his own selection. He kept no account of the profits of the farm, but received them all himself, keeping the children on the farm, charging them board and allowing no compensation for their services, of which he received all the benefit.

Under these circumstances, and upon other grounds disclosed by the record, we are
129 of opinion that the court *below did not abuse the discretion vested in it by law in removing the guardian. Especially in this case would this court be slow to reverse the court below, because it appears that at the time the decree was entered for the removal of the guardian, all the wards (one of whom had become of age), had left the guardian and gone to live with their uncle in the state of Illinois, who in that state had duly qualified as the guardian of those who were still infants. It is difficult to conceive why, under all the circumstances, the appellant should desire still to retain his office as guardian of wards who are now residents of another state, and who are now the wards of another guardian, unless, indeed, upon the ground that he shall receive some further profit by still holding his wards' property. Upon the whole evidence the court is of opinion that there is no error in the decree removing the appellant from his office of guardian, and that in this respect the said decree be affirmed.

The court is further of opinion that there is no error in the decree of the said circuit court in fixing the annual rent of the wards' land at $400, as ascertained by Commissioner English's report and depositions therewith returned. This rental value was fixed by taking the average value fixed by a number of witnesses. This is a fair and legal mode, and even if not precisely accurate, will not be disturbed by the appellate court. The same may be said as to the amounts fixed as a reasonable board for the wards, as ascertained by said commissioner's report. The court is therefore of opinion that the decree of the circuit court overruling the appellant's exceptions to Commissioner English's report is not erroneous, and that the same, in this respect, be affirmed.

But the court is further of opinion that the decree of the circuit court directing a sale of the wards' real estate under the bill in this case is erroneous. It is no doubt,
130 as *shown by the record, to the interest of the wards that their land shall be sold; but this can only be done upon proper proceedings under the statute providing for the sale of real estate of infants, or upon a proper bill for partition and sale for that purpose, and cannot be done under the bill and proceedings in this case.

The court is further of opinion that so much of said decree as directs the appellant to pay over the amounts found due by Commissioner English's report, to the foreign guardian, is erroneous. Such payment can only be made in accordance with the fifth section, chapter 125, Code 1873. That section provides as follows:

"No such order" (i. e., order referred to in the third and fourth preceding sections, referring to transfer of property of infant or insane person) "shall be made until notice of the application shall have been published once a week for four successive weeks in a newspaper, nor until it shall be shown by authentic documentary evidence that such foreign guardian, or committee, has, where he qualified, given bond with surety sufficient to insure his accountability for the whole amount of the ward's or insane person's estate in his hands, or which will probably be received by him as such guardian or committee, nor until the court shall be satisfied that the removal of such money or property from this state will not impair the rights, or be prejudicial to the interests, either of the ward or insane person or of any other person."

These provisions of the statute are mandatory, and must be complied with before any money or other personal property belonging to a non-resident infant can be paid over to a foreign guardian.

The proper proceeding in this case, would be the filing of a petition by the foreign guardian, and the publication of notice of

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such petition or application "once
131 a *week for four successive weeks in a newspaper," as required by the statute. These provisions of the statute not having been complied with, so much of said decree of the circuit court as directs the payment of money due the wards to the foreign guardian, without his compliance with the aforesaid provisions of the statute, is erroneous, and must be reversed.

The court is therefore of opinion that so much of the said decree of the circuit court of Wythe as is not in conformity with the principles herein declared, must be reversed, and in all other respects that the same be affirmed.

The decree was as follows:

This cause, which is pending in this court at its place of session at Wytheville, having been fully heard, but not determined at said place of session, this day came here the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the decree of the said circuit court in overruling the demurrer filed by the appellant to the original and amended bills of the appellees; nor is there any error in said decree removing the appellant from his office of guardian of the infant children of J. H. Harkrader, deceased, and of committee of Frances E. Harkrader; nor is there any error in said decree in overruling exceptions of appellant to commissioner English's report, and confirming said report with respect to the amounts therein charged against said appellant for rent of the land, and credited to him for board of his said wards and the said Frances E. Harkrader. It is therefore decreed and
132 ordered that the said decree *of said circuit court of Wythe county, in all these respects and to this extent be affirmed. But the court is further of opinion, for reasons stated in writing and filed with the record, that so much of said decree as directs a sale of the infants' real estate under the bills and proceedings in this cause, and that so much of said decree as directs the appellant to pay over to the foreign guardian, H. E. Harkrader, the sums respectively found due to the appellees by the said report of Commissioner English, is erroneous. It is therefore decreed and ordered that the said decree of said circuit court be in these respects reversed and annulled, but in all other respects be affirmed; and the appellees being the parties who substantially prevailed in this court, it is decreed and ordered that the said appellees recover of the appellant their costs by them expended in their defence of this appeal and supersedeas here. And this court now proceeding to enter such decree as the said circuit court ought to have entered, it is decreed and ordered that so much of said original and amended bills as seek for a sale of infant real estate be dismissed. But liberty is reserved to them to file their bill in said court, either by the guardian of the infant defendants in the mode prescribed by the statute for the sale of infants' real estate, or by the adult appellees for partition and sale of the subject for that purpose. And leave is also granted to the appellee, H. E. Harkrader, the foreign guardian, to file his petition in said court, after due advertisement as prescribed by the statute, and upon such petition so filed, the said circuit court shall decree to be paid over to him the several amounts respectively due from the former guardian, Snavely (the appellant), as already ascertained by said report of Commissioner English. And it is further decreed and ordered that said circuit court shall, through one of its commissioners, ascertain what proportion of the costs was incurred in
133 *taking evidence in reference to the sale of said infants' real estate, and of evidence certified from the state of Illinois as to the qualification of said foreign guardian, and the cost of printing the same; and such costs, so ascertained, shall be, upon a final decree, decreed against the said H. E. Harkrader. All of which is ordered to be certified to said circuit court.

It is further ordered, that this decree be entered on the order book here, and forthwith certified to the clerk of the court at its place of session, where this cause is pending as aforesaid, who shall enter the same on his order book, and certify it to the said circuit court of Wythe county.

Decree reversed, but with costs to the appellees as the party substantially prevailing.

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134 *Forrer v. Forrer's Ex'ors & als.

September Term, 1877, Staunton.

1. **Partnership—Compensation for Services—Agreement.***—The law is well settled that one partner is not entitled to claim compensation for his services in the business, without a special contract for such compensation. And although one partner attended almost exclusively to a very large partnership business, from 1844 to 1865, there having been no agreement for compensation to him, he is not, under the circumstances, entitled to compensation.

2. **Same — Surviving Partner — Fiduciary Relationship.**†—Partners buy a tract of land

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***Partnership—Compensation for Services—Agreement.**—The rule laid down in the principal case, negativing the right of one partner to claim compensation for his services in the business without a special contract, is affirmed in Frazier v. Frazier, 77 Va. 793, citing the principal case, and Patton v. Calhoun, 4 Gratt. 138. See also, 3 Min. Inst. (2nd Ed.) 690, 699, 736; Roots v. Salt Co., 27 W. Va. 496; Taylor v. Dorr, 43 W. Va. 351, 27 S. E. 317.

†**Same—Surviving Partner — Fiduciary Relationship.**—The principal case is distinguished in the rule laid down in the second headnote in Va. Coal & Iron Co. v. Kelly, 93 Va. 336. See Pillow v. Improvement Co., 92 Va. 144, and Buchanan v. King, 22 Gratt. 414, for cases sustaining the principal case. See also, 3 Min. Inst. (2nd Ed.) 698; Cecil v. Clark, 44 W. Va. 682, 30 S. E. 224.

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for partnership purposes, and it is conveyed to them. After the death of one of them, it is ascertained that the title to one-third of the land is defective, and the surviving partner purchases this third interest and takes the conveyance to himself. He has purchased for the joint benefit of himself and the heirs of the deceased partner, and they are entitled to claim it upon paying their share of the expense of the purchase. This principle applies equally to joint tenants, tenants in common, co-partners and all others having a common title and interest.

This was a suit in equity in the circuit court of Augusta county, instituted in April, 1871, by the executors, devisees and legatees of Daniel Forrer, deceased, against Henry Forrer, for the settlement of an account of the partnership which had existed for many years between the brothers, Daniel and Henry Forrer. It appears that about the year 1841, the brothers purchased a property in the county of Page, called "The Shenandoah Iron Works," with between four and five hundred acres of land, and commenced the manufacture of iron. At this time they were worth about $16,000. Both of
135 them *lived at the works until 1844, when Daniel, who was married, purchased a farm in Augusta county and removed to it, and lived upon it until his death, which occurred in January, 1868. He seems to have taken no, or a very little, part in the management of the business of the partnership; though he occasionally visited the works, and seems, once or twice, to have assisted in hiring hands to work.

Henry Forrer, who was unmarried, lived at the works, and conducted the business. It appears that at sometimes the firm met with losses, and were reduced to great straits; but, on the whole, it was prosperous. Out of the profits of the business the quantity of land was increased to upwards of thirty thousand acres; two furnaces, three forges, two saw-mills, merchant mill, and excellent dwelling-house and a number of other houses were built; and in 1865, after the end of the late war, the property was sold for $240,000; but there was a large partnership debt of $80,000.

About the year 1859, the said Daniel and Henry Forrer purchased a tract of land in Augusta county, called "Elizabeth Furnace," and there carried on the manufacture of iron, Henry Forrer managing the business, and after the death of Daniel Forrer, his two sons and Henry Forrer carried on the business for a time.

In June, 1871, there was a decree for accounts, and in April, 1872, the commissioner returned his report. From the report it appeared that the parties agreed upon the items of the accounts except a claim set up by Henry Forrer for compensation for his attention to the business of the partnership during its active operations. As to this claim, it appears that there was no agreement on the subject between Daniel and Henry Forrer, nor does it appear that Henry Forrer ever preferred such claim to Daniel, or during his life. And it also ap-
136 peared that *the plaintiffs, before hearing of this claim, had released Henry Forrer from all claim by them for losses incurred in the business of the partnership.

After this suit had been instituted, the parties wishing to sell the Elizabeth Furnace property, one of the counsel for the plaintiffs examined the title, and discovered what appeared to be a defect in the title to two of the tracts which constituted a part of it. The owner of one of these for forty-five acres, on which the furnace stood, was soon discovered and his title purchased by the parties. The other, of one hundred and fifty acres, on which the iron ore was located, had been conveyed by a former owner to three brothers, Jameson, one of them named John. The heirs of the other two brothers conveyed the whole tract to Daniel and Henry Forrer, and their agent informed the Forrers at the time, as he no doubt believed, that John Jameson had died young and unmarried, and his brothers were his heirs.

As the counsel was not satisfied of the death of John Jameson, it was suggested that M. A. Miller should be employed to make enquiry on the subject, and he was employed by Henry Forrer to make the enquiry; and he having ascertained that John Jameson had married and died leaving several children, Henry Forrer employed Miller to hunt them up and purchase their interest. This Miller succeeded in doing after much travel; his expenses and the price paid these parties amounted to about $4,000, all of which was paid by Henry Forrer, and by his directions the conveyances were made to him.

When the plaintiffs ascertaind that the deeds from John Jameson's heirs were made to Henry Forrer, they filed an amended bill, in which they charged that it was upon the advice of their counsel and upon consultation among all the parties, that Miller
137 was employed to hunt *for and procure the conveyance of John Jameson's interest in this land; that though whilst this search was in progress, Henry Forrer was in frequent conferences with their counsel and themselves, he gave them no intimation that he was seeking to obtain a conveyance of the land to himself; and they insisted that as the land had been conveyed to Daniel and Henry Forrer, he could only purchase the interest of John Jameson's heirs for the purpose of quieting their title, and his purchase must enure to the benefit of both the partners; of course the expense attending the purchase to be borne by both parties.

Henry Forrer answered, averring that he had employed Miller on his own account, and paid all his expenses and the purchase money out of his own pocket, and insisting that there was nothing in the relation which he sustained to the plaintiffs to forbid him to purchase the property on his own account and take the conveyances to himself. He said that he did this that he might be able to put the plaintiffs on fair and just terms as to his compensation for the great portion of his life which he had devoted to the service of the partnership, and he was still willing to allow them to share the benefits of his pur-

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chase if they would do him justice in the matter of his services.

On the evidence it appeared that whilst Henry Forrer employed Miller and paid him, that the suggestion of employing him was made by the plaintiffs' counsel, and that the counsel and the plaintiffs supposed that he was employed on joint account; and although they had frequent conferences with Henry Forrer whilst the matter was in progress, he gave them no intimation that he was employing Miller on his own account.

The cause came on to be heard on the 18th of November, 1875, when the court held that the defendant, Henry Forrer, had no right to appropriate the interest in the 138 *tract of one hundred and fifty acres of which he had taken the deeds to himself, to his own exclusive use, but that he must be credited with the expenses and costs attending said purchase; and that he was not, under the circumstances of the case, entitled to compensation for his services to said firm of D. & H. Forrer. And adjusting the account by admitting this credit for the purchase of the land, it was decreed that Henry Forrer should pay to the executors of Daniel Forrer the sum of $18,157.27, with interest on $13,132.24, part thereof, from the 1st of June, 1873. And commissioners named were directed to sell the Elizabeth Furnace property, &c., on terms, &c. And thereupon Henry Forrer applied to a judge of this court for an appeal; which was allowed.

Sheffey & Bumbgardner, for the appellant.

George M. Cochran, for the appellees.

Staples, J. No rule of law is better settled than that one partner is not entitled to compensation for his services while employed in the partnership business, unless it be so agreed between the parties. The doctrine is thus laid down by a writer of acknowledged merit: "As it is the duty of each partner to devote himself to the interests of the concern, to exercise due diligence and skill for the promotion of the common benefit, it follows that he must do it without any reward or compensation, unless there is an express stipulation to that effect. And there is no difference in this respect, though the duties performed by the partners have been very unequal in value and amount." Collyer on Partnership, sec. 183. See also Strong on Partnership, sec. 182; Parsons on Partnership, page 130. In Franklin *v.* Robinson, 1 John. Ch. R. 157, Chancellor Kent said 139 he knew of no case *which entitles one partner to charge for his services except upon the ground of special agreement. In Philips *v.* Turner, 2 Dev. & Battle Eq. R., at page 123, it appeared that one of the partners had taken the almost entire and exclusive charge and superintendence of the business of the firm, and yet it was held that his claim for compensation could not be allowed. The numerous cases on this subject may be found in the works already referred to, and need not be here cited. See also Patton's ex'ors *v.* Calhoun's ex'ors, 4 Gratt. 138. The reasons for this rule, as stated by the commentators and judges, are, first, each partner in taking care of the joint property is in fact taking care of his own interest, and is but performing his own duties and obligations growing out of the partnership. These duties and obligations are supposed to enter into and constitute a part of the consideration for others to engage in the business with him. The partners are considered as meeting on a common ground, each engaging to do all he can do for the common good.

In the second place the law cannot undertake to measure and settle between the partners the relative value of their various and unequal services bestowed on the joint business; and for the obvious reason it is impossible to see how far the relative experience, skill, ability or even known character and reputation of each entered as ingredients in the adjustment of the terms of the partnership. If a partner is unwilling to perform very unequal service without reward, he ought to stipulate that it shall be allowed him. In the absence of such stipulation, it must be presumed he is willing to render the service without remuneration. Parties assuming this relation to each other are supposed to know the law and to intend to be governed by it, unless they agree to be bound by some other rule.

When the nature of the partnership is 140 of a *character to require the attention of all the partners, and one of them voluntarily withdraws himself from the business, refusing to give it any attention, throwing the entire burden upon his copartner, such misconduct might be good ground to put an end to the partnership; but it confers upon the active partner no right to compensation for services in the line of his duties and obligations. If one partner, because he is the sole manager of the concern, is thereby entitled to be paid, another partner simply contributing more than his share of skill and labor, must have equal claim to be compensated for the excess.

It is a mere question of degree. So soon as the courts undertake, upon a mere estimate of a partner's services, to award compensation in one case, they must do so in all cases where the skill and labor and diligence are unequally bestowed. This would be simply to abolish the rule of law, and to place the right to compensation not upon contract, but upon the principle of quantum meruit.

The learned counsel for the appellant has cited the case of Bradford *v.* Kimberly, 3 John. Ch. R., p. 431, in which it was held that where several joint owners of a cargo appoint two of the part owners their agents to receive and sell the cargo and distribute the proceeds, these latter are entitled under such special agency to a commission or compensation for their services as factors or agents, in the same manner as a stranger. The ground upon which this decision was based is, that this special agency was altogether distinct from their ordinary powers of part owners, and the persons so appointed were to be considered, for this purpose, as agents of the company. In such case a compensation is necessarily and equitably im-

plied in and by virtue of the special agreement. It is obvious that this principle
141 has no application where *there is no special agreement, and where the services performed by a partner are not distinct from, but directly within the line of his ordinary duties. It will be found, upon examination, that the doctrine of nearly all the cases is, that compensation can only be allowed where there is an express agreement to that effect, or one necessarily to be implied from the conduct of the parties.

We are next to inquire whether the appellant, consistently with this rule of law, is entitled to compensation for the services rendered by him during the existence of the partnership between him and his brother Daniel Forrer. It is in proof, and indeed it is conceded, that there was no express contract to that effect; and it is equally clear that there is no fact or circumstance from which such a contract may be inferred. The appellant's claim rests solely upon the ground that he rendered very valuable services to the concern, without interruption, through a long series of years, while his co-partner, Daniel Forrer, rendered none. The testimony very clearly establishes that the latter, in the year 1844, left the "Shenandoah Iron Works," and removed to his farm in Augusta county, and that the only assistance he rendered was occasionally to give some attention to the financial business of the concern, and to aid in the beginning of each year in hiring the laborers needed on the works. On the other hand, it is but just to say that the appellant remained at the place of business, devoting himself with fidelity and energy to all his duties. By his efforts a large quantity of real estate was acquired, new furnaces and forges constructed, several new buildings erected, and the property greatly improved in value, and finally sold in 1865 at an unprecedented price. All this is conceded, and yet it does not tend in the slightest degree to prove an agreement for compensation, or even a fact from which an agreement may be implied. The same
142 *may be said of hundreds of partners all over the country, who have voluntarily devoted all their time, energy and skill to the common benefit without contract, and therefore without compensation.

When it is conceded that the partnership property was greatly improved by the appellant, it must be borne in mind also that very heavy losses were sustained during the period of his supervision and control. There were large losses by fire, and losses by the insolvency of those to whom he had given credit, to the amount of nearly one hundred thousand dollars. It may be that they were unavoidable: it is impossible to say. The appellant having in 1868 obtained a release from the appellee which would cover any liability on this score, these matters could not be investigated in the present case. It is in proof also, that at the close of the partnership in 1865, the liabilities of the concern amounted to more than eighty thousand dollars. It was only saved from utter bankruptcy by the extraordinary sale in 1865. If Daniel Forrer, under these circumstances, had been called on to agree that the appellant should have compensation, it is almost certain he would have refused it. He had no confidence in the business; he wished to sell the property and pay the debts; and only consented to a continuance of the partnership in deference to the wishes of the appellant. The result would have indicated his sagacity, but for the war, which enabled the appellant to pay off a large indebtedness in a depreciated currency, and indirectly paved the way for the sale of the property.

The appellant not only did not prefer any such claim as he now asserts, but it does not appear he ever intimated to his brother his purpose to do so during the existence of the partnership. Having charge of the books, he never, during all the various
143 years of his *supervision, put upon record any charge for his services, or even a line or word to that effect.

In 1868, after the death of Daniel Forrer, the appellant had a settlement with the appellees. In that settlement he admitted a liability to the estate of his brother of $62,295, on account of the partnership assets. As a condition of such admission on his part he required of the appellees a full acquittal and release of all claims or demands against him on account of his management of the iron works. If the appellant then believed he had a valid claim for compensation, it is natural to suppose he would have presented it as a set-off, in part at least, against this liability. If it was his intention to insist upon it, good faith required he should make it known while demanding the acquittance from the appellees. It seems, however, that he did not even mention the claim. Had he done so, had he then said he had an account of more than fifty thousand dollars, I think it is very clear he would never have gotten the release given him by the appellees. It was not until two years or more afterwards and five years after the dissolution of the partnership, that this claim was asserted. Under all these circumstances I think there is nothing in this case to take it out of the operation of the general rule which denies compensation to a partner for services unless under a special agreement.

The next question for our consideration grows out of the purchase made by the appellant from the heirs of John Jameson. Are the appellees entitled to the benefit of that purchase upon contributing their just share of the expense incured? The deed executed by the heirs of Mathew Jameson and James Jameson, on the 18th December, 1859, to the appellant and Daniel Forrer, was a conveyance of the entire tract of one hundred and fifty acres known as the "Ore Bank."
144 The grantors *no doubt imagined their title to be valid, as they conveyed with general warranty. The appellant and Daniel Forrer supposed they were purchasing the entire tract; they took possession of the whole, and held that possession continuously adversely, from the date of their purchase, in 1859, until after the institution of this suit. They were joint tenants of the entire tract, with a perfect title to two-thirds, and a defective

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but colorable title to the other third. What is the principle governing such a relation? Nothing is better settled than the rule in such cases. Whenever two or more persons having a community of interest hold an imperfect title and one of them buys in an outstanding title, such purchase will enure to the common benefit upon contribution made to repay the purchase money. This rule is based upon the community of interest in a common title, creating such a relation of trust and confidence between the parties that it would be inequitable to permit one of them to do anything to the prejudice of the other in reference to the common property. Bothwell *v.* Dewees, 2 Black, U. S. R. 613; Buchanan *v.* King's heirs, 22 Gratt. 414. This principle equally applies to joint tenants, tenants in common, co-partners and all others having a common title and interest.

The appellant, in the attempt to purchase the one-third held by the heirs of John Jameson, violated this rule of law, and he violated his duties and obligations to his co-tenants. So soon as the purchase was made it enured to their benefit, jointly with him, and no arrangement or contrivance of his could deprive them of the right, if they so elected, to participate in the acquisition.

It is very true if the appellant and Daniel Forrer had purchased and claimed but two-thirds of the land, the other third being in the heirs of John Jameson, the appellant might have acquired that third for his 145 own *exclusive benefit. The reason is plain. In such case there is no identity of interest as to the third; it is not common property, and of course involves none of the relations of trust and confidence growing out of a community of interest. That is not this case. As has been seen, the appellant and Daniel Forrer purchased and claimed title to the whole, and not a part of the tract, and neither of them could do any act to the prejudice of the other's title to the whole or any part of it.

If there was the shadow of a doubt as to the just application of the general rules of law in this case, that doubt will be removed by the facts connected with the appellant's purchase. The appellant heard of the defect in the title through the counsel of the appellees. They disclosed it to him only because he was jointly interested with others in the property. But for that interest he would never have known of the defect. And this knowledge, thus obtained, he has sought to use as a means of destroying the rights of his co-tenants, and of appropriating the joint property to his own individual use. When the question of the defect in the title was under consideration, the parties with their counsel had repeated consultations on the subject, the appellant being generally present. By the advice of appellees' counsel, it was finally determined to employ an agent to hunt for the heirs of John Jameson, and buy in their title. The agent was selected and sent upon his mission. After a long and laborious search he learned the names and residences of these heirs.

No sooner was this information obtained, than the appellant took the agent into his confidence, entered into a secret arrangement with him to buy in the title for the exclusive benefit of the appellant, and take the deeds in his name. All this was carefully concealed from the appellees and their counsel. The first intimation they 146 *had of the fact was derived from the deeds put on the record by the appellant. Such conduct cannot be justified in any forum of law or morals. It is utterly indefensible. The explanation given by the appellant of the reasons inducing him to take these deeds to himself, does not very much help the matter. But whatever may have been his motives, he can derive no sort of advantage from the purchase to the exclusion of his co-tenants. All that he can ask is, that they shall contribute their due proportion of the expense incurred by him.

Upon the whole, I think there is no error in the decree of the circuit court, and the same must be affirmed.

The other judges concurred in the opinion of Staples, J.

Decree affirmed.

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147 *Rudisill's Ex'or v. Rodes & Wife.

September Term, 1877, Staunton.

Wills—Revocation.*—Where a will which revoked a former will is destroyed by the testator *animo revocandi*, with intention that the former will shall be his will, but he does not re-execute it, or make a codicil reviving it, though he retains it uncancelled, it is not revived by the destruction of the last will.

John Rudisill, of the county of Nelson, died in 1874. He had made three wills in his lifetime, the last of which could not be found after his death, and he had, in fact, destroyed it with the intention that the second should be his will; but he did not re-execute it.

After his death this second will was propounded for probate in the county court of Nelson, by the nominated executor, when William H. Rodes and Mary Susan his wife, the said Mary Susan being a daughter of John Rudisill, made themselves parties, and opposed the probate of the paper as the will of Rudisill. The only ground on which the objection to the probate of the paper was placed, was that the last will having expressly revoked all former wills, this will was thereby revoked, and could only be renewed by a re-execution of it.

The county court refused to admit the paper to probate; and upon appeal by the propounder of the will of the circuit court of Nelson, that court affirmed the judgment of the county court. And thereupon the propounder of the will applied to a judge of this court for a supersedeas; which was awarded.

148 *Fitzpatrick and Spiece, for the appellant.

Whitehead, for the appellees.

***Wills—Revocation.**—See 3 Min. Inst. (2nd Ed.) 552; Va. Code 1887, sec. 2519.

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Burks J., delivered the opinion of the court.

John Rudisill, of the county of Nelson, died in the month of June, 1874, having in his lifetime made and published successively three wills, dated, the first on the 22d day of January, 1868; the second on the 14th day of February, 1871, and the third and last in the month of April or May, 1872. The second contained a clause revoking all former wills, and the third contained a similar clause. The testator destroyed the last will animo revocandi, leaving the other two uncancelled; the single question is, whether by the destruction of the third and last will, the second was revived.

The solution of this question depends upon the construction of section 9, chapter 118, Code of 1873, which is in these words:

"No will or codicil, or any part thereof, which shall be in any manner revoked, shall, after being revoked, be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and then only to the extent to which an intention to revive the same is shown."

This section was first enacted in this state at the general revisal of the laws in the year 1849, and is almost a literal copy of the first clause of the English Statutes of Wills, 7 Will. IV and 1 Vic. ch. 26 (July 3, 1837), which may be found in 2 Jarman on Wills (1st Amer. ed.), 751. Indeed, nearly the whole of this chapter, of which this section is a part, as reported by the revisors, was adopted from the English statute for the double reason, as they say, that they approved its pro-
149 visions, *and that the adoption here of those provisions would give us the benefit of the English decisions upon them; decisions made by courts over which there generally preside men of ability and learning. Report of Revisors, p. 623.

Previous to the act 1 Vic. ch. 26, it was a vexed question in the English courts, whether by the destruction, animo revocandi, of a will containing a revocatory clause, a former will preserved uncancelled, was thereby revived. It seems to have been held generally by the common law courts, that in such a case it was a necessary conclusion of law, admitting of no proof to the contrary, that the former will was revived. This rule was deduced from the nature of the revoking instrument, which is itself revocable and never becomes final and absolute until the death of the testator; and it was considered that the effectual revocation of such instrument, restored the former will and left it to operate in like manner and with like effect as if the revoking will had never been executed. Goodright *v.* Glazier, 4 Burr. R. 2512; Burtinshaw *v.* Gilbert, 1 Cowp. R. 49; Bates *v.* Holman, 3 H. & M. 503, 525, 542; 1 Jarman on Wills, 123; 4 Kent's Com'rs, 531; 1 Redfield on Wills, 374, 375; 1 Tuck. Com'rs (Book 2), 295; 2 Minor's Ins., 931, 932.

On the other hand, in the ecclesiastical courts, the revival or restoration of the former will was made to depend on the intention of the testator, to be gathered from the facts and circumstances of each particular case, and parol evidence was admissible to show the intention. 1 Jarman on Wills, supra, and cases cited in notes on Lawson *v.* Morrison, 2 Amer. Lead. Cas. (5th ed.), 482, 518 to 523.

The effect of the rule in the law courts was to exclude arbitrarily all extrinsic evidence of intention upon the question of revival, and thus oftentimes to set up a
150 will *contrary to the intention of the testator; while the rule in the ecclesiastical courts threw the door wide open to the admission of such evidence, and suffered the intention of the testator to be determined by "the uncertain testimony of slippery memory."

It was the object of the English statute, by the 22d section, to abrogate both of these rules, which were attended with the mischiefs just indicated, and to establish in their stead a safer rule, by which the intention of the testator would be manifested with more certainty, and be less liable to be defeated by acts and circumstances of an equivocal character.

This section, from which, as before stated, section 9 of our statute was taken almost in totidem verbis, was construed by the prerogative court in the year 1843, and, therefore, before its adoption in this state. The case decided was, in its circumstances, almost identical with the one in judgment here.

A testatrix, after the act 1 Vic. ch. 26, duly executed a will, and, subsequently thereto, two other wills, in each of which was contained a clause revoking all former wills. She afterwards destroyed the two latter wills. It was held that the first will was not thereby revived, and that parol evidence was not admissible to show an intention to revive.

Sir Herbert Jenner Fust said: "I feel that I have no discretion to exercise in this case. There have undoubtedly been cases decided over and over again under the statute of frauds, holding that parol evidence was admissible to prove the revival of a once revoked instrument. It was this that led to the introduction of the 20th and 22d sections into the present Wills Act. It is admitted, in this case, that the testatrix did, subsequently to the will of January, make two other wills; that both were duly executed; and both
151 contained a clause expressly *revoking all former wills. Then, the first was revoked to all intents and purposes, and to have a re-operation, it must have been revived. Then, was it revived? The only mode by which it could be revived is that pointed out by the 22d section. That section is most express; there must be a re-execution. There are no other means of showing an intention to revive. Destruction of the revoking instrument is not sufficient; it is not a re-execution of the revoking will, according to the present act. I pronounce against the paper as a will." Major & Mundy *v.* Williams & Iles, 3 Curteis, 453. (7 Engl. Eccl. R. 453).

This is the only English case upon the construction of this section of the statute, which has been brought to our notice, and we find eminent law-writers concurring in the construction there given. 1 Jarman on Wills

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123; 4 Kent. Com. (5th ed.,) 533, note a; 1 Redfield on Wills (3d ed.,) 369-371; Id. 320-322, and notes; 2 Amer. Lead. Cas. (5th ed.), 522; 1 Lomax's ex'ors (2d ed.,) side p. 53, top 131; Id. top pp. 160-161; 2 Minor's Ins. (2d ed.,) 932.

We are not aware that this section (the 9th of our act) has ever been construed by this court. There is no case reported. But we find no difficulty at all in construing it. Its language is very plain, and taken in connection with the other sections of the act of which it is a part, its meaning can hardly be mistaken.

By section 4 it is declared how wills and codicils (see section 1) may be executed and attested; by sections 7 and 8, the "manner" in which they may be revoked; and by section 9, the only mode, in which, after being "in any manner revoked," they may be "revived," and that mode is by "re-execution, or by codicil."

The circuit court for the county of Nelson, affirming the judgment of the 152 county court of said county, held *that the paper writing offered for probate as the last will and testament of John Rudisill, deceased, bearing date on the 14th day of February, 1871, had been revoked by the subsequent will of said decedent, executed in April or May, 1872, and was not revived by the destruction, animo revocandi, of the last named will; and that, therefore, the said paper writing was not the true last will and testament of the said decedent, and that the motion to admit the same to probate as such last will and testament be overruled.

We are all of opinion, for the reasons stated, that there is no error in the said judgment of the said circuit court, and that the same should be affirmed.

Judgment affirmed.

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153 *Leake, Trustee v. Benson & als.

September Term, 1877, Staunton.

Absent, ANDERSON, J.

Conveyance from Husband to Wife—Wife's Separate Estate—Liability for Her Debts.*—By deed bearing date August 8, 1854, A in consideration of his affection for his wife M, and of his children born and to be born of his said wife M, conveyed to L all his property after payment of the debts he then owed—"In trust for the benefit of my wife and children aforesaid, giving, granting and conveying for my wife an estate for life, and at her death for my children an estate in fee simple, the whole of what belongs to me over and above my just debts being in trust conveyed to the aforesaid L." And he directed that none of the principal of the trust property should be expended during the life of his wife, unless L should think it necessary for the support of his wife and children. During A's life he executed bonds in which his wife joined, and after his death she gave her bonds or notes for debts contracted by her. Upon a bill by these creditors to subject the life estate of M in the trust property—HELD: M took a life estate in the property which may be subjected to satisfy the debts in which she joined, either as surety or principal.

By deed bearing date the 8th of August, 1854, William L. Anderson, of the county of Culpeper, in consideration of the natural affection he bore his wife, Martha J. Anderson, and his children born or to be born of his said wife, conveyed to Shelton F. Leake all his property after paying his debts then contracted, "in trust for the benefit of my wife and children aforesaid, conveying for my wife an estate for life, and at her death to my children an estate in fee simple;" "with the proviso, that no portion of the 154 principal of what is hereby *conveyed, shall be expended during the life of my wife, the aforesaid Martha J. Anderson, but the interest or income only, unless in the judgment of the aforesaid trustee, Shelton F. Leake, it may be necessary and proper for the support and comfort of my wife and children to use the principal; in which case, he, the aforesaid trustee, for that purpose, shall have power in his discretion to expend or invest, as he may deem best, the whole or any portion of the principal herein conveyed."

This deed was duly admitted to record in the clerk's office of the county court of Culpeper.

William L. Anderson was killed in the battle of Malvern hills, and his widow removed to Charlottesville, in Albemarle county.

During the lifetime of William L. Anderson, he and his family lived on a farm in the county of Culpeper, a part of the trust property, and his wife joined him in executing certain bonds and notes, some of them given for the hire of slaves to work on the farm, and others for articles furnished them. After his death the farm in Culpeper was

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***Conveyance for Use of Wife and Child—Effect.**—In Bain and Bro. v. Buff, 76 Va. 371, the principal case is cited as authority for the proposition that the words "for the sole and separate use of herself and child or children," &c., do not give any estate to the child or children but indicate the motive for the gift to the mother, citing also Wallace v. Dold, 3 Leigh 258; Stinson v. Day, 1 Rob. 439, and Penn v. Whitehead, 17 Gratt. 503. See also the following cases, citing the principal case, Atkinson v. McCormick, 76 Va. 800; Mauzy v. Mauzy, 79 Va. 537; Richardson v. Seevers, 84 Va. 270; Stace v. Bumgardner, 89 Va. 421; Mosby v. Paul, 88 Va. 533; Seibel v. Rapp, 85 Va. 30; Walke v. Moore, 95 Va. 729; Waller v. Catlett, 83 Va. 200; Wilmoth v. Wilmoth, 34 W. Va. 433, 12 S. E. 731; Radford v. Carwile, 13 W. Va. 679.

Wife's Separate Estate—Intention to Charge.—In Garland v. Pamplin, 32 Gratt. 305, and *note*, the principal case is cited for the proposition that though the wife in order to charge her separate estate must *intend* to charge it, yet such intention is implied when she executes a note, bond or other instrument on the payment of money. See also, Miller v. Miller, 92 Va. 515, and as to her powers of charging it, see Price v. Planters' Nat. Bank, 92 Va. 468.

Same—Manner of Establishing.—For a discussion of the manner in which a wife's separate estate is established by conveyances from her husband, see Harshberger v. Alger, 31 Gratt. 52, and Garland v. Pamplin, 32 Gratt. 305. See also, 2 Min. Inst. (4th Ed.) 650.

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sold and the proceeds invested in a house and lot called Wertland, near Charlottesville, which was conveyed to Shelton F. Leake, trustee of Mrs. Anderson and her children, but without setting out any trusts in the deed.

Mrs. Anderson having contracted some debts in Charlottesville, for which she gave her notes, which were not paid, and some of the debts which had been contracted in the lifetime of her husband remaining due, these creditors brought actions at law against her, and recovered judgment; and executions upon them being returned "no effects," the said creditors—Henry Benson and others—instituted their suit in equity in the circuit court of Albemarle, to subject Mrs. 155 Anderson's interest *in the said trust property to satisfy their judgments, claiming that she had a life estate in the property.

An account of the debts and their priorities, and also of the trust property was ordered and taken. The debts amounted, principal and interest, up to the 15th of October, 1874, to $753.70; the only trust property was the house and lot called Wertland, valued at from $3,000 to $3,500, and its annual rent at $300.

The cause came on to be heard on the 14th of February, 1876, when the court confirmed the commissioner's report and held that Mrs. Anderson had a life estate in the property known as Wertland, and appointed commissioners to lease the same, either publicly or privately as to them might seem best, either by the month or the year, &c.; to collect the rents, and after paying the costs of the suit to deposit the residue in bank to the credit of the cause, &c., &c. From this decree Shelton F. Leake, the trustee, applied to a judge of this court for an appeal; which was allowed.

Leake, for the appellant.

Blakely, for the appellees.

Staples, J., delivered the opinion of the court.

The court is of opinion that the deed executed by William L. Anderson on the 8th of August, 1854, to Shelton F. Leake, trustee, vested in Mrs. Martha J. Anderson, the wife of the grantor, a life estate in the trust property, not jointly with the children of the grantor, but for the separate use and benefit of Mrs. Anderson. It was the intention of the grantor to give to his wife the trust property for her life, relying upon her discretion and affection for the chil- 156 dren so to dispose *of the income as would most conduce to the support and comfort of the family. He very properly thought it was best to entrust her with the management and control of the property, rather than to raise unpleasant contentions between her and the children in respect to the proper use and application of the trust estate. The language of the deed in this particular is too plain to create a doubt as to the real purpose and meaning of the grantor.

The court is further of opinion that no particular form of words is necessary to create a trust for the separate use of the wife. Whenever it appears from the nature of the transaction, or from the whole context of the instrument limiting the property to the wife, she is intended to take the sole use, that intention will be carried into effect. Bright's Husband and Wife, page 210. Where the conveyance is by the husband to the wife, or a third person for her benefit, as a general rule it will be construed as operating to her separate use, although no such words are used as would be necessary to a separate estate in a conveyance by a stranger. Sayers et als. *v.* Wall, 26 Gratt. 354; Hulme *v.* Tenant, 1 Lead. Cases in Eq., Part 2d, 679, 733. The reason is said to be that otherwise the conveyance would be wholly inoperative. Whether this principle would apply in every case where there is a conveyance of the fee by the husband to the wife, or to a trustee for her benefit, may not be so clear. Upon this point it is unnecessary now to express an opinion.

In the present case it is apparent it was the purpose of the grantor to confer upon his wife a separate use in the life estate. In no other way can the deed take effect. For if upon its execution the martial rights of the husband attached upon the life estate of the wife, the whole object and design of the deed in providing for her and the children is necessarily defeated. The court, in order to give effect to the instrument, will 157 construe it according *to the manifest intent of the husband, as conferring upon the wife a separate estate, free from the control and liabilities of the former, and subject to all the rules incident to such estates.

The court is further of opinion that whenever a feme covert, having a separate property, executes an obligation for the payment of money as principal or surety, it is to be presumed, in the absence of evidence to the contrary, it was her intention to charge such property with the debt. Burnett & wife *v.* Hawpe, 25 Gratt. 481; 26 Gratt. 878.

The debts which are the subject of controversy here, are evidenced by the bonds and notes of Mrs. Anderson and executed by her as principal, or as surety for other parties. It must be presumed it was her purpose to create a charge upon her separate estate, since in no other way can her acts have any effect. By the decree of the circuit court the accruing rents of the "Wertland property" are directed to be applied to the discharge of the debts in question, and in this we think there is no error. The decree is therefore affirmed.

Decree affirmed.

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158 *Mackey v. Mackey's Adm'r.

September Term, 1877, Staunton.

Absent, ANDERSON, J.

1. Contracts—When Complete and Binding.*—A paper complete on its face, set out an

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***Contracts—Destruction of Subject-Matter.**—In 3 Min. Inst. (2nd Ed.) the principal case is cited for the proposition that if the subject-matter of a contract be in existence when the contract is

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agreement between Mrs. M. on the one part and S. M. on the other part, by which she sold to S. M. her dower right in land of her deceased husband, which had been assigned to her, for a certain price on stated credits, and they both executed the paper in duplicate; but it was agreed between them that they should meet on a certain day at the office of S., a lawyer, to have the paper examined by him and put into proper form if necessary. Mrs. M. was prevented from attending at the office of S., on the day named; and soon after she died—HELD: The agreement was a complete and binding contract between the parties from the time of its execution.

2. **Judgments—Conclusiveness.**—An action of *assumpsit* having been brought on said agreement by the administrator of Mrs. M., and judgment recovered against S. M. for the purchase money agreed to be paid by him for her dower right, the said judgment is conclusive, and S. M. cannot resort to a court of equity to set up the defence that there never was a completed contract between the parties; which defense he could have set up at law under the general issue.

This was a bill filed in the circuit court of Rockbridge county by Samuel C. Mackey to enjoin a judgment recovered against him by the administrator of Mary A. Mackey, deceased, for $905 with interest. This judgment was founded on the following paper:

"Article of agreement made and concluded this 9th day of November, 1870, be-
159 tween Mary A. Mackey of *Rockbridge county, and state of Virginia, of the one part, and Samuel C. Mackey of the county and state aforesaid of the other part, to-wit: That the said Mary Ann Mackey hath granted, bargained and sold to said Samuel C. Mackey, all her right, title, claim and interest in and to —— of —— dower of a tract of land, which right of dower was awarded to the said Mary A. Mackey by commissioners appointed by the court of Rockbridge county, to award to her out of her husband's, Hugh W. Mackey, deceased, real estate, for the sum of $1,100, of which sum the said Samuel C. Mackey is to pay on or before the first day of February, 1871, four hundred and fifty-five dollars, and the balance of four hundred and fifty dollars on the 1st of November, 1871; at which time, or as soon as the said Samuel C. Mackey pays the above sum of $1,100, the said Mary A. Mackey will make a good and sufficient right of dower interest; for true and faithful performance of which we bind ourselves, our heirs, executors, administrators, and assigns the day and year above written.

Mary A. Mackey, [Seal.]
Sam'l C. Mackey, [Seal.]"

On this paper was endorsed the following:

"Received on the above article of agreement one hundred and ninety dollars as part payment.

Mary C. Mackey."

The plaintiff in his bill, insisted that this paper was a mere memorandum of a proposed contract to be thereafter effectually and formally completed and perfected between them; which was never done. He said that Mrs. Mackey having in person and by
160 her friend, proposed *to sell plaintiff her dower right, that he, at her suggestion, met her at the house of her father, John Crawford, on the 9th of November, 1870, and on that day the general terms were discussed and arranged between complainant, Mrs. Mackey and said Crawford, for the sale by Mrs. Mackey to the complainant of her said dower right; and Crawford then wrote a form of a paper intended to express the terms and conditions of the proposed agreement in the premises; but that all the parties present being inexpert in the matter of preparing papers on so unusual a transaction as the sale and purchase of a dower interest, and the place of bargaining (Gilmore's mills) being fifteen miles from the lawyer's office, it was agreed at the time, that this paper was to be used only to express a memorandum of their proposed agreement, and the principal parties thereto were, at the instance of the complainant, to meet the next Saturday, November 12th, at the law office of J. G. Steele, Esq., in Lexington, to have properly written out, after consultation with said Steele as a lawyer, a formal and legal contract, and all other papers relating to the subject, including the bonds alluded to in said paper writing (which bonds were in fact never written), and Mrs. Mackey was to make formal and legal delivery to complainant of the enjoyment of her said dower interest, as the sole and true consideration of the bargain of sale in the premises.

Complainant further says he went to Steel's law office on the 12th, but failed to meet Mrs. Mackey, and nothing was done in the matter. But he received a letter from Mrs. Mackey, explaining why she could not meet him on that day, and proposing to meet him on the next Wednesday, and asking him to have the article ready and she would sign it, and also complainant's bonds. Complainant accordingly returned on the next Wednes-
161 day, *prepared to fulfil his engagement provided the terms could be made entirely satisfactory (he having been advised on the 12th by his counsel, Steele, that the paper writing prepared by Crawford was not a sufficient one in the premises), but Mrs. Mackey failed to appear, and complainant knew and did nothing more in the matter, and heard nothing more from her; but heard of her sudden death soon after, which he believes occurred about the 5th of December following.

The complainant insists that the parties were not bound by said agreement, and Mrs. Mackey did not consider him bound, and that the judgment recovered against him was based upon an incomplete contract; and he prayed for an injunction and for general relief. The injunction was granted.

The administrator of Mrs. Mackey demurred to the bill, and also answered. He denied that the paper was a mere memorandum of an agreement afterwards to be entered into by the parties; and insisted that it was valid and binding, and

entered into, its subsequent destruction, without fault in the seller, in no wise invalidates the agreement, though the purchaser derived from it no benefit whatsoever. See also, 3 Min. Inst. (2nd Ed.) 353, 354.

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that the plaintiff had received the full consideration for which he contracted; that he had received possession of the dower interest under said contract. A formal and legal possession was not necessary, as he was already in possession as a renter. He denies that Mrs. Mackey did not consider complainant bound by said writing; and charges that she always considered him bound, and accepted from him $190 in part execution of his contract.

It appeared in evidence that Mrs. Mackey's dower had been assigned to her. It adjoined the land of the plaintiff, and she had rented it to G. W. Thornton for five years; and that Thornton, on his removal to Missouri, had assigned his lease to the plaintiff, who was in possession under said lease at the time the paper was signed
162 by the parties. *There were two persons (females) present when the agreement was entered into, who say in their testimony, that the agreement was to be re-written; and they say also that Mrs. Mackey was taken sick on her visit to Buchanan, or soon after her return, and so continued until her death; and one of them says that the payment made on the day the agreement was written, $150 of it was in a horse, and was a payment on account of rent.

The paper written by Crawford was copied by Mrs. Mackey, and executed by both of the parties; and this was the paper on which the action was founded, and which, or a copy of which was filed with the bill. The plaintiff did not produce the paper he held.

The cause came on to be heard on the 26th of May, 1874, when the court overruled the demurrer, but dissolved the injunction and dismissed the bill with costs. And thereupon Samuel C. Mackey obtained an appeal to this court.

Tucker & Christian, for the appellant.
Steele & Houston, for the appellee.

Moncure, P., delivered the opinion of the court.

The court is of opinion that the article of agreement marked "Exhibit B," and filed with the appellant's bill, was a valid and binding agreement between the parties thereto, Mary A. Mackey, the intestate of the appellee William F. Johnston, and the appellant, Samuel C. Mackey, for the sale of right of dower therein described of the said Mary A. to the said Samuel C. Mackey, for the sum of eleven hundred dollars, payable as therein mentioned. It has all the indicia of a
163 valid and binding *agreement and was manifestly intended by the parties so to be. It commences thus: "Article of agreement made and concluded this ninth day of November, 1870, between," &c., sets out the names of the parties, the description of the property sold and how it was derived, the consideration of the sale and how it is to be paid, that the title is to be conveyed when the purchase money is fully paid, the last instalment of which was payable on the first of November, 1871, about a year after the date of the agreement; and it concludes thus: "for true and faithful performance of which we bind ourselves, our heirs, executors, administrators and assigns the day and year above written." Signed, "Mary A. Mackey, [Seal,] Sam'l C. Mackey, [Seal.]" The instrument was manifestly intended for a specialty, but the word "seal" not being embodied in the instrument, it is at least doubtful whether it be not a mere simple contract. It was so treated in the argument and will be so treated in this opinion, as it is immaterial whether it be a specialty or a simple contract, in the view we take of this case. It may be as valid and binding in the one alternative as the other.

The instrument was drawn by the father of Mary A. Mackey, who was not a lawyer, and at his house in the country, where the parties then were, about fifteen miles from the residence of any lawyer, or at least of the lawyer who was to be consulted on the subject. The agreement being a very important one, it was intended by the parties that it should, as soon as convenient, be put in perfect form by the agency of a lawyer, and it was accordingly agreed by them that three days thereafter, they would meet at the office of a certain lawyer in Lexington and have a new instrument drawn by him in perfect form, to be then executed by them, when bonds would be drawn and
164 and executed for the deferred *instalments of the purchase money. Mr. Mackey accordingly attended at the time and place named, but Mrs. Mackey did not. She did not fail, however, from any unwillingness to comply with her engagement in any respect. On the 10th of November, 1870, the day after the date of the agreement, she wrote a letter to Mr. Mackey, marked "Exhibit C," and also filed with the bill, in which she gave the reason for her not being able to meet him according to their first appointment, but said she would try and go down on Wednesday next thereafter, or Saturday, and requested him to "have the article ready," saying she would "sign it," also his bonds. She did not attend on either of the two latter days named, being prevented by her engagements from doing so, and she was taken sick and died within less than a month after the date of the agreement, without having during that period executed any other agreement on the subject or had one presented to her for the purpose, or gone to Lexington, or seen the said Samuel C. Mackey, so far as appears from the record.

The result of her unexpected death, at only thirty-eight years of age, was very unfortunate to Samuel C. Mackey, supposing the agreement to be valid and binding. It would have been just as unfortunate, indeed, precisely the same in effect, if the agreement had been, if it was not, perfect in form as well as substance. It would have been written by a lawyer if one had been present when it was written. If it had been so written and had been perfect in form and substance, nobody can doubt that he would have been bound and liable to pay the whole consideration money, although by the death of Mrs. Mackey, her dower interest, which he purchased, would have ceased at once and

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forever. The agreement was one of great hazard in its very nature. If she should live to an old age, it would be very ad-
165 vantageous *to him; if she should die very soon, as she did, it would be very much to the contrary. He made the agreement with his eyes open, in full view of the risk. Her health, no doubt, was then very good, and her death in any short time very unlikely; but she did, very unexpectedly, die in less than a month after the date of the agreement, and he cannot complain of the effect of her death upon the agreement if it was valid and binding. The only question, therefore is, Was it valid and binding?

That the parties intended to make it so, there cannot be a doubt. Else why enter into it at all? Why express it in such formal and significant language? "Article of agreement made and concluded this 9th day of November, 1870," is the language used in the commencement; not "memorandum of an agreement intended, or contemplated to be hereafter made and concluded." Why set out therein so minutely the names and residences of the parties, the property intended to be sold and conveyed, the price intended to be paid for it, the instalments in which and the times at which such price was to be payable, and the time when the conveyance was to be made? and why conclude it in these formal and significant words: "for true and faithful performance of which, we bind ourselves, our heirs, executors, administrators and assigns, the day and year above written?" and why subscribe to it, not only the names, but the seals of the parties? All these are strong indicia of intention as to the binding nature and effect of the instrument apparent upon its face. There are also strong collateral indicia of such intention in the circumstances surrounding its execution. It was drawn in duplicate, and one of the duplicates was delivered to and kept by each party. A part of the purchase money was paid in hand at the date of the agreement, to-wit: one hundred and ninety dollars, and a receipt therefor was endorsed on the
166 instrument, *or written under it, and signed by "Mary A. Mackey." There can be no doubt but that there were such duplicates. The original agreement was drawn by the father of Mrs. Mackey, and yet the one exhibited with the bill is in the handwriting of Mrs. Mackey, and was signed by the parties respectively, showing that she copied the original at the time it was drawn, and that the two drafts were then executed and interchanged by the parties. Nor can there be any doubt but that there was, at the time of making the agreement, such a part payment as is indicated by the said receipt Otherwise the difference between $1,100, the total amount of the purchase money, and $905, the total amount of the deferred instalments thereof, cannot be accounted for. Samuel C. Mackey does not produce the duplicate of the agreement in his possession, to show that there is no such receipt upon it; and the presumption is that there is such a receipt upon it. That receipt was written and signed by Mrs. Mackey, and she died within less than a month after the date of the agreement. She had no motive to fabricate a receipt. On the contrary, her motive, if she had any, was the other way, to-wit: to claim the one hundred and ninety dollars as applicable to the payment of rent due to her, if any such rent was so due to her, by Samuel C. Mackey, and to claim the balance of the purchase money which would remain due to her after deducting the amount of the deferred instalments, if such balance was not paid as aforesaid. There is still the small sum of five dollars to be accounted for to make up the whole amount of the purchase money; but that was no doubt retained by Samuel C. Mackey to purchase the bridle mentioned in her letter to him, marked "Exhibit C," and filed with his bill. There is no evidence in the record tending to show that there was due to her by him at the date
167 of the said agreement the *sum of $190, or any other sum on account of rent of her dower interest. Neither of the parties manifested, and doubtless neither of the parties felt, the slightest disposition not to carry the said agreement into full effect from the time of its date down to the time of her death; but on the contrary, both parties, during all that time, contemplated the full execution of the agreement. This view conclusively repels the idea of such a fabrication by her of the receipt as is before mentioned.

Nothing is more common or natural than for parties unlearned in the law, when they enter into an important contract which they desire to be binding as soon as possible, and there is no lawyer near enough to be employed to draw the instrument immediately, to draw it, or have it drawn, as well as they can under the circumstances, to make it binding at and from the time of entering into such contract, with the understanding and agreement, however, that the instrument will be submitted to a lawyer agreed upon by them, at some convenient time afterwards, who is to re-write it, so as to make it valid and binding if it be not already so, or put it in better form if deemed proper and desirable by him. And that is precisely what seems to have been the intention and object of the parties in this case. If Mrs. Mackey, after entering into the agreement aforesaid, had been offered for her dower interest twice the amount which Samuel Mackey had agreed to pay for it, can anybody suppose that she would have had a right to disregard that agreement and enter into one with the person making such higher offer?

Certainly the parties intended that their agreement should be binding if it was in such form as to have that effect. And it certainly is in such form.

There is nothing in conflict with what we have said in any of the books or
168 cases cited by the learned counsel *for the appellant. We have examined them as far as we have had access to them, and we have had access to nearly all, and we take the meaning of the rest from the account given of them in the said counsel's brief. In the case of Mackenzie v. Roper, 2 Strobhart

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308, which we have not seen, it appears to have been decided that it is considered no contradiction of a deed to show when it became a deed. Certainly not. The doctrine of escrow, so well established and understood, is based on that theory. In Johnson &c. v. Baker &c., 4 B. & A. 440 (6 Eng. C. L. R. 479), cited in 2 Rob. Pr., new edition, p. 20, both of which we have seen, the case was one of escrow, and the principle on which it was decided is a familiar principle. The same may be said of Bowker v. Burdekin, 11 Mees. & W. 127; and also of Hicks &c. v. Goode, 12 Leigh 479. It is true, as stated in 2 Rob. Pr. 338, that "there is of course a material difference between an unaccepted proposal and a binding agreement; between negotiations preparatory to an agreement, and the agreement itself. Head & al. v. Providence Insurance Company, 2 Cranch 127, 1 Curtis 459. Sometimes the meaning is that there shall be no binding engagement until a written contract is entered into and signed by the parties. Governor &c. v. Petch, 28 Eng. Law and Equity, 470. The statute of frauds is based upon that hypothesis, and the parties may, and often do, upon the same principle, manifest an intention not to bind themselves until they put their agreement in writing and sign it. Until then the locus penitentiae exists. In the case cited from 28 Eng. L. & E. R., it was expressly stipulated, that "all contractors would have to sign a written contract after acceptance of tender." There was an offer and acceptance, and an appointment made in pursuance thereof, which, however, the intended appointee immediately 169 declined before there *was any written contract. It was held that the transaction amounted merely to a proposal for a contract, and that there was no binding contract until a written agreement had been signed. There can be no doubt about the correctness of that decision. In Strickland v. Turner, 7 Exch. R. 206, W. H. & G. 208, which is relied on by the learned counsel as closely in point to the present case, the abstract of the decision is correctly stated thus, at the caption of the report of it:

"E. H. L., who resides at Sydney, New South Wales, being entitled to an annuity for his life, assigned it, in 1847, to certain trustees to dispose of it for his benefit. The plaintiff entered into a correspondence by letter with the trustees, upon the subject of the purchase, and from the various letters which passed between the parties it appeared that the terms of the purchase were not finally determine on and settled until the 28th of February, 1849. Upon the 6th of that month the annuitant died. The purchase money was paid by the plaintiff in ignorance of the fact, and was ultimately received by the executrix of the deceased—Held: That as, at the time of the purchase of the annuity, it had ceased to exist, the plaintiff was entitled to recover back the whole of the purchase money from the executrix, on the ground that the purchase money had been paid without consideration."

The principle of this decision is very obvious, and does not at all conflict with the views we have before expressed of this case. As Martin, Baron, said in Strickland v. Turner: "If a chattel is sold and at the time of the sale the chattel does not exist, the contract is not binding upon the purchaser." And as Pollock, C. B., who delivered the judgment of the court in that case, said: "Until the day was fixed, up to which the annuity should continue to be paid, it is 170 impossible to ascertain what *sum of money was to be paid and received" for the purchase of the annuity. "Now, this was never ascertained or settled in the lifetime of the annuitant. The annuity, therefore, still continued to belong to Lane," the annuitant, and never "passed to the purchaser till this was ascertained and the bargain finally arranged between them. When this was done, the annuity became the property of Strictland, and the money the property of the vendors. But then there was no annuity in existence. The money, therefore, which was paid was paid wholly without consideration, and may now be recovered back," &c. The case of Franklin v. Long, 7 Gill. & Jno. 407, cited in a note to that case, seems to be to the same effect. The Nisi Prius decision of Best, C. J., in Routledge v. Grant, 3 C. & P. 267, 14 E. C. L. R., 298, also cited by the counsel for the appellant, depends upon a very plain principle, not at all in conflict with our views of this case. There, a proposal was accepted with a variation, when it was withdrawn. Afterwards the acceptor said his acceptance with a variation was by mistake, and he then accepted the proposal as it was made, according to its terms; but the latter acceptance was held to be too late.

The books and cases cited by the learned counsel for the appellee, sustain the views we have expressed. It is unnecessary to notice all of them here. In Fry on Specific Performance of Contracts, section 344, that author says: "But the mere fact, though appearing on the paper, that a more formal agreement is intended to be drawn up, will not prevent a paper duly signed and containing all the terms from being an agreement any more than will a reference to deeds thereafter to be executed." Citing in notes the cases of Gibbons v. Northeastern Metropolitan District Asylum, 11 Beav. 1; and Skinner v. McDowell, 2 DeG. and 171 Sm., 265; and in section *175 he says: "Nor will the court consider a new term to be introduced by the circumstances that the acceptance proceeds to treat of the way in which the contract is to be carried out; as for instance by referring to a formal agreement that was to be made." Citing in a note the same cases above referred to.

The books and cases cited by the counsel for the appellant in their reply to the argument of the counsel of the appellee, do not, in our opinion, vary the result. In Addison on Contract, page 370, section 243, it is said that "a document purporting to be a contract signed by the parties is not necessarily so, and it is competent for either of the parties to show by parol evidence that it

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was not their intention in signing it that it should operate as a contract, and that the real contract between them was not in writing." That is very clear, but it is clearly not this case. In the same book, page 38, section 20, the author says: "Where a proposal or tender is accepted, subject to the terms of a contract being arranged and drawn up for signature, there is no concluded bargain until the terms have been arranged and a written contract executed." The same may be said of this as has been said of the next preceding quotation from the same author. In this case the terms had "been arranged and a written contract executed." In 3 Parson's on Contract, pp. 351, 389n, 353, 393, 394, we see nothing in conflict with our view of this case, and nothing that need be stated here. We cannot see the application of the case of Moore's adm'r v. Fitz Randolph &c., 6 Leigh 175, 183, to this case.

The court is further of opinion, that if the article of agreement aforesaid was not a valid and binding agreement between the parties thereto as aforesaid, the appellant was entitled to defend himself at law on that ground, under the general issue in the
172 action of assumpsit brought *by the appellee against the appellant upon that agreement. And the judgment recovered by the appellee against the appellant in that action is a conclusive bar of any right of the appellant to relief in the suit in equity brought by him, from the decree rendered in which the appeal in this case was obtained. The remedy of the appellant being complete at law, he was therefore entitled to no relief in equity upon familiar principles.

The case of Tapp's adm'r v. Rankin, 9 Leigh 478, cited in the brief of the appellee's counsel, fully sustains the position, which is also sustained by other authorities too numerous to be cited. The demurrer to the bill ought therefore to have been sustained instead of being overruled. But the court below did right in dissolving the injunction and dismissing the bill with costs.

The court is therefore of opinion that there is no error in the decree appealed from to the prejudice of the appellant, and the said decree is therefore affirmed.

Decree affirmed.

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173 *Coffman's Ex'ors & als. v. Shafer & al.

September Term, 1877, Staunton.

Case.—In August, 1844, C conveys land to his son D to enable D to pay C's debts. On the same day D conveys the land to B in trust to secure a debt of $5,000, payable in five years, with interest, to S. D dies in 1862, and B in 1866. In August, 1867, D files his bill against C, D's administrator and heirs, to subject the land to pay his debt, but he cannot produce the bond. Held under the pleadings, proceedings and evidence in the cause: First. That D was authorized to give the deed of trust. 2d. That D received value from S for the bond. 3d. That D had not paid off the bond or reduced it materially in his lifetime. 4th. That S had not delivered the bond to D, but it was still a valid and subsisting security. 5th. That it was not barred by the statute of limitations. 6th. That the presumption of payment did not arise under all the circumstances of the case.

This was a suit in equity in the circuit court of Rockingham county, brought in 1867, by Jonathan Shafer against Joseph Coffman and wife, and the administrator, widow and heirs of David Coffman, deceased, to subject land conveyed by David Coffman in trust to secure a debt of $5,000, which the plaintiff claimed that he had lent to David Coffman in August, 1844, the bond for which had been lost. The defence relied upon was, that the money was not lent, or if lent, it had been paid entirely, or all but the sum of $762.17; that it was usurious, and barred by the statute of limitations, if it was a note. All these questions of fact are sufficiently considered in the opinion of Anderson, J.

174 *The case was once before in this court, when the decree was reversed and the cause remanded. And it came on again to be heard in June, 1876, when the court held that the plaintiff's debt was still due, and made a decree for the sale of the land. And Joseph Coffman having died, his executor and devisees applied to this court for an appeal, which was allowed.

William B. Compton and John E. Roller, for the appellants.

Robert Johnston, H. W. Sheffey, G. G. Grattan and C. T. O'Ferrall, for the appellees.

Anderson, J., delivered the opinion of the court.

This suit was brought by Jonathan Shafer against David Coffman's representatives, to enforce a sale of land to satisfy a debt which he had secured by deed of trust thereon. The lands were conveyed to him by his father, Joseph Coffman, by deed of bargain and sale bearing date the 19th of August, 1844; and the deed of trust conveying them to Allen C. Bryan, trustee, to secure complainant's debt, was executed by David Coffman on the same day, and both deeds were duly recorded. David Coffman died before the suit was instituted, and the plaintiff's bill was filed in August, 1867, making his widow, Josephine R. A. Coffman, and his administrator de bonis non and his children, together with Joseph Coffman and Abigail his wife, parties defendants, &c. Joseph Coffman and the widow of David Coffman did not answer until September, 1870, more than three years after the bill was filed, and after it had been taken for confessed as against them, and after there had been two interlocutory decrees.

175 *The widow of David Coffman, in her answer, admitted the sale of the land to her husband by Joseph Coffman, and the execution of the deed of trust by her husband, David Coffman, to plaintiff, as alleged in his bill; but she says she is not prepared to admit the existence of said deed of trust in full. She believes and alleges that a very large pro-

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See Coffman v. Coffman, 79 Va. 504 for sequel to the principal case.

portion of the debt was paid by her husband in his lifetime; and she calls for full proof of said debt, and what were the separate and specific items comprising it. She admits that the proceedings in the injunction suit are correctly set forth in plaintiff's bill. And she relies on the statute of limitations.

The cause was proceeded with to a hearing on the 2d of May, 1872, when a decree was pronounced in favor of the plaintiff. The cause was afterwards brought to this court, and was remanded, with instructions to the lower court to allow the petition of Joseph Coffman for a rehearing, which had been refused by the circuit court, to be filed, and to exclude the testimony of Jonathan Shafer, who was an incompetent witness. I need not take further notice of the action of this court, as it decided no other questions in the case. Upon the return of the cause to the circuit court, the defendants, Joseph Coffman's executor and devisees, (he having died since it was tendered,) were allowed to file his petition as a bill of review, and the plaintiff had leave to answer it; which he did.

If the debt is lawful and just, and was secured by a conveyance by the debtor, of the land, in trust by deed duly recorded, and the debtor had a right to convey them, the plaintiff is entitled to a decree of sale, unless it be shown that the debt has been paid, or that his suit is not in time.

There is an allegation in the answer of Joseph Coffman, which is reiterated in 176 his petition, that there was no *consideration given for the bond, but that it was given merely as an indemnity for future advances, which were never made. If the future advances were made, the security would be as valid as it would be if the consideration had been received cotemporaneously with or before the execution of the bond.

The answer to the petition, which may be treated as an answer to a bill of review, and is entitled to all the weight of an answer to a bill in chancery, positively denies these allegations, and moreover exhibits cotemporaneous proofs of the consideration of the bond for five thousand dollars in the obligor, David Coffman's, own hand-writing. This proof had not been found when the formal appeal was taken to this court, and was not in the cause when the defendant's said petition was prepared, nor when it was filed; and with the other proofs, as to the availability of the paper securities which were transferred and assigned to the obligor as the consideration of his said bond, and in the entire absence of proof that David Coffman, ever in his lifetime, asserted any liability of complainant as assignor of either of said securities to him as the consideration of said bond which was not promptly met, or that any such liability now exists, it is an overwhelming refutation of both the foregoing allegations, and establishes the fact beyond cavil or controversy that said bond was executed for a full and valuable consideration. The allegation that it was usurious is denied also, and has not a scintilla of evidence in the record to support it. That the debt secured by the deed of trust was just and lawful, must therefore be taken to be an established fact in the cause.

That such a deed was executed by David Coffman, conveying two tracts of land, one of 170 acres and the other of 80 acres, (which had been previously conveyed to him by his father, Joseph Coffman,) to Allen C. 177 *Bryan in trust to secure the said debt, which was justly due from him to the plaintiff, is shown by the deed itself; and said deed was duly recorded. Had the debtor a right to make a conveyance of said lands?

The plaintiff's bill alleges that the deed of bargain and sale from Joseph Coffman to David Coffman (which upon its face appears to have been for a money consideration), was executed in consequence of an arrangement and understanding between the parties that "said David Coffman should pay his father's debts, and devoted the purchase money of said land to that purpose." The allegation to this extent is admitted by Joseph Coffman in his answer. He admits the execution of the deed, and says "although it expressed to be for a certain consideration," "in truth no money was paid at all, the deed being executed upon the express agreement and understanding that it was to be used by David and respondent for the purpose of paying the debts of respondent." How? By "giving him credit (is the language of the answer) to borrow money on its faith." To give him, David, credit —not "David and respondent." How the said conveyance was to be used by David and respondent for paying respondent's debts, is not very perceptible. It can well be seen how it could be used by David in the way suggested for the payments of debts. But if it was to be used by respondent, it was his before the conveyance, and might have been used by him for that purpose; but the only way by which he could use the land in the payment of his debts, by conveying to David, was by directing the application of the purchase money thereto; and this is the allegation of the bill. But the inquiry is, had David a right to convey it in trust? If the land was his, he had; and that is alleged by the bill; that the inducement to the conveyance was the payment of the grantor's debts, and that it was expressly agreed 178 *and understood by the grantor and grantee that the purchase money, the price to be paid for the land, was to be devoted to the payment of the grantor's debts by the grantee. It is true, as the answer says, no money was paid to the grantor. The understanding was not that the purchase money was to be paid to him, but to his creditors. And the answer admits that the coneyance was made to David to give him credit, that he might borrow money on the faith of it for the payment of his father's debts; and upon the faith if it he borrowed $5,000 from the plaintiff, every dollar of which, there can scarcely be a doubt, was devoted to that purpose. It matters not, so far as the validity of the plaintiff's security is concerned, whether the deed was intended by the Coffmans to invest David with the absolute title to the lands, or whether there

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was an express or implied trust that after the payment of the debts he was to divide the lands with his father. It is admitted that both tracts were conveyed to him, in order to enable him upon the faith of the conveyance, that is, upon the land security, to obtain money; which is precisely what he did, in his transaction with the plaintiff, now in controversy. And to hold now, that he had no right to charge the land with the debt, which under that assurance he negotiated, would be a fraud upon the plaintiff. He had a right to convey the land in trust for the security of the plaintiff's dept.

Has it been shown that this debt has been paid? The answer of Joseph Coffman to the plaintiff's bill, nowhere alleges the payment of the debt, though he intimates that it has been paid, "if it ever existed." If it never existed, it could not have been paid. He avers that some payments were made by himself on the alleged debt, though he does not admit it, or any part of it, to be due. He speaks of it also as a pretended debt.

179 He admits that a deed of *trust was given by David Coffman to A. C. Bryan, trustee, to secure the payment of an alleged debt to complainant of $5,000. And he says: "This would have been all proper enough, as it was intended that David should obtain credit on the land, if the complainant had in fact loaned the money, but in truth little money, if any, was loaned; some paper, it is said, by both of them, was passed and repassed between them." This was written and sworn to before complainant had produced cotemporaneous and other evidence showing that David received the full amount of the five thousand dollar bond, if not in money, in paper securities, upon which he got the money, and which was applied to the payment of Joseph's debts.

We have seen that the debt for which the security was given, was just and lawful. There is nothing in the foregoing tending to show that it has been paid. The onus is on the defendants.

He files as an exhibit with his answer, a copy of a deed bearing date 7th of October, 1844, of Joseph Coffman, conveying in trust to Jonathan Shafer, certain slaves and other personal estate, and some real estate, to secure a debt of $3,883.76, which he declares by said deed is justly due from him to David Coffman. He avers in his answer that the large amount of personal property, several thousand dollars of paper and a lot of negroes, was conveyed by said deed, all of which passed into the hands of complainant. This is an affirmative allegation. The same is faintly reiterated in the petition, and is responsively and positively denied in the answer of Jonathan Shafer. If it had, as alleged, come into the hands of Jonathan Shafer as trustee for David Coffman, he could not have applied it to his debt, but would have been bound to apply it to David's debt. This would seem to be a sufficient answer to

180 the allegation. *But the allegation is not true, as the answer to the petition declares; and the answer is supported by the evidence. The allegation is disproved by Hiram Coffman, now executor and devisee of Joseph Coffman, and his own witness. In answer to the question on cross-examination, "What became of all the paper that was transferred in the deed of trust from Joseph Coffman to Jonathan Shafer, of date of 7th of October, 1844, and the other personal property named therein?" he answers: "The paper was left in David's hands. He collected as he could, and paid off the indebtedness. The personal property was left on the farm. Horses, cattle, &c., were included in the trust. Shafer got cattle and a horse; they were sold to him. Another negro besides Jeff. was sold; the others became free by the result of the war." This testimony not only contradicts the allegation of the answer of Joseph Coffman, but supports the answer of Jonathan Shafer to Joseph Coffman's petition or bill of review. No inference can be drawn from the deed of trust of the 7th of October, that Jonathan Shafer's debt of $5,000, or any part of it, was paid out of the property or effects, or claims conveyed by that deed.

To the allegation in the petition, that the debt of $5,000 has been paid, there is a flat denial in the answer of Jonathan Shafer. To the allegation of the petition, that said debt of $5,000 was fully adjusted between respondent and David Coffman in the lifetime of the latter, and that the balance due on said debt of about $760, was secured by a new deed of trust executed by David Coffman to Abraham Paul, as trustee, on the 3d of August, 1860, the answer of Jonathan Shafer gives a direct and responsive denial. And he adds, "it is not true that said $5,000 bond was at any time settled, paid off, or fully adjusted, in any way by David Coffman. It is not true that the deed of trust of August 3,

181 1860, *had anything to do, or was in any way connected with the $5,000 debt, or that the bond for that debt was ever renewed or lifted out of respondent's hands by said David Coffman. It was filed as an exhibit in the injunction suit referred to in said petition, and was destroyed, as respondent supposes, with the record; at any rate he has never seen it since his counsel filed it among the papers in said injunction suit. It is not true, as the petitioner intimates in said petition, that David Coffman, having lifted said bond, filed it among the papers as his voucher; on the contrary, it was filed as evidence of respondent's subsisting debt against David Coffman, and it perished as the property of respondent and not that of David Coffman." These answers are responsive to the allegations of the bill, and repel the idea that the said bond of $5,000 has been fully paid, or paid with the exception of the inconsiderable sum of $760; or that the bond of $5,000 was lifted by David Coffman in his lifetime, and the lien on his land was discharged.

And we think the denials of the answer are supported by the presumptions growing out of the circumstances of the case. Let us consider first the question as to the non-production of the $5,000 bond. In the plaintiff's bill, speaking of the injunction suit, he alleges

that it was matured for hearing, and upon the hearing at the October term, 1860, the court decreed that the deed from Joseph Coffman to David Coffman, conveying the land in question, was a good and bona fide deed, and directed an account of rents and profits and of the permanent improvements put upon the land by Joseph Coffman after the sale. Joseph Coffman virtually admits this allegation in his answer. He says, "while it is true that in the interlocutory decree rendered in said injunction suit in 1860 the deed from respondent to his son David was not set aside, yet the 182 character of the *account directed to be taken, would, in respondent's opinion, have resulted in directing a conveyance to respondent, at least of that portion of the land allotted to him in the partition between him and David, and in the ascertainment of a liability from David to him, which David could not have met." The destruction of the record of that suit, which Joseph Coffman admits, is a misfortune. He says that "none of the papers are in existence, so far as he knows." But from what is here disclosed by the bill and answer, it would seem to be important for Jonathan Shafer, as well as David Coffman, that the bond of $5,000 should have been exhibited in that suit. It is inferable from Joseph Coffman's answer, that he was seeking to have the whole land reconveyed to him from David. But after the court had established, as he virtually admits, the validity of the conveyance from him to David, and directed an account, upon the taking of that account, he hoped to get a decree reconveying to him at least that portion of the land which had been allotted to him by David. (It appears that he and David, in '52 or '53, had made a partition, in which a part of the land had been allotted by David to him.) For he says he expected to show a liability to him by David, which he could not meet. It seems, then, he was seeking a revocation in that suit of his conveyance to David, which, if successful, would greatly prejudice Jonathan Shafer, as his deed upon that land was the only security he had for his bond; and being a party, if he laid by and suffered a decree for a reconveyance of the land, or a part of it, from David to Joseph, upon which his security rested, he might ever afterwards be estopped to assert his right. And it was important to David, as it would show his liability for a large sum, which he had borrowed, to 183 pay the purchase *money of the land in the payment of the debts of Joseph Coffman.

Jonathan Shafer was a party to that injunction suit, not only as trustee, but also as cestui que trust under several trust deeds which were involved in said suit, according to the testimony of Mr. Kenney. He was cestui que trust in only two deeds, one conveying lands to secure the debt of $5,000, and the other conveying negroes to secure three bonds to him and one to Mrs. Yount, dated 3d of August, 1860, about two months before the interlocutory decree in the injunction suit. If there was more than one, both of these deeds were involved in said suit. He avers that he delivered said bonds to his counsel to be filed as an exhibit in the cause. He doubtless regarded Mr. Kenney, who had been employed by David Coffman as his counsel, as his counsel too. Mr. Kenney says "he always came and talked to him about the case." There was no contest between them, or conflict of interest involved in that suit. But they were united in its defence. Mr. Kenney's memory as to some things is not distinct; but he says he and his client (David Coffman, he means,) frequently talked about a bond for a large amount due Jonathan Shafer. This he is certain of. That could have been no other than the bond for $5,000; Mr. Kenney thinks it was for $5,000, and it was then recognized by David Coffman as a large amount, and as due Jonathan Shafer. He did not claim to have lifted it; it was talked of frequently between them. This injunction suit was brought in 1858 or 1859, and the decree before referred to was made in October, 1860. These frequent conversations must have occurred between those two periods. He further says that he recollects some paper, which he considered highly important as evidence, could not be produced by David Coffman when he wished to file 184 it as evidence. *Of course, then, the paper did not belong to Coffman, and could not have been in his possession. Subsequently Jonathan Shafer and David Coffman came together to his office and produced the paper he wanted, which he at once filed in the then pending cause. He cannot say which one handed it to him. But there can be no question as to which of them it belonged, and which of them had had the possession of it, as it could not be produced by David Coffman, and was produced when Jonathan Shafer came, who lived seventy miles distant. And he states other facts from which he himself infers "that Shafer must have produced the paper." He also testifies that the papers in the cause were destroyed, and thinks this paper was destroyed with them. Jonathan Shafer swears, in response to Joseph Coffman's petition, that he handed the bond for $5,000 to his counsel to be filed as evidence in that cause, and supposes it was destroyed with the other papers in the cause; at least he has never seen it since. And we have seen from what is disclosed as to the subject and objects of the suit, it was very important for him as well as for David Coffman, that that paper should have been filed as evidence in the suit. Indeed it is proved by James Kenney, the counsel, that is was involved in said suit. No presumption can arise unfavorable to this hypothesis from his not taking the counsel's receipt for it, as it was not placed in his hands for collection, and the records of the court would naturally have been regarded as a very safe depository for it. It was not retained by the counsel, but he testifies was at once filed in the cause. We think the non-production of said bond by Jonathan Shafer is sufficiently accounted for, and can justify no presumption unfavorable to his claim. And the testimony of Mr. Kennedy repels the allegation of the petition, that David Coffman had paid the debt, or reduced it to $760, which he included in

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185 his *deed of trust of August the 3d, 1860, and lifted the bond for $5,000, and filed it himself in the pending suit as a voucher to show payments he had made for Joseph Coffman. And it supports the answer of Jonathan Shafer, denying such allegation. Indeed it tends strongly, in connection with other facts of the case, to refute the whole theory of the defence, that the $5,000 bond was paid or adjusted by David Coffman, and the lien discharged. These facts we will now proceed to consider.

The first I will notice is the letter from David Coffman to Jonathan Shafer. It is dated June 5th, 1858. It appears from this letter that he had advertised the sale of the negroes; and that he had a talk with his father about it, and said to him, he says, "that I saw no alternative but to sell land or negroes, and to say which he preferred being done, and no other reply could I get out of him but pursue my own course. I left him at that, and have not since spoken to him on the subject. I believed at the time that he would have done all in his power to have prevented the land from being sold to have paid you your money." At this time it is certain, therefore, that the $5,000 bond had not been paid, or the lien lifted from the land. The alternative was to sell land or negroes to pay debts, most probably, mainly for the payment of this debt to Jonathan Shafer. David Coffman evidently preferred, and time has shown wisely, to have sold the negroes. He had advertised them, and it would seem that an injunction had been threatened, for he says to Shafer in said letter, "I do not think any judge can give an injunction," and he wishes to reconcile his indulgent creditor to that course, for he tells him that he believed if he had elected to sell the land to pay his debt, his father would have done all in his power to prevent the sale of the land to pay it. This letter is a clear and unequivocal acknowledgment 186 that the debt due Jonathan *Shafer, then June 5th, 1858, was a subsisting debt binding the land. And this was the large debt due Jonathan Shafer, about which he, David Coffman, had frequent conversations with James Kenney, after the injunction suit was brought.

On the 10th day of January, 1859, David Coffman executed his bond to Jonathan Shafer for $762.17, payable one day after date. This bond, they say, was given upon settlement for the balance due upon the $5,000 bond, which was lifted. The bond itself does not purport to have been given on settlement for the balance due on said debt. And it is not very credible that David Coffman would have executed a bond as this is executed, purporting a separate debt, and allowed Shafer to retain his bond for $5,000 and his lien upon the land, if there had been a settlement of the $5,000 bond, and this small bond was given for the balance; nor is it probable that Jonathan Shafer would have surrendered to him the $5,000 bond and taken the smaller one without any security for it. There was no security given for the smaller bond until the 3d of August, 1860, when David Coffman received further accommodation of $1,000 from Jonathan Shafer, and executed the deed of trust of that date, conveying a negro woman and four small children to secure both debts, and also a debt of $193.85, with interest from August 27th, 1856, due Jonathan Shafer, and a debt due to Mrs. Yount for about $300 and interest. This precarious and uncertain property, if sold, would hardly have satisfied the debts it was intended to secure and the costs of executing the trust: and is it credible that Jonathan Shafer would have surrendered his safe and substantial landed security for such a frail and insufficient security as this? This bond of $5,000, subject to credits of course for payments which had been made upon it, is recognized by Joseph Coffman, by claim- 187 ing credit *as late as 1856 for a payment of $120 upon it as of that date. It was recognized by David Coffman, by his letter of June 5th, 1858. And again he frequently spoke of it in conversations with James Kenney, pending the injunction suit which was afterwards brought by Joseph Coffman to prevent the sale of slaves under the deed of trust of 7th of October, 1844, which sale was intended to be made, at least in part, for the payment of this large debt, as is evidently implied by his said letter. And, as we shall further see, no presumption of payment can arise from the non-assertion of the debt by Jonathan Shafer. But if the debt was paid or reduced to $762.17, for which the bond afterwards was given, which is embraced in the deed of trust of 3d of August, 1860, it must have been paid on or before the 10th of January, 1859, the date of said bond, and subsequent to the 5th of June, 1858, when its existence as a subsisting debt was recognized by David Coffman's letter, and also to the conversations, pending the injunction suit with James Kenney, when it was spoken of as a large debt due Jonathan Shafer.

What were David Coffman's means to have paid so large a debt at that time? He was arrested in his efforts to raise money by the sale of negroes, by his father's injunction. He told his father in 1858, that there was no alternative but to sell land or negroes to raise money. We find him giving his note of $193 to Jonathan Shafer in August, 1856, which was not paid on the 3d of August, 1860, the date of the deed of trust, and borrowing money from him in 1860, which is not disputed. And his brother, Hiram Coffman, one of the adverse parties, testifies that he was pressed for money about that time (1860). The Jordan debts were pressing him, and he says further: "After David failed in 188 having his *father's negroes sold, it was necessary that he should raise money," and that failure existed from the date of his said letter. It is evident upon the face of this record that he had not the means of paying this debt, or of reducing it to the amount of the bond of the 10th of January, 1859; and in fact, his recognition of its continued obligation, in his frequent conversations with James Kenney, were most probably subsequent to that date. The circumstances and facts of this case very strongly support

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the responsive and positive denials by the answer of Jonathan Shafer to all the allegations of Joseph Coffman's petition, to the effect that the $5,000 bond had been paid, or that it had been settled and adjusted between David Coffman in his lifetime, and the balance reduced to $762.17, for which a new bond was given, secured by a deed of trust on negroes and the old bond and the lien upon the land discharged. The only testimony to the contrary is the loose and uncertain testimony of one Levi Shafer, of conversations he had held with Jonathan Shafer, and of admissions he made to him, which do not weigh as a feather against the answer, supported as it is by the facts and circumstances of the case referred to, and which are utterly in conflict with the said witness. Some testimony was given by other witnesses of declarations made by David Coffman in his own favor and adverse to the plaintiff's claims, which were excepted to by the plaintiff's counsel. They were clearly inadmissible, and ought to have been excluded from the record, and cannot be considered. From the best view we can take of this case, we think the defendants have wholly failed to show any further payments of the $5,000 debt due to Jonathan Shafer than those which he has admitted, and which have been credited to David Coffman by Commissioner Dangerfield in his report.

189 *The only remaining question we have to consider, is, Is the plaintiff's suit in time? is it barred by the statute of limitations? or does his delay in suing create such a presumption against the justice of his demand as ought to defeat it in a court of equity?

Right of action did not accrue upon the bond in question until the 19th of August, 1849, when it fell due. Suit was brought in June, 1867, less than eighteen years after right of action accrued; so that, if it had been an action of debt on the bond, it would not have been barred, and this suit in equity, by analogy to the statute, is not barred.

Has his delay in asserting his claim by suit been such as, under the circumstances of the case, ought to raise the presumption that it is unjust? It is true that he extended very great indulgence to David Coffman, for whom he seems to have had the most friendly regard, and to have been desirous to aid him, as far as he could, in carrying out his contract with his father. But in 1858, about two years after Joseph Coffman had recognized the obligation of the debt upon his son by making a payment on it for him, Jonathan Shafer required it to be paid. This is clearly implied by David's letter to him, and it is evident from that letter that David preferred to raise the money by selling the negroes than by selling the land, which the plaintiff acquiesced in. But that sale was prevented by Joseph Coffman's injunction. And as we have seen that, in the suit he brought, was not only involved the sale and conveyance of the land by Joseph to David Coffman, upon which plaintiff's security rested, but also the deed of trust itself, as we have seen, is shown by the testimony of James Kenney, who was counsel in the case. There was no reason, therefore, why he should bring suit to

190 enforce his lien *pending that suit, in which the whole matter would be settled and determined, and if in favor of David Coffman, a sufficient sum would be raised to pay his debt by the sale of the negroes and it would be unnecessary to sell David Coffman out of his home. It seems that that suit was progressing favorably for the interests of David Coffman and the plaintiff, when it was arrested by the war, and finally in 1864 the papers of the suit were destroyed by the enemy. The negroes were emancipated as the result of the war, and the only alternative left the plaintiff to make his debt was to enforce his security on the land; and in July, 1867 soon after the courts were re-established, he instituted this suit for the purpose. This brief statement of the facts satisfactorly account for the plaintiff's delay in bringing this suit and in the light of them, we think no presumption can arise therefrom unfavorable to him, or to the justice of his claim.

We do not think that the court erred in overruling the defendants' motion to file a cross-bill after the cause had been decided although the decree had not been entered, and we think it could not have benefited them if it had been allowed, as they had every advantage under the petition for rehearing, which was treated as a bill of review, that they could have had under a cross-bill.

We are also of the opinion that the court did not err in not directing an issue to be tried by a jury. There was no application to the court by either party for an issue, and we think that the conclusion to which the court arrived, could hardly have been otherwise if there had been the verdict of a jury. The case was obscured by irrelevant matter thrown into it, and by complications, which could be better cleared away and solved by the chancellor than by a jury.

191 If we had any doubts as to *the correctness of our conclusions, the fact that two commissioners and two learned judges have reached the same conclusions, would go far to dispel them.

Upon the whole, we are of opinion to affirm the decree.

Decree affirmed.

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192 *Womack v. Circle.†

September Term, 1877, Staunton.

Absent, ANDERSON, J.

I. **Pleading—Trespass on the Case—Trespass Vi et Armis.‡**—In an action of trespass on the case, counts in case and counts in trespass

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†**For monographic note on Instructions, see note at end of case.**

‡**Trespass on the Case—Trespass.**—In Railroad Co. v. Kellam, 83 Va. 851, the principal case is cited to sustain the view that the act Code 1873, ch. 145, sec. 6, abolishes the distinction between the action of trespass on the case and trespass *vi et armis*.

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vi et armis may be joined in the declaration. Code 1873, ch. 145, § 6.

II. **Falsely Charging One with a Misdemeanor.**—In an action of trespass on the case, the count, without any special averments, charges that the defendant falsely and maliciously charged that the plaintiff attempted to bribe H (a negro woman), to burn the wheat stacked on his land—HELD: The statute, Code of 1873, ch. 188, § 5, makes the malicious burning of a stack of wheat a felony. To solicit another to commit a felony, though the felony be not afterwards committed, is a misdemeanor at common law, indictable and punishable, and the count avers a good cause of action.

III. **Evidence—Wealth of Defendant.***—In an action for slander, malicious prosecution and false imprisonment, the plaintiff, in order to show the wealth and influence of the defendant, offered in evidence certified abstracts from the books containing the returns of the assessments for taxation of the land and personal property belonging to the defendant in the year 1876, the year of the trial of the cause. There being no objection to the form of the abstracts, or that they did not truly state what they purported, the evidence was admissible.

IV. **Same—Action of Defendant after Making Charge.**—In such an action, what the defandant did after making his complaint to the justice to have the plaintiff arrested, is not evidence on his behalf.

V. **Service of Warrant.**—The officer having returned the warrant executed, and the plaintiff having appeared before the justice in obedience to it, that is a sufficient service of it, though he did not take the plaintiff into his custody, but only
193 read it to her and requested *her to appear. And any instruction of the justice to the constable as to not taking her into custody, was wholly immaterial.

VI. **Evidence—Rebuttal.**—Plaintiff introduces a witness who is examined, but the court, after hearing the evidence, excludes it, without objection by the plaintiff. The defendant cannot introduce evidence to rebut the evidence so excluded.

VII. **Instructions.**—The defendant asks the court to instruct the jury that, if they shall be satisfied from the evidence that A informed him that C, the plaintiff, had attempted to bribe H to burn defendant's wheat stacks, and that believing the information to be true, he went before O, a justice of B, and made complaint that C did attempt to bribe H to burn his wheat, and that said O caused C and witnesses to be brought before him and examined into the truth of the complaint, and decided that C was guilty, as charged, and required her on account thereof to enter into a bond and recognizance for her good behavior, this was a sufficient proof of probable cause for the proceeding of the defendant; and the plaintiff cannot recover on account of said complaint, or on account of the arrest and imprisonment of the plaintiff in pursuance thereof, though they should find that the complaint was subsequently dismissed by the county court, the plaintiff acquitted and the said bond and recognizance quashed, unless they shall be satisfied from the evidence that the defendant knew the testimony before the justice to be false. The court refused to give the instructions—HELD:

1. **Judgment of Justice — Probable Cause.***—*Quaere:* Whether the judgment of the justice, though reversed, was or was not conclusive evidence of probable cause for the complaint of the defendant. On this question the court was divided.

2. **Same—Same—Prima Facie Evidence of.**—The judgment of the justice, though reversed, was *prima facie* evidence of such probable cause.

3. **Instructions.**—The court should have so modified the instruction, and should have given it so modified.

VIII. **Same.**—The court is not bound, on the motion of one of the parties, to instruct the jury generally on the law of the case.

This case was argued at Wytheville, but was decided at Staunton. It was an action of trespass on the case in the circuit court of Botetourt, brought by Margaret
194 Circle *against William W. Womack. The declaration contained five counts. The first count charged that the defendant spoke and published of and concerning the plaintiff and her brother, Charles S. Circle, these false and malicious and defamatory words, to-wit: "Margaret Circle and Charles Circle attempted to bribe Hannah Scott to burn the wheat now stacked on my farm."

The second and third counts need not be stated. The fourth and the fifth counts are as follows:

4. For that also the defendant afterwards, to-wit: On the day and year first aforesaid, did unlawfully and maliciously, and without any reasonable and probable cause, make complaint before a justice of said county that the plaintiff and Charles S. Circle (meaning the plaintiff's said brother) did, on or about the — day of——, 1876, attempt to bribe Hannah Scott (meaning a certain negro woman) to burn the wheat then stacked on the defendant's farm, and that by reason thereof the defendant feared, and had good cause to fear, that the plaintiff and the said Charles Circle and the said Hannah Scott would do the defendant some grievous bodily harm, or would burn the defendant's wheat, then stacked on the said farm; and did cause the said justice to issue a warrant for the arrest of the plaintiff; and did cause the plaintiff to be arrested, and taken before the said justice and to be prosecuted on and convicted of such charge, and to be required on the pain of imprisonment, to execute her bond, with security in the penalty of $500, conditioned to keep the peace towards all of the citizens of this commonwealth, and especially towards the defendant; and, in order to prevent herself from such imprisonment, she (the plaintiff) did execute such bond; but the plaintiff avers that the conviction of herself of such charge was afterwards, to-wit:

*__Evidence as to Wealth of the Defendant.__—In Harman v. Cundiff, 82 Va. 246, the principal case is cited to support an instruction defining the purposes for which the jury may in certain actions consider the wealth of the defendant.

*__Judgment of Justice—Evidence of Probable Cause.__—For a discussion of the question of the effect of the judgment of the justice in determining whether there was want of probable cause for the prosecution, see Womack v. Circle, 32 Gratt. 324, and *note*.

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on the 14th day of August, 1876, in the county court of the said county, in due
195 form of law, upon her appeal *against the same, reversed, and that the said complainant was then dismissed, and that the said bond was then quashed; and that the prosecution has long since ended and been determined.

5. And for that also the defendant afterwards, to-wit: On the day and year first aforesaid, did with force and arms cause an assault to be made upon the plaintiff, and caused the plaintiff to be seized, and with violence dragged from her usual abode along the public road into the presence of a juctice of the said county, and to be kept and detained in prison for a space of time, to-wit: one day, and to execute a bond with security in the penalty of $500, in order to prevent herself from being sent to the public jail of the said county, and in order to save herself from being longer kept or detained in prison, without any reasonable or probable cause whatever, contrary to the laws of this commonwealth, and against the will of the plaintiff; by means whereof she was greatly injured. And the plaintiff says by means of the premises and of the said several grievances in the foregoing several counts respectively set forth and enumerated and charged as having been committed by the defendant upon and against the plaintiff, the plaintiff has been damaged to the amount of $10,000; and therefore she brings her suit.

The defendant demurred to the declaration, and to each count thereof; but the court overruled the demurrer to the declaration, and to the first, fourth and fifth counts, and sustained it as to the second and third. The defendant thereupon pleaded not guilty, and offered a special plea, which was objected to by the plaintiff, and the objection was sustained by the court; to which ruling of the court the defendant expected. This special plea is sufficiently stated in the opinion of Judge Burks.

196 *Upon the trial the defendant took several exceptions to rulings of the court, excluding evidence offered by him, and also to the refusal of the court to give instructions to the jury asked by him. These are numbered from 2 to 7 inclusive, and are sufficiently stated by Judge Burks in his opinion.

There was a verdict and judgment in favor of the plaintiff for $2,000, and a motion for a new trial, which was overruled, and an exception; and the defendant applied to a judge of this court for a supersedeas; which was awarded.

E. Pendleton, for the appellant.
G. W. Hansbrough, for the appellee.

Burks, J. This is a writ of error to a judgment of the circuit court of Botetourt county, rendered on the verdict of a jury for two thousand dollars in an action for damages.

The action was case, and the only issue was on a plea of "not guilty." The declaration contained five counts. The first count was for alleged slanderous words, the second for insulting words under the statute, the third for libel, the fourth for malicious prosecution, and the fifth for false imprisonment. The defendant demurred generally to the declaration and to each count. The court overruled the demurrer to the declaration as a whole, and to the first, fourth and fifth counts, and sustained it as to the second and third counts. This ruling (except as to the second and third counts) is assigned as error.

The fifth count is in form trespass vi et armis. The other counts are in case.
197 At common law, this would *have been a misjoinder of causes of action, and a defect fatal on demurrer. But our statute provides, that "in any case in which an action of trespass will lie, there may be maintained an action of trespass on the case." Code of 1873, ch. 145, § 6. This section of the statute has been construed by this court as intended to remove the difficulties at common law growing out of the nice distinctions between the cases in which trespass was the proper action and those in which the remedy was case, and as abolishing, in effect, the distinction between these different causes of action in a declaration in case. Pearsons v. Harper, 16 Gratt. 64.

In this suit, the writ and declaration are in case. The joinder, therefore, of the count in trespass with the counts in case, was admissible under the statute. The declaration as a whole is sufficient in law, and the demurrer to it was properly overruled.

The first count, reciting the usual formal colloquium, and without any special averments, alleges that the defendant falsely and maliciously spoke and published of and concerning the plaintiff, the false, malicious, and defamatory words following, to-wit: "Margaret Circle (the plaintiff) and Charles Circle (her brother) attempted to bribe Hannah Scott (a negro woman) to burn the wheat now stacked on my (defendant's) land."

Words spoken, as distinguished from words written, which are actionable at common law, have been classified as follows: 1. Words falsely spoken of a person, which impute to him the commission of some criminal offence involving moral turpitude, for which, if the charge is true, he may be indicted and punished. 2. Words falsely spoken of a person, which impute that he is infected with some contagious disease, which, if the charge is true, would exclude him from society. 3. Defamatory words falsely spoken of a person, which impute to him un-
198 fitness *to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment. 4. Defamatory words falsely spoken of a person, which prejudice such person in his or her profession or trade. 5. Defamatory words falsely spoken of a person, which, though not in themselves actionable, occasion such person special damage. Pollard v. Lyon, 91 U. S. R. (1 Otto), 225.

The words, as laid in the first count, do not answer the description of defamatory words in either the second, third, fourth or fifth class just mentioned. If they are

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actionable in the form alleged, it must be because they belong to the first class, and per se impute a criminal offence of moral turpitude, indictable and punishable under the law.

The malicious burning of "a stack of wheat, or other grain, or of fodder, straw or hay," is a felony under our statute. Code of 1873, ch. 188, § 5.

To solicit another to commit a felony, although the felony be not afterwards committed, is a misdemeanor at common law, indictable and punishable. The King v. Higgins, 2 East. R. 5; King v. Phillips, 6 East. R. 464; Davis Crim. Law, 371. Whether such solicitation would be an "attempt" within the meaning of the statute, Code of 1873, ch. 195, § 10, need not be decided in this case.

Giving to the words laid in this count their ordinary meaning, as is proper in such cases (Coleman v. Godwin, 3 Doug. R. 90; Woolnoth v. Meadows, 5 East. R. 463), I do not doubt that they are actionable per se at common law. The words, "attempted to bribe," as alleged, imply a promise or offer of reward, importing, at the least, a solicitation; and connected with the other words laid, they impute a criminal of-
199 fence, indictable and punishable *under the laws of this state. The moral turpitude of such an offence, none will question.

The demurrer to this count was properly overruled. And so, I think, there was no error committed in overruling the several separate demurrers to the fourth and fifth counts.

The fourth count sets out a case of malicious prosecution. To be sufficient in law, such count should allege: 1st. The prosecution in its particulars. 2d. That it was set on foot, instigated, or procured by the defendant. 3d. That it had terminated favorably to the plaintiff. 4th. That it was without probable cause. 5th. That it was malicious. Scott & Boyd v. Shelor, lately decided by this court at Wytheville, and not yet regularly reported. (Published in the Virginia Law Journal September, 1877, vol. I, No. 9, p. 539, et seq.) 28 Gratt. 891.

The objection urged on the demurrer to this count, is, that although want of probable cause is alleged for the complaint and proceedings in said count mentioned, yet that the judgment of the justice of the peace therein referred to, although reversed and annulled, shows of itself the existence of probable cause, and that the count therefore shows no sufficient cause of action. The answer to this objection will be found in what will be said in disposing of the exception taken to the refusal of the court to give the first instruction to the jury asked for by the plaintiff in error.

The fifth count is from the precedent to be found in 4 Rob. Prac. 580-581, copied by the author from 70 Eng. C. L., and pronounced by Wilde, C. J., as in the ordinary form.

After pleading the general issue, the defendant tendered a special plea to the fifth count of the declaration, which was rejected by the court upon the ground that it amounted to the general issue. I think it was
200 properly *rejected. The count is for an illegal forcible arrest and imprisonment. The plea specially denies such arrest and imprisonment, and is so far, it would seem, in effect, a plea of "not guilty;" but it further proceeds to set out all the proceedings before the justice, as it were by way of confession and avoidance, and concludes thus: "And so the said defendant says, that the said arrest and imprisonment complained of in said fifth count of said declaration was made in the course of a judicial proceeding and upon probable cause," &c. The plea is incongruous and othewise fatally defective.

In the course of the trial, the defendant filed several bills of exceptions to the rulings of the court on the admission and rejection of evidence, but I do not perceive that any error was committed in the rulings.

The special constable charged with the arrest of the plaintiff and her brother under the warrant issued by the justice of the peace, being examined as a witness by the plaintiff, testified that on Sunday, the 16th of July, the day on which the warrant was issued and placed in his hands for service, he went to the house of the plaintiff, read the warrant to her, and without then taking her into custody, requested her to attend before the justice on the next day (Monday). On cross-examination, the defendant's counsel propounded to him the following questions: "Why did you not arrest them on Sunday evening? Was it not in consequence of instructions from Captain Douthat, the justice of the peace, when he gave you the warrant?" The court refused to allow the questions to be answered. I do not see how the answers, either one way or the other, could have been relevant. The warrant was the constable's only authority to make the arrest. The fact of the arrest was one of the facts in issue, but whatever instructions, if any, the
201 constable received from *the justice, they could not show or tend to show, whether or not the arrest was actually made.

The plaintiff was permitted, against the objection of the defendant interposed, to give in evidence to the jury certified abstracts from the books containing the returns of the assessment for taxation of the lands and personal property belonging to the defendant in the year 1876. The objection to this evidence was not to the form of the abstracts, or that they did not truly state what they purported. The purpose of introducing it, as avowed by the plaintiff's counsel, when it was offered, was to show the wealth and influence of the defendant in the community. I think it was competent for that purpose. Damages in such cases as this are assessed, not according to the ability of the defendant to pay, but according to the injury by the plaintiff sustained. The inquiry for the jury is not what the defendant can pay, but what the plaintiff ought to receive. So far, then, as the defendant's rank and influence in society, and therefore the extent of the injury are increased by his wealth,

evidence of the fact is pertinent to the issue. 2 Greenleaf Ev. § 269; 3 Phil. Ev. (5th Amer. ed.) side p. 573, note 6.

The court very properly refused to permit the witness, Walkup, to answer the questions propounded to him by the defendant's counsel in the form in which they were put. Threats, if any made by John S. Circle, even if communicated to the defendant, were res inter alios actae. The court, however, stated that if the counsel would confine the question to the plaintiff and her brother Charles, the question, thus limited, might be asked and answered; but it does not appear that the question thus modified was ever asked.

Evidence of the fact that the defendant kept watch over his wheat, if he did keep such watch, after he received such information from Sallie Ailstock, that the 202 plaintiff *and her brother Charles had attempted to bribe Hannah Scott to burn the wheat, was not competent. The proof was, that as soon as the defendant received the information from Sallie Ailstock, the warrant for the arrest of the plaintiff and her brother was issued. The acts of the defendant could not be introduced as evidence in his own behalf any more than could his declarations, especially post litem motam. They were not offered, and did not come, under the rule res gestae. There was no error therefore in the refusal of the court to permit the witness, James Ryalls, to answer the question propounded to him by the defendant's counsel.

Nor did the court err in the refusal to permit George M. Carper to answer the question put to him. Carper was introduced by the defendant to rebut the testimony of Charles S. Circle. Circle's testimony was excluded by the court without objection on the part of the plaintiff, who had introduced him, and therefore Carper's answer would have been immaterial and irrelevant.

The defendant's counsel asked for three instructions to the jury, all of which were refused by the court, and he excepted.

The first instruction was in these words: "If the jury shall be satisfied from the evidence, that Sallie Ailstock gave information to the defendant, William W. Womack, that Margaret Circle and Charles Circle had attempted to bribe Hannah Scott to burn defendant's wheat stacks, and that defendant, believing said information to be true, went before Henry C. Douthat, a justice of the peace in the county of Botetourt, and made complaint that the plaintiff and her brother, Charles S. Circle, did attempt to bribe said Hannah Scott to burn his wheat; and if the jury shall furthermore be satisfied that said Henry C. Douthat, justice of the peace, caused said plaintiff and witnesses to 203 be brought before him *and examined into the truth of said complaint, and upon such examination decided that said plaintiff, Margaret Circle, was guilty as charged, and required her on account thereof to enter into a bond or recognizance for her good behavior, this constitutes sufficient proof of probable cause for the proceeding of the defendant, and the jury cannot find a verdict for the plaintiff on account of said complaint on oath before Henry C. Douthat, justice of the peace, or on account of the arrest or imprisonment of the plaintiff in pursuance thereof, even though they should find that the complaint was subsequently dismissed by the county court, the plaintiff acquitted, and the said bond or recognizance quashed by said court, unless the jury shall be satisfied by the evidence that William W. Womack, the defendant, knew the testimony before the justice to be false."

Of the several definitions of probable cause given in the opinion delivered in the recent case of Scott & Boyd v. Shelor, supra, that which was approved as supported by the greatest weight of authority, is in these words: "Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted."

The question of probable cause is a mixed proposition of law and fact. The existence of the facts and circumstances is a question of fact for the jury; their sufficiency, a question of law for the court. It was so held by Lord Mansfield and Lord Loughborough in the celebrated case of Johnstone v. Sutton, 1 Term R. 510, a decision in the exchequer chamber, affirmed in the house of lords; and since that case, the decisions of the courts have been generally to the same effect. 204 Indeed, it is *said it is now universally agreed that such is the settled rule.

The case of Crabtree v. Horton, 4 Munf. 59, is not at all in conflict with the rule. There the court below had decided that the exidence proved probable case. This court held the decision to be erroneous, because the facts were not left to be deduced by the jury.

The purport of the instruction under consideration is not very clear, but as I understand it, it informs the jury that if they believe the facts therein hypothetically stated, then that the decision of the justice was conclusive evidence of probable cause for the defendant's complaint and the proceeding thereon. I say conclusive, because they are directed not to find a verdict for the plaintiff, although they should find that the complainant was subsequently dismissed by the county court, the plaintiff acquitted, &c.

The instruction does not declare that the information therein referred to, if received and believed, alone constituted probable cause for the complaint, but it seems to have been intended to give to the decision of the justice a conclusive effect as evidence of the existence of probable cause.

So understanding the instruction, I think it was properly refused.

The complaint in this case and the proceedings thereon were evidently made and had under chapter 196 of the Code of 1873, sections 2, 3, 4, 5, 6. The justice held that there was good cause for the complaint, and gave judgment that the plaintiff should

enter into recognizance to keep the peace and be of good behavior, and upon failure to give the recognizance, should be committed to jail. The recognizance was given and an appeal taken to the county court. On the ap-
205 peal, the judgment of *the justice was reversed and annulled, the recognizance quashed, and the complaint dismissed.

It may be conceded, that a final judgment of conviction by a judicial tribunal having jurisdiction, in full force, would be conclusive evidence of the existence of probable cause for the prosecution in which such judgment was rendered, and that a judgment of a justice of the peace, such as was rendered in this case, based presumptively upon the conclusion required by the law, that "there was good cause for the complaint upon which it was rendered, would, if left in full force, be entitled to the same weight as evidence; but it by no means follows that such an effect should be attributed to a judgment which, in due course of law, has been appealed from, reviewed, wholly reversed and anulled by an appellate court. In such case, the first judgment has been authoritatively pronounced to be erroneous. It is a nullity; and while it may still be regarded as furnishing some evidence, perhaps prima facie, of probable cause for the proceeding in which it was rendered, from the nature of the case and upon principle, as it seems to me, it can have no conclusive operation as evidence of such probable cause. The authorities are conflicting, and as we have no decision of this court upon the question, I feel free to form my own judgment in the matter.

In an English work of merit it is said: "A conviction of the plaintiff by a magistrate, so long as it has not been reversed on appeal, affords a conclusive answer to the charge that the complaint or information was founded in malice, and was preferred without reasonable or probable cause." 2 Add. on Torts (4th Eng. ed.) 750. It would seem to be plainly implied, that if "reversed on appeal," the judgment would not be a conclusive answer. See further same book, pp. 754, 755.

206 *In Massachusetts it has been held that a judgment of conviction by a justice of the peace, is conclusive evidence, although, on appeal, the judgment has been reversed, (Whitney v. Peckham, 15 Mass. R. 243), while in Connecticut it seems to have been held that such judgment is not conclusive, although, if the trial was fair and full, entitled to great consideration. Goodrich v. Warner, 21 Conn. R. 432, cited in 1 Hilliard on Torts, 480.

These were cases, it will be observed, in which the magistrate had jurisdiction to try and convict for petty offences. In the case under consideration, the justice had no such jurisdiction, and he exercised none such.

There was no trial and no conviction in a strict sense. His judgment was only the exercise of a protective and preventive justice. The complaint, however, on which the judgment was based, if malicious and without probable cause. furnished good cause of action. From what has been said in passing upon the demurrer to the first count in the declaration, it will be seen that the complaint of the defendant preferred to the justice, charged the plaintiff with a substantive offence, a solicitation to commit a felony. For this offence, the plaintiff might have been indicted and tried, and instead of merely requiring the plaintiff to give recognizance for her good behavior, with a view of preventing the commission of the alleged threatened felony, the justice, if he thought there was sufficient cause for charging her with the offence of soliciting another to commit a felony, might have recognized her, and in default of recognizance, have committed her to answer for that offence at the next term of the county court of Botetourt. Code of 1873, ch. 199, § 15. If the justice had pursued this course, as he might have
207 done, upon the trial for *the offence she had been acquitted, certainly the judicial action of the justice would have been only prima facie evidence of probable cause for the complaint, Maddox v. Jackson, 4 Munf. 462. No greater weight, it seems to me, should be given to the judgment which was rendered and afterwards reversed. The justice held that there was good cause for the complaint, the county court, on appeal, decided that there was not good cause for the complaint, reversed the judgment and dismissed the complaint. To give to such reversed judgment the conclusive effect claimed for it, would be extending the doctrine of legal presumptions much farther than I am willing to go.

The instruction as asked for was, I think, erroneous, and was properly refused. But the court should not have contented itself with a mere refusal to give the instruction. It is susceptible of several constructions, and the refusal to give it tended to mislead the jury. The court should have so modified it as to inform the jury that the judgment of the justice, under the circumstances stated in the instruction, although reversed by the county court, was prima facie evidence of probable cause, and consequently that the presumption arising from it might be repelled by other evidence; and thus modified, the instruction should have been given. Peshine v. Shepperson, 17 Gratt. 472; Ward v. Churn, 18 Gratt. 801.

The discussion of the second instruction is unnecessariy after what has been said of the first. It was properly refused.

The fault in the third instruction lies in making confinement in jail or other place, or actual seizure of the person, necessary to a verdict for the plaintiff under the fifth count in the declaration.

Actual contract is not necessary to constitute arrest or imprisonment. False im-
208 prisonment is the unlawful *restraint of a person contrary to his will, either with or without process of law. 1 Hilliard on Torts, 208.

There was evidence in the case tending to show that on the day after the warrant was issued, if not before, the plaintiff was in the power and custody of the constable under the warrant in his hands. The warrant com-

manded the arrest, and the constable endorsed, as his return upon it, "executed." No error was committed in refusing this instruction.

After the court had refused to give the several specific instructions, which have been considered, the counsel of the defendant then asked the court to "instruct the jury generally upon the law of the case," which the court refused to do, remarking that "it would leave the case to the jury upon the discussion of the law by the counsel;" to which refusal of the court so to instruct the jury the defendant by his counsel excepted.

It has not been the practice in Virginia, as in England, for the courts to charge the jury upon the law of the case, and it is not error to refuse to give such charge, or to refuse to instruct generally upon the law of the case. If either party desire any specific instruction to be given, he has the right to ask it, and the court is bound to give it, provided it expounds the law correctly upon any evidence before the jury. A party cannot, by asking for an erroneous instruction, or, as I apprehend, by asking for a general instruction, devolve upon the court the duty of charging the jury on the law of the case. See Rosenbaums v. Weeden, Johnson & Co., 18 Grat. 785, 799. As before stated, if the refusal of an erroneous instruction asked for tends to mislead the jury, a proper instruction should be given in its stead, and it would be error not to give it.

The remark of the judge that "he would leave the case to the jury upon the discussion of the law by the counsel,"
209 *does not appear to have been addressed to the jury, and although it is embodied in the bill of exceptions, it is not therein made a ground of objection. The exception is only to the refusal of the court to instruct. The remark, no doubt, was addressed to counsel, and was so understood.

I am of opinion, that for the error of the court in not giving the first instruction asked for by the defendant, modified as hereinbefore indicated, the judgment of the circuit court should be reversed, the verdict of the jury set aside, and the cause remanded for a new trial.

As there must be a new trial, it is unnecessary, and would be improper for me to express any opinion upon the questions raised by the defendant's eighth bill of exceptions taken to the refusal of the court to set aside the verdict of the jury, on the ground that it was contrary to the law and the evidence, and that the damages allowed by the jury were excessive.

The judges were divided upon the question as to the weight which should be given to the judgment of the justice of the peace. Moncure, P., and Christian, J., were of opinion that the judgment, although reversed upon appeal, was conclusive evidence of probable cause for the complainant, and that the defendant's first instruction should have been given as asked for. Staples, J., concurred with Burks, J., that the reversed judgment was only prima facie evidence of probable cause, and that the instruction was properly refused; but that the court erred in not giving a proper instruction in place of the one refused.

In all other respects the opinion of Burks, J., was concurred in by all of the other judges.

210 *The judgment was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said circuit court erred in its ruling upon the first instruction prayed by the defendant to be given the jury on the trial of the issue in this cause, which instruction is set out in the defendant's second bill of exceptions and noted therein as "No. 1;" two of the judges of this court being of opinion that the said instruction as asked for was not erroneous, and should have been given to the jury as asked for, and the other two judges being of opinion that said instructions as asked for was erroneous, and was properly refused; but that said circuit court erred in not modifying said instruction so as to inform the jury that the judgment of the justice of the peace referred to in said instruction, under the circumstances therein stated, although reversed by the county court of Botetourt county, was prima facie evidence, and only prima facie evidence of probable cause for the complaint therein mentioned and the proceedings thereon, and that the presumption of probable cause raised by said judgment might be repelled by other evidence; and that said circuit court further erred in not giving said instruction, so modified, to the jury.

And the court is further of opinion, that there is no other error in said judgment, or in the rulings of said circuit court, complained of in this cause.

It is therefore considered that the said judgment be reversed and annulled, the verdict of the jury set aside, and a new trial be had by a jury in the said circuit court of the issue joined by the parties in this
211 cause, and that *the plaintiff in error recovered against the defendant in error his cost by him expended in the prosecution of his writ of error aforesaid here.

And this cause is remanded to the said circuit court for further proceedings to be had therein in conformity with the opinion and principles herein expressed and declared; which is ordered to be forthwith certified to the said circuit court of Botetourt county.

Judgment reversed.

INSTRUCTIONS.

I. In General.
II. Province of Court and Jury.
  a. Questions of Law for the Court.
    1. Criminal Cases.
  b. Questions of Fact for the Jury.
  c. Invasion of the Province of the Jury.
    1. By Instructing as to Sufficiency or Weight of Evidence.
    2. By Instructing as to Credibility of Witnesses.

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3. Remarks of Court on the Weight, etc., of Evidence.
4. West Virginia Rule.
5. Instances That Do Not Amount to an Invasion.
d. Construction of Written Instruments.
e. Assumption of Facts in Issue.

III. Elements and Style.
a. Object and Office.
b. Must Be Limited to the Pleadings.
c. Must Be Limited to the Evidence.
1. West Virginia Cases.
d. Singling out Portions of the Evidence.
e. Must Not Be Ambiguous.
f. Must Be Consistent.
g. Must Not Be Contradictory.
h. Must Not Be Indefinite.
i. Must Not Be Obscure.
j. Must Not Deal in Abstract Questions.
k. Should be Taken as a Whole.

IV. Requesting Instructions.
a. In General; Duty of Court to Give.
b. Weakness of Evidence No Ground for Refusal.
1. Contra.
c. Absence of Request.
1. No Error to Instruct on Its Own Motion.
2. Not Obliged to, unless Requested.
d. Refusal to Instruct Generally.
e. Requesting Erroneous Instructions; Effect.
1. Must Modify if Refusal Would Mislead Jury.
2. Instances Where Court Properly Refused to Modify.
3. Equivocal Instructions—Court Should Modify.
f. When and Where to Be Given—Instances.
g. Instructions Correct in Themselves Should Be Given as Asked.
h. Substituting Instructions Asked for.
i. Requesting Instructions on Points Already Covered.

V. Effect of Erroneous Instructions.
a. Policy of Virginia Court.
b. Rule Stated and Cases Cited.
c. Will Effect Reversal.
d. West Virginia Rule.
e. Misstating Punishment.
f. Rule Stated.

VI. Practice.
a. Counsel Arguing Instructions Wrongly.
b. Arguing against Instructions.
c. As to Special Verdict.
d. Admitting Existence of Evidence.
e. As to Marked Lines.
f. Correct Instructions Never Work Surprise.
g. Reading Section of Code.
h. Should Specify Points.
i. Refusal Not Justified—Instance.
j. Court Not Bound to Reduce Oral Instructions to Writing; Jury Having Retired.
k. How and When, Dissatisfied Party Should Except.
l. Remedy of Court When Jury Disregards Instruction.

VII. On Appeal.
a. Must Appear on the Record.
b. Objection Cannot Be First Made in Appellate Court.
c. Instruction Not Appearing in Record, Presumed to Be Correct.
d. Bill of Exceptions Must Set Out Sufficient Matter.
e. Will Presume Jury Followed.
f. Will Not Consider Erroneous Instructions Given at Appellant's Instance.
g. Instances.

VIII. At Second Trial.

I. IN GENERAL.

All instructions are the instructions of the court, regardless at whose instance they are given. Gray's Case, 92 Va. 772.

It is well settled that a party has a right to a full and correct statement by the court of the law applicable to the evidence in his case, and that any misdirection by the court, in point of law, on matters material to the issue, is ground for a new trial. Honesty's Case, 81 Va. 295, citing Rea v. Trotter, 26 Gratt. 585.

II. PROVINCE OF COURT AND JURY.

a. Questions of Law for the Court.—Questions of law are for the court alone, and an instruction which makes the jury judges of a question of law is erroneous. Keen's Ex'or v. Monroe, 75 Va. 424.

1. Criminal Cases.—Juries are not judges of the law in criminal cases, and the court will properly refuse an instruction to that effect. Brown v. Commonwealth, 86 Va. 466, disapproving *dicta* in the early case of Doss v. Commonwealth, 1 Gratt. 557. In Brown v. Commonwealth, 86 Va. 466, LEWIS, P., delivered the opinion of the court on this question as follows: "The prisoner also moved the court to instruct the jury that they were the judges of the law as well as the facts, but the court refused to give the instruction, and the prisoner excepted.

"We think the instruction was rightly refused. Although authorities may be found in support of the doctrine contended for by the prisoner (for at one time it was a popular one), it is not founded in principle. There is no doubt that in criminal cases the jury have the power to find a verdict of acquittal in direct opposition to the opinion of the court upon the law, and their verdict will be forever binding. But this is not because they have the right to judge of the law in opposition to the opinion of the court, but because the law in its humanity does not permit a person charged with crime to be twice tried for the same offense, or rather does not permit a verdict of acquittal in a criminal case to be set aside. Hence, if the power to find a verdict of acquittal in a criminal case is improperly exercised, the error is, in general, irremediable.

"In other words, the jury have the physical power to disregard the law as laid down by the court, but not the moral right to do so. It is, indeed, a maxim of the law, almost coeval with the institution of juries, that it is the office of the judge to respond as to the law, and the jury as to the facts, and few rules are more essential in the administration of justice.

"LORD MANSFIELD in a case before him declared that the doctrine that the jury were the judges of the law, was contrary not only to the fundamental principles constituting trials by jury, but to reason and fitness, and that he was glad he was not bound to subscribe to such an absurdity. And to the same effect is the great preponderance of judicial authority in this country at the present day."

If the prisoner's counsel, in a criminal case, asks the opinion of the court and an instruction to the jury on a point of law, and the court rules the point against the prisoner, his counsel shall not be allowed to controvert the correctness of the court's opinion

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on such point, before the jury. Davenport v. The Commonwealth, 1 Leigh 588.

b. Questions of Fact for the Jury.—Juries are judges of the facts of a case, and an instruction which in any way invades the province of the jury in this respect, is erroneous, and ground for reversal. Ross v. Gill, 1 Wash. 88; Wroe v. Washington, 1 Wash. 357; Martin v. Stover, 2 Call 514; Crabtree v. Horton, 4 Munf. 59; Gwatkin's Case, 9 Leigh 678; Dickinson v. Dickinson, 25 Gratt. 321; Cornett v. Rhudy, 80 Va. 710; McDowell v. Crawford, 11 Gratt. 402; Baring v. Reeder, 1 Hen. & M. 174; Moore v. Chapman, 3 Hen. & M. 266; Whitacre v. M'Ilhaney, 4 Munf. 310; McRae v. Scott, 4 Rand. 463; Davis v. Miller, 14 Gratt. 1; Hopkins v. Richardson, 9 Gratt. 485; Tyler v. C. & O. R. R. Co., 88 Va. 389; McKinley v. Berry *et als.*, 2 Gratt. 333.

It is error in the court to instruct the jury, "that the defendant was a fair purchaser for a valuable consideration," that being a question which ought to have been left to the jury upon the evidence. Fowler v. Lee, 4 Munf. 373.

c. Invasion of Province of Jury.—Says the court in Richmond & Danville R. R. Co. v. Noell *et als.*, 86 Va. 19, "It is a fundamental maxim that the court responds to questions of law, and the jury to questions of fact. The court must decide on the admissibility of evidence, that being a question of law; but not as to its weight after it is admitted, that being a question of fact; and the decided cases, says Mr. Conway Robinson, evince a zealous care to watch over and protect the legitimate powers of a jury. They show that the court must be very careful not to overstep the line which separates law from fact. They establish the doctrine that when the evidence is parol any opinion as to the weight, effect, or sufficiency of the evidence submitted to the jury, any assumption of a fact as proved, will be an invasion of the province of the jury."

1. By Instructing as to the Sufficiency or Weight of Evidence.—"For making observations or instructions to the jury as to the weight to be given by them to any part of the testimony or the whole evidence the cause may be reversed and a new trial granted." Tyler v. C. & O. R. R. Co., 88 Va. 389, citing Davis v. Miller, 18 Gratt. 1; Hopkins v. Richardson, 9 Gratt. 486. In Tyler v. C. & O. R. R. Co., *supra*, it was held that it was an invasion of the province of the jury and therefore error, for the lower court to give the following instruction. "The court, being of opinion that it could be fairly inferred from the testimony that plaintiff was either a passenger or an employee of the company, and that it was fairly inferrable that he was aware of the rules of the company prohibiting persons from riding on the hand-cars."

In Fisher v. Duncan *et al.*, 1 Hen. & M. 563, the opinion of the court was, "That the county court erred in instructing the jury, that, 'from the whole testimony before them the demand of the appellees was barred by the act of limitations;' as the sufficiency of the evidence ought to have been left wholly to the consideration of the jury."

The court has no right to instruct the jury as to the weight of evidence, this being a subject proper only for the decision of that body. Keel v. Herbert, 1 Wash. 203.

2. By Instructing as to Credibility of Witnesses.—The jury is the sole judge of the credibility of witnesses, and it is error for the court to invade their province in this respect. Hash's Case, 88 Va. 172, 200.

3. Remarks of Court on the Weight, etc., of Evidence.—"No remarks which have a tendency to intimate the bias of the court on the character or weight of the testimony should be indulged in." Dejarnette's Case, 75 Va. 867.

The essential feature of an instruction must be that it relates to the law alone and not to the facts; and although it is always proper to base an instruction upon a hypothetical condition of facts, provided there be any evidence before the jury in any way tending to prove them, yet any frame of an instruction which tends to elicit an opinion, or the intimation of an opinion, as to the truth of matters in issue, is wholly improper, and error for which the proceedings must be set aside. Barton's Law Prac. (2d Ed.) 653-54.

4. West Virginia Rule.—The West Virginia courts evince the same policy, of watching over and jealously guarding the powers of the juries in this respect, and the cases hold that any invasion of the province of the jury, as judges of the facts of a case, by the court, is reversible error. State v. Greer, 22 W. Va. 801; State v. Thompson, 21 W. Va. 741; State v. Hurst, 11 W. Va. 75; Dickeschied v. Wheeling Exch. Bank, 28 W. Va. 341.

The court must not invade the province of the jury by giving any instruction which bears upon the weight of the evidence or the credibility of the witnesses. State v. Kerns, 47 W. Va. —, 34 S. E. Rep. 743; State v. Allen, 45 W. Va. 65, 30 S. E. Rep. 209; State v. Musgrave, 43 W. Va. 672, 28 S. E. Rep. 813; Thompson's Case, 21 W. Va. 741; State v. Greer, 22 W. Va. 800; State v. Sutfin, 22 W. Va. 771; State v. Perry, 41 W. Va. 641, 24 S. E. Rep. 634.

5. Instances That Do Not Amount to an Invasion.—The testimony of a witness tending to fix a fraud upon himself, ought not be regarded, and the court should so instruct the jury. Claiborne v. Parrish, 2 Wash. 146.

An instruction by the court that the facts proved are not conclusive evidence, does not amount to an instruction as to the weight of evidence, because it leaves the whole matter open to the jury. Dabney v. Taliaferro, 4 Rand. 256; Bogle v. Sullivant, 1 Call 561.

Where the plaintiff's case is clearly made out, and the only question is whether the defendant has made out a good defense; it is not deciding upon the weight of the evidence to instruct the jury upon the assumption of the facts as true, which the evidence tended to prove, if they believe it, that the defense is not sufficient if the instruction itself is correct. Davis v. Miller, 14 Gratt. 1.

Evidence Not Conflicting.—An instruction of the court to the jury, that if they believe the evidence (reciting it) in which there is no contrariety (except in a matter in which the court takes that which was given for the defendant to be true) the plaintiff had a right to recover in the action, not speaking of the amount of damages, is not erroneous. It is an instruction on the law, not on the fact. Pleasants v. Pendleton, 6 Rand. 473.

Assumption of Truth.—A motion to instruct the jury assumed all the facts stated by the subscribing witnesses as true, and asked the court to instruct the jury that the paper was not proved to be the will of C., according to the statute, should be granted if the facts warrant it, as the instruction does not ask the court to pass upon the truth of the facts, but upon the law as applicable to them. Green *et als.* v. Crain *et als.*, 12 Gratt. 252.

Immaterial Point.—An instruction as to the sufficiency of evidence upon a point which is immaterial, is no error for which the appellate court will reverse the judgment. Pitman v. Breckenridge *et al.*, 3 Gratt. 127.

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d. Construction of Written Instruments.—All written instruments are to be construed by the court and not by the jury, and an instruction to the jury to disregard all the parol evidence introduced by the plaintiff to prove his right to the land in controversy not embraced within the boundaries of the deed under which he claims is good. Pasley v. English, 10 Gratt. 236. In Burke v. Lee, 76 Va. 386, the court held that it was no invasion of the province of the jury by the court, to instruct them, that although they believe all the parol evidence of the plaintiff to be true, and giving it its full legal effect, under the will of the testatrix, they must find for the defendants. See also, Davis v. Miller, 14 Gratt. 1; Beach v. O'Riley, 14 W. Va. 55.

In Addington v. Etheridge, 12 Gratt. 436, the court held that when a deed appeared upon its face void as tending to defraud creditors, it was the duty of the lower court to so instruct the jury, saying: "The question whether the said deed was fraudulent *per se* or not, was one to be decided by the court on an inspection of said deed, and not proper to be submitted to the jury."

While it is erroneous to instruct the jury upon the weight of parol testimony, and if so instructed they are not bound thereby, yet it is the province of the court to construe a written instrument, and the jury are bound to take the construction of the court as correct. Barton's Law Prac. (2d Ed.) 658. See also, Johnson v. Jennings, 10 Gratt. 11; Washington, etc., R. Co. v. Lacey, 94 Va. 465; Union Central Life Ins. Co. v. Pollard, 94 Va. 146, 154.

When a question arises, what passes by a written instrument, it is proper for the court to decide it. Herbert & Wife v. Wise *et als.*, 3 Call 240.

"It is indisputably the province and the duty of the court to construe and instruct the jury as to the legal effect of all written instruments which are the subject of the controversy and the basis of the suit." Norwich Lock Mfg. Co. v. Hockaday, 89 Va. 557, 562.

The court cannot be called on to instruct the jury to find a verdict for the defendants, although some of the evidence is written testimony. Martin & Jones, Ex'or v. Stover, 2 Call 514.

e. Assumption of Facts in Issue.—An instruction which assumes a material fact in issue to be true, is erroneous. Boswell v. Commonwealth, 20 Gratt. 860; Houston v. Commonwealth, 87 Va. 257; Hudgins v. Simon, 94 Va. 665; Va. Mid. R. R. Co. v. White, 84 Va. 498; U. S. M. Acc. Ass. v. Neman, 84 Va. 52; Fishburne *et als.* v. Engledove, 91 Va. 548; Harrison v. Farmers' Bank, 4 W. Va. 393; Parkersburg Bank v. Andy Als, 5 W. Va. 50; State v. Robinson, 20 W. Va. 714.

Assumption of Fact—Harmless Error.—But where the fact assumed in the instruction is clearly and conclusively proven by the evidence, and there is no contradictory evidence, the error will be held harmless, and no ground for reversal. Sheff v. Huntington, 16 W. Va. 307; Rangeley v. Southern R. Co., 95 Va. 719; State v. Dickey, 46 W. Va. 319, 33 S. E. Rep. 231; State v. Douglass, 28 W. Va. 297; State v. Lowe, 21 W. Va. 782; State v. Robinson, 20 W. Va. 713.

III. ELEMENTS AND STYLE OF INSTRUCTIONS.

a. Object and Office.—The office of an instruction is to enlighten the jury as to the law in a case, and not to confuse them, and an instruction which on account of indefiniteness, uncertainty, or indirectness, is likely to mislead the jury, should be refused. Baltimore & Ohio R. Co. v. Polly, Woods & Co., 14 Gratt. 447; Rosenbaums v. Weeden, Johnson & Co., 18 Gratt. 785; Balto., etc., R. Co. v. Lafferty, 2 W. Va. 104; State v. Jones, 20 W. Va. 764; State v. Robinson, 20 W. Va. 714; Reusens v. Lawson, 91 Va. 226; Lewis' Case, 90 Va. 843; Muscoe's Case, 86 Va. 443; Shipp's Case, 86 Va. 746; R. & D. R. Co. v. Pickleseimer, 85 Va. 798.

Says FAUNTLEROY, J., in Gordon v. City of Richmond, 83 Va., page 442: "The object of instructions is to convey to the minds of the jury correct principles or rules of law applicable to the evidence which is before them. 'Indeed any instruction calculated to mislead the jury whether it arises from abiguity or any other cause, ought to be avoided; and if given it will oblige the appellate court to reverse the judgment.' 4 Minor's Inst., Part 1, 1878, p. 876."

b. Must Be Limited to the Pleadings.—Where a certain clause of a contract does not appear in the pleadings, it is an error for which the appellant court will reverse the judgment, to instruct the jury as to such clause. Barber v. Wheeling F. & M. Ins. Co., 16 W. Va. 658.

It is not error to refuse to instruct the jury as to the effect of the statute of limitations, where the plea of the statute has been overruled and stricken out by the court, and therefore does not appear in the pleadings or on the record. Fry v. Leslie, 87 Va. 269.

An instruction which is inappropriate to the offence for which the prisoner is indicted is improper, and should be refused. Commonwealth v. Lucas, 84 Va. 303; Mister's Case, 79 Va. 5.

c. Must Be Limited to the Evidence.—In instructing the jury the court must limit its instructions to the facts brought out by the evidence. Hall v. Commonwealth, 89 Va. 171; Lewis v. Commonwealth, 90 Va. 843; Fire Asso. of Phila. v. Hogwood, 82 Va. 343; Roanoke Nat. Bank v. Hambrick, 82 Va. 135; Bartley v. McKinney, 28 Gratt. 750; Kincheloe v. Tracewells, 11 Gratt. 587; Johnson v. Jennings, 10 Gratt. 1; Palsey v. English, 10 Gratt. 236; Wiley v. Givens, 6 Gratt. 277; Priest v. Whitacre, 78 Va. 151; Birch v. Linton, 78 Va. 584; Rea v. Trotter, 26 Gratt. 585; Moon v. Richmond & A. R. R. Co., 78 Va. 745; Buster v. Wallace, 4 Hen. & M. 82; Bowen v. Flanagan, 84 Va. 313; Richmond, etc., N. Co. v. Yeamans, 86 Va. 860; Norfolk & W. R. Co. v. Burge, 84 Va. 63; Kimball & Fink v. Borden, 95 Va. 207; Richmond Locomotive Works v. Ford, 94 Va. 627; B. & O. R. Co. v. Few's Ex'or, 94 Va. 82; Seaboard, etc., R. Co. v. Joyner, 92 Va. 354; Burke v. Shaver, 92 Va. 345; Reusch v. Roanoke, etc., 91 Va. 534; Norfolk & W. R. Co. v. Neely, 91 Va. 539; Lewis' Case, 90 Va. 843; Hodge's Case, 89 Va. 265; Fields v. Grenils, 89 Va. 606; Hash's Case, 88 Va. 172; Travelers' Ins. Co. v. Harvey, 82 Va. 949; Petersburg R. Co. v. Hite, 81 Va. 767; Caton *et al.* v. Lenox, etc., 5 Rand. 31.

An instruction which in part is not based upon any evidence before the jury is erroneous, and is ground for reversing the judgment. Rea v. Trotter, 26 Gratt. 585.

1. West Virginia Cases.—Henry v. Davis, 7 W. Va. 715; State v. Poindexter, 23 W. Va. 805; McMechen v. McMechen, 17 W. Va. 683; Oliver v. Ohio River R. Co., 42 W. Va. 703; Winkler v. C. & O. R. Co., 12 W. Va. 699; Storrs v. Feick, 24 W. Va. 606; Lawson v. Dalton, 18 W. Va. 766; Vinal v. Core, 18 W. Va. 1; State v. Greer, 22 W. Va. 801; Moore v. Douglass, 14 W. Va. 708; State v. Dickey, 46 W. Va. 319, 33 S. E. Rep. 231; State v. Cross, 42 W. Va. 253, 24 S. E. Rep. 996; State v. Betsall, 11 W. Va. 703; State v. Belknap, 39 W. Va. 427, 19 S. E. 507.

d. Singling out Portions of the Evidence.—Instructions that single out certain facts

which a part only of the evidence tends to prove, and gives such facts undue prominence, tend to mislead the jury, and should be refused. New York, etc., R. Co. v. Thomas, 92 Va. 606; Seaboard, etc., R. Co. v. Joyner, 92 Va. 354; Brown v. Rice, 76 Va. 629.

In New York, etc., R. Co. v. Thomas, *supra*, RIELY, J., states the reason of the rule to be as follows: "Calling the special attention of the jury to a part only of the evidence and the particular fact or facts it may tend to prove, and ignoring the residue of the evidence and the facts it may tend to prove, gives undue prominence to such recited evidence, and disposes the jury to regard it and the fact it tends to prove as the particular evidence, and the fact to be relied on in determining the issue before them, and thus misleads them." See also, Hash v. Comm., 88 Va. 172; Honesty's Case, 81 Va. 283; Rea v. Trotter, 26 Gratt. 585; Kimball & Fink v. Borden, 95 Va. 209; New York L. Ins. Co. v. Taliaferro, 95 Va. 525; State v. Morgan, 35 W. Va. 260, 13 S. E. 385.

An instruction which undertakes to set out all the evidence in the case, and omits a portion of it which is material is erroneous. Hash's Case, 88 Va. 172, 188; Brown v. Rice's Ex'or, 76 Va. 629.

An instruction based on the engineer's duty after discovering a person on the track, but completely ignoring his duty to exercise ordinary care to discover such person is erroneous. Va. Mid. R. R. Co. v. White, 84 Va. 498.

e. Must Not Be Ambiguous.—An instruction which is susceptible of two interpretations, one of which is erroneous, and which may therefore mislead the jury should not be given. Virginia Central R. Co. v. Sanger, 15 Gratt. 230; cited and followed in Gas Co. v. Wheeling, 8 W. Va. 371. See also, Gordon v. Richmond, 83 Va. 436; Henry v. Davis, 7 W. Va. 715; Fishburne v. Engledove, 91 Va. 548, 560; Dejarnette's Case, 75 Va. 867.

f. Must Be Consistent.—An instruction which is inconsistent, and likely to mislead the jury, should be refused. Hess v. Johnson, 3 W. Va. 645; McMechen v. McMechen, 17 W. Va. 683; Jackson's Case, 97 Va. 762; Brown's Case, 86 Va. 466.

g. Must Not Be Contradictory.—Where two instructions are inconsistent with or contradict each other, it is impossible to say whether the jury was controlled by the one or the other. Va. & N. C. Wheel Co. v. Chalkley, 98 Va. —, 5 Va. L. Reg. 763, citing and following Richmond Traction Co. v. Hildebrand, 98 Va. —, 5 Va. L. Reg. 691.

Says the court in B. & O. R. Co. v. Lafferty, 2 W. Va. 114: "A party ought not to be heard to complain that the court would not stultify itself, by giving at his instance, instructions, which contradicted each other, and thus confuse, rather than enlighten the jury upon the law of the case. It is certainly a reprehensible practice and condemned by the case of Lazzell v. Mapel, 1 W. Va. 43." See Jackson's Case, 97 Va. 762.

h. Must Not Be Indefinite.—Brown's Case, 86 Va. 466.

i. Must Not Be Obscure.—The court properly refuses to give an instruction which is so obscurely expressed as to leave in doubt the meaning intended. Levasser v. Washburn, 11 Gratt. 572; Brown's Case, 86 Va. 466; Dejarnette's Case, 75 Va. 867; N. & W. R. Co. v. Irvine, 85 Va. 217; Gordon v. City of Richmond, 83 Va. 436; Kincheloe v. Tracewells, 11 Gratt. 587.

j. Must Not Deal in Abstract Questions of Law.—An instruction which is not applicable to the facts in evidence should be refused, although the proposition of law which it states is correct. See authorities gathered under title "Must Be Limited to the Evidence." In Norfolk & Western R. Co. v. Burge, 84 Va. 63, JUDGE RICHARDSON, in sustaining the lower court in refusing the following instruction, "The jury are instructed that the degree of care required of a railroad company is that used by good specialists in the same business," says, "this instruction was very properly refused. It embodies an altogether abstract proposition, and would shed no light upon the case the jury were sworn to try. It would not have informed the jury either what is meant by a 'good specialist,' or what degree of care is required of such a person; so that the jury, instead of being aided or enlightened, would have been perplexed by the instruction had it been given." Quoted and approved in Richmond, etc., R. Co. v. Yeamans, 86 Va. 860. See also, Burke v. Shaver, 92 Va. 345; Easley v. Valley Mutual Life Ass., 91 Va. 161; Hodge's Case, 89 Va. 265; Richmond City R. Co. v. Scott, 86 Va. 902; Shenandoah & R. R. Co. v. Moose, 83 Va. 827; State v. Thompson, 21 W. Va. 741.

"An instruction is not considered as abstract where the pleadings show that it might apply to the case." Johnston v. Moorman, 80 Va. 131, 143, citing and following Shelton v. Cocke, 3 Munf. 191.

A new trial will not be granted, on account of the court giving an instruction on an abstract question, where the jury have asked for such instruction. Whitehurst v. Commonwealth, 79 Va. 556, citing and following Perkins' Case, 7 Gratt. 651.

k. Instructions Should Be Taken as a Whole.—"The instructions of the court to the jury should be clearly expressed, and the law as to the question in issue clearly and distinctly stated; but where an instruction construed as a whole presents the law to the jury fairly and correctly, in a manner not calculated to mislead them, the fact that some of its expressions standing alone might be regarded as erroneous or misleading furnishes no ground for reversing the judgment." The court in Kimball v. Borden, 97 Va. 483.

Although the instructions are not correct in every particular, yet if they as a whole fairly submit to the jury the issues raised by the pleading and evidence, and substantially state the law applicable to the case, so that the jury could not have been misled or the other party prejudiced by them, the judgment of the lower court will not be disturbed. Washington, etc., R. Co. v. Quayle, 95 Va. 749.

The case of Russell Creek Coal Co. v. Wells, 96 Va. 416, goes farther and holds that even if the whole instruction itself was misleading, but if read with other instructions, the objection is removed, then the court did not err in granting it. See also on this subject, Washington, etc., R. Co. v. Lacey, 94 Va. 467; Reynolds v. Richmond, etc., R. Co., 92 Va. 400.

IV. REQUESTS FOR INSTRUCTIONS.

a. Duty of Court to Give Instructions When Proper.—No question is better settled in Virginia, than that it is the right of the parties to demand, and the imperative duty of the court to give instructions to the jury, upon the law of a case applicable to the evidence. Picket v. Morris, 2 Wash. 255; Austin v. Richardson, 3 Call 201; Boatright v. Meggs, 4 Munf. 145; Maddox v. Jackson, 4 Munf. 462; Wells v. Washington, 6 Munf. 532; Brooke v. Young, 3 Rand. 106; Dimmett v. Eskridge, 6 Munf. 311; Early v. Garland, 13 Gratt. 9; B. & O. R. Co. v. Polly, Woods & Co., 14 Gratt. 468; B. & O. R. Co. v. Laffertys, 14 Gratt. 486; Hansbrough v. Neal, 94 Va. 722; Washington, etc., R. Co. v. Lacey, 94 Va. 460; Blankenship v. C. & O. R. Co., 94 Va. 449;

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Hash's Case, 88 Va. 172; Vaughan v. Commonwealth, 85 Va. 671; Gordon v. City of Richmond, 83 Va. 436.

b. Weakness of Evidence No Ground for Refusal.—To entitle a party to have an instruction as to the law applicable to the evidence, it is not necessary that there be a great mass of evidence proving a fact, but the slightest evidence will warrant an instruction as to the law on that fact. As expressed by DANIEL, J., in Farish & Co. v. Reigle, 11 Gratt. page 719, "If there was any competent and relevant testimony, *however slight*, tending to show that the upsetting was due to that fact the defendant in error was entitled to have the law in that particular hypothetically expounded to the jury." Says LEE, J., in Hopkins v. Richardson, 9 Gratt. page 497, "Where there is such evidence, of however little weight it may appear to be to the court or however inadequate in its opinion, to make out the case supposed, it is best and safest for the court not to refuse to give the instruction asked for, if it propounded the law correctly."

"When there is any evidence tending to prove a material fact in a case, the party in whose favor it is has the right, without regard to the amount of the evidence, to have the court instruct the jury as to the law arising upon the fact or facts which the evidence tends to prove, and leave them to find whether or not the evidence is sufficient to establish the fact it was introduced to prove." The court by RIELY, J., in New York, etc., R. Co. v. Thomas, 92 Va. 611. See also, Early v. Garland, 13 Gratt. 1; Honesty's Case, 81 Va. 283; Michie v. Cochran, 93 Va. 641; Reusens v. Lawson, 96 Va. 285; Tyson v. Williamson, 96 Va. 636; C. & O. R. Co. v. Anderson, 93 Va. 657; Fire Ass. v. Hogwood, 82 Va. 342.

"Any evidence tending to prove a fact is sufficient to justify the court in giving an instruction applicable to it, if requested to do so, even though the evidence is so slight as to be insufficient to support a verdict founded upon it." The court in Jones v. Morris, 97 Va. 49, citing and following Washington, etc., R. Co. v. Lacey, 94 Va. 460.

1. Contra.—There is *dicta* in Bloyd v. Pollocks, 27 W. Va. 75, 139, to the contrary, GREEN, J., delivering the opinion of the court, says: "A number of the instructions asked by the defendants were based upon an hypothesis, which there was no evidence to sustain. All such instructions were properly rejected. Even had there been some evidence tending to support any one of these hypotheses, yet, if the weight of the evidence was so strong against such hypothesis, that the court would have been compelled to grant the plaintiff a new trial on the ground that the verdict was contrary to the weight of the evidence, if the jury had rendered a verdict in favor of the defendants, apparently based on the assumption that the hypothesis was true, yet the court ought to have refused such instruction. For it would be an absurdity on the part of the court after instructing a jury, if they believed certain facts, to find for the defendants, to set aside a verdict for defendants which the jury were induced to find by its own instruction. If therefore the court believes, that the hypothesis, on which an instruction is based, is supported by some evidence, but that the weight of the evidence is so strongly against the hypothesis that the court will set aside a verdict based on the truth of such hypothesis, it ought not to grant any instruction based on such hypothesis."

c. Absence of Request.—The court has a right to instruct the jury, although neither parties ask for such instructions, and they are objected to. Gwatkins' Case, 9 Leigh 678.

It is not the custom in Virginia for the court to instruct without being requested, although in England it is usual for the court to do so. 4 Min. Inst. 918. "This court thinks it is the right and duty of a judge sitting in a criminal trial to instruct the jury as to the law." The court by CHRISTIAN, J., in Gwatkins' Case, 9 Leigh 678.

1. No Error to Instruct on Its Own Motion.—"Although it is not the practice in Virginia for the court unasked to charge the jury upon the law of the case, yet the mere fact that it does so cannot of itself be assigned as error." Dejarnette's Case, 75 Va. 867, 877, citing and following Womack v. Circle, 29 Gratt. 192.

The court may, at all times, instruct the jury on any question of law arising in a cause, if, in its opinion, justice shall require such interposition. Blunts' Case, 4 Leigh 689.

2. Court Not Obliged to Instruct unless Requested to Do So.—A judge is not obliged to give an instruction unless asked for, and in the absence of any requests for instructions by the parties to the suit, it is not error to allow the case to go to the jury, without instructing them as to the law. Rosenbaums v. Weeden, 18 Gratt. 785; Womack v. Circle, 28 Gratt. 192.

It is not error for a court to omit to instruct the jury that it may punish murder in the first degree with either death or confinement in the penitentiary, unless asked to do so. State v. Cobbs, 40 W. Va. 718, 22 S. E. Rep. 310.

d. Refusal to Instruct Generally.—"It has not been the practice in Virginia, as in England, for the courts to charge the jury upon the law of the case, and it is not error to refuse to give such charge, or to refuse to instruct generally upon the law of the case. If either party desire any specific instruction to be given, he has the right to ask it, and the court is bound to give it, provided it expounds the law correctly upon any evidence before the jury." The court by BANKS, J., in Womack v. Circle, 29 Gratt. page 208.

A court, though asked, is not bound to instruct a jury generally as to the law of the case. Instructions as to specific law points ought to be asked. A court may, without request, if it think the interests of justice and a fair trial call for it, instruct a jury in matter of law; but it is not bound to do so unless asked. State v. Cobbs, 40 W. Va. 718, 22 S. E. Rep. 310.

e. Requesting Erroneous Instruction.—Nor can a party by asking for an erroneous instruction, devolve upon the court the duty of charging the jury upon the law of a case. Womack v. Circle, 29 Gratt. 192; Rosenbaums v. Weeden, 18 Gratt. 785. Nor to modify or give another instruction in its place. Rosenbaums v. Weeden, *supra*; Keen v. Monroe, 75 Va. 429.

1. Must Modify if Refusal Would Mislead Jury.—But if the refusal of such erroneous instruction, would mislead the jury, then the court should modify it, and give it to the jury in its correct form. Rosenbaums v. Weeden, *supra;* The Baltimore & O. R. Co. v. Polly, Woods & Co., 14 Gratt. 448, 466; Keen v. Monroe, *supra*.

2. Instances Where Court Properly Refused to Modify.—If a party ask for instructions, on points of fact as well as law, the court is not bound to separate the facts from the law; but may refuse the instruction altogether. Brooke v. Young, 3 Rand. 106; M'Rae v. Scott & Saunders, 4 Rand. 463.

Upon a motion by plaintiff to instruct the jury to disregard all the documentary evidence introduced by the defendant, of which some part is legal and other illegal, the court may properly overrule the motion,

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without undertaking to state to the jury which is legal or illegal. Kincheloe v. Tracewells, 11 Gratt. 587.

As a general rule, according to the practice in this state, it is not error for the trial court to fail to correct an improper instruction asked and then to give it as corrected. State v. Caddle, 35 W. Va. 73, 12 S. E. Rep. 1098.

If one instruction asked embraces two distinct matters, one of which should not, and the other should be given, the court should not reject the whole, but should separate them, and refuse to give the one and give the other. Peshine v. Shepperson, 17 Gratt. 472.

An instruction which states several propositions, and which directs the jury to find for the party offering them, if they find any of the propositions sustained by the evidence, should be refused if one of the propositions is erroneous. Keen's Ex'or v. Monroe, 75 Va. 424.

3. Equivocal Instructions—Court Should Modify.—If the language of an instruction is equivocal, the court should not refuse to give it, but should give it with such an explanation of its meaning as to insure its being understood by the jury in its proper sense. Ward v. Churn, 18 Gratt. 816, citing and following B. & O. R. Co. v. Polly, Woods & Co., 14 Gratt. 447; Peshine v. Shepperson, 17 Gratt. 472; Rosenbaums v. Weeden, 18 Gratt. 785. See also, Johnson v. R. & D. R. R. Co., 86 Va. 979; Alexandria Savings Inst. v. McVeigh, 84 Va. 41; Carrico v. W. V. Cent. R. Co., 35 W. Va. 389; Keen v. Monroe, 75 Va 729.

f. When and Where to Be Given.—"Instructions may be given either before or after the argument of the case by the counsel, and the practice in this respect cannot be said to be fixed or uniform. The jury may, at the court's own instance or in obedience to the request of counsel and in the sound discretion of the court, be recalled from their room and instructed; but such instruction must, in every case, be given in the presence of the counsel for both sides. The instructions must, in all cases, be given in open court, and the judge should neither communicate with the jury on the subject of the case in writing or by messenger, nor should he go to their room, even though it be merely for the purpose of informing them that if they should desire any further information on matters of law they should ask him for it." Barton's Law Pr. (2d Ed.) 551. See Lewis v. Commonwealth, 78 Va. 732; Williams v. Commonwealth, 85 Va. 609, which cases afford instances of instructions to jury after retirement to consider verdict.

The judge may exercise his discretion as to the time of charging the jury. B. & O. R. R. Co. v. Polly, Woods & Co., 14 Gratt. 458.

It is not too late to request an instruction during the concluding an argument of counsel for plaintiff. Hoge v. Turner, 96 Va. 635.

It is for the judge who tries a cause to determine whether he will give or refuse an instruction asked for, before the argument is commenced or after it is concluded. B. & O. R. R. Co. v. Polly, Woods & Co., 14 Gratt. 447.

The law does not fix any time for instructions. The court may fix it by rule. State v. Cobbs, 40 W. Va. 718, 22 S. E. Rep. 310.

In State v. Cobbs, 40 W. Va. 718, 22 S. E. Rep. 310, it was held that after jury had returned verdict of murder in the first degree, it was error for the court on motion of counsel to refuse to instruct the jury that it was in their discretion to punish the prisoner with death or confinement in the penitentiary for life.

Instructions should never be given until the evidence is all in, unless it be during the examination to warn the jury not to consider certain evidence which may have been incautiously and improperly admitted. Barton's Law Prac. (2d Ed.) 651.

When a case is submitted to the jury without instructions, as a matter of practice neither parties have a right to demand instructions after the jury has retired. Williams v. Commonwealth, 85 Va. 607. See also, Sterling Organ Co. v. House, 25 W. Va. 65; Jarrett v. Stevens, 36 W. Va. 445; Tully v. Despard, 31 W. Va. 370.

g. Instructions Correct in Themselves Should Be Given as Asked.—Baltimore & O. R. Co. v. Lafferty, 14 Gratt. 478; Gordon v. Richmond 83 Va. 436; N. & W. R. R. Co. v. Wysor, 82 Va. 250.

"When a party asks for a proper instruction, it is the duty of the court to give it substantially as asked for." The court in B. & O. R. R. Co. v. Polly, Woods & Co., 14 Gratt. 468.

"A party has the right to have his own instruction given as he offers it, if it clearly and correctly states the law, and is applicable to the facts of the case." Bertha Zinc Co. v. Martin, 93 Va. page 805, citing and following Rosenbaums v. Weeden, Johnson & Co., 18 Gratt. 799. To the same effect are the W. Va. cases of Jordon v. Benwood, 42 W. Va. 312; State v. Evans, 33 W. Va. 417, 10 S. E. Rep. 792; State v. Kerns, 47 W. Va. 000, 34 S. E. Rep. 734.

h. Substituting Instructions Asked for.—In R. & D. R. R. Co. v. Norment, 84 Va. 167, the court refused to disturb the judgment of the lower court for refusing defendant's instructions, although correct, where the instructions substituted by the court itself were in substance the same, only more direct and strongly expressed; on the ground that defendant could not possibly have been injured by the refusal and substitution. See also, Simmons & Winch v. McConnell, 86 Va. 498, where it was held, no error to refuse an instruction if the court gives one in its place of the same tenor and effect. Citing and following N. & P. R. R. Co. v. Ormsby, 27 Gratt. 457; Va. Midland R. v. White, 5 S. E. Rep. 573; Central Lunatic Asylum v. Flanagan, 80 Va. 116. See also, Norfolk & W. R. Co v. Marpole, 97 Va. 594; Bertha Zinc Co. v. Martin, 93 Va. 791; Blankenship v. C. & O. R. Co., 94 Va. 458; Proctor v. Spratley, 78 Va. 254.

i. Requesting Instructions on Points Already Covered.—It is not error for the court to refuse instructions, on points which have already been covered by previous instructions.

"No court is bound, in the same case, to give two instructions of the same tenor and effect." The court in R. & D. R. R. Co. v. Burnett, 88 Va. 544.

"The settled rule is that when an instruction is given which covers the entire case, and properly submits it to the jury, it is not error to refuse to give another, even though in point of law it is correct." The court by LEWIS, P., in Ferguson v. Wills, 88 Va. 140, citing and following Central Lunatic Asylum v. Flanagan, 80 Va. 110.

If an instruction states two distinct propositions, one of which is already covered by another instruction, the other not based upon any evidence in the case, it is not error to refuse the whole instruction. R. & D. R. R. Co. v. Burnett, 88 Va 538. See also, Harman v. Cundiff, 82 Va. 239; Atkinson v. Smith, 24 S. E. Rep. 901; Davidson v. Pittsburg, etc., R. Co., 41 W. Va. 407; State v. Bingham, 42 W. Va. 234; Hoge v. Turner, 96 Va. 624; McDonald v. N. & W. R. Co., 95 Va. 98; Morotock Ins. Co. v. Pan-

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key, 91 Va. 259; Norfolk, etc., R. Co. v. Mills & Fairfax, 91 Va. 613; Taylor v. Commonwealth, 90 Va. 109; Hall's Case, 89 Va. 171; Simmons & Winch v. McConnell, 86 Va. 494; Virginia Midland R. R. Co. v. White, 84 Va. 498; Travelers' Ins. Co. v. Harvey, 82 Va. 949; Snouffer v. Hansbrough, 79 Va. 166; Nicholas v. Commonwealth, 91 Va. 741; State v. Staley, 45 W. Va. 792, 32 S. E. Rep. 198; State v. Bingham, 42 W. Va. 234, 24 S. E. Rep. 883.

V. EFFECT OF ERRONEOUS INSTRUCTIONS.

a. Policy of Virginia Court.—The policy of the Virginia Court is well expressed by KEITH, P., in Jackson's Case, 97 Va. 762, "It has been said by this court that all error is presumed to be prejudicial, and while it has approved verdicts rendered upon erroneous instructions, it does so with great caution, and only where it clearly appears that no injury could have resulted from the error."

b. Rule Stated and Cases Cited.—In Wright v. Independence Bank, 96 Va. 732, the court said: "It is unnecessary to consider that assignment of error, for if it were conceded that the action of the court was erroneous, as claimed, it is immaterial, for under the facts of the case, upon correct instructions, a different verdict could not have been rightly found by the jury. And it is the settled rule of this court, recognized and acted upon in numerous cases, not to reverse where the court can see from the whole record that under correct instructions a different verdict could not have been rightly found, or that the exceptant could not have been prejudiced by the action of the court in giving the instructions given, or in refusing those which were rejected. Richmond Ry. Co. v. Garthright, 92 Va. 627, 839; Brighthope Ry. Co. v. Rogers, 76 Va. 443, 451." See also to this effect, Preston v. Harvey, 2 H. & M. 55; Colvin v. Menefee, 11 Gratt. 87; Western U. Tel. Co. v. Reynolds, 77 Va. 173; Snouffer v. Hansbrough, 79 Va. 166; Benn v. Hatcher, 81 Va. 25; B. & O. R. R. Co. v. McKenzie, 81 Va. 71; Payne v. Grant, 81 Va. 164; R. & D. R. R. Co. v. Norment, 84 Va. 167; Preston v. Harvey, 2 H. & M. 55; Commonwealth v. Lucas, 84 Va. 303; Wager v. Barbour, 84 Va. 419; Bernard v. R. F. & P. R. R. Co., 85 Va. 792; Richmond Granite Co. v. Bailey, 92 Va. 554; Vaughan v. Commonwealth, 85 Va. 671; Keesee *et als.* v. Bank, 77 Va. 129; N. Y. Life Ins. Co. v. Hendren, 24 Gratt. 536.

"It is well settled that if a misdirection or other mistake of the court appear in the record, it must be presumed that it affected the verdict of the jury, and is therefore a ground for which the judgment must be reversed, unless it plainly appear from the whole record that the error did not and could not, have affected the verdict." Kimball & Fink v. Borden, 95 Va. 207, citing 4 Min. Inst. 937; Kincheloe v. Tracewells, 11 Gratt. 587; Danville Bank v. Waddill, 27 Gratt. 448; Edmunds v. Harper, 31 Gratt. 637; Richmond, etc., R. Co. v. Garthright, 92 Va. 627.

When it appears from the record that the granting of an erroneous instruction could not have prejudiced the prisoner, the appellate court will not reverse the judgment of the lower court. Muscoe's Case, 87 Va. 460.

The question whether or not certain instructions are correct is immaterial, where the evidence certified, shows that the case is clearly with the winning party. Moore v. City of Richmond, 85 Va. 538, citing and following Colvin v. Menefee, 11 Gratt. 87.

c. Erroneous Instruction Will Effect a Reversal.—When an appellate court is of opinion that an instruction given by the lower court to the jury, is erroneous, the appellate court cannot undertake to determine that the verdict, notwithstanding the erroneous instruction, is right upon the evidence, and therefore to affirm the judgment. But the judgment must be reversed and the cause remanded for a new trial. Wiley *et als.* v. Givens *et als.*, 6 Gratt. 277, cited and followed in Rea's Adm'x v. Trotter & Bro., 26 Gratt. 585, 600.

d. West Virginia Rule.—The rule in both civil and criminal courts is, that when an erroneous instruction has been given to the jury, the presumption is that the exceptor was prejudiced thereby; and the judgment will be reversed for this cause, unless it clearly appears from the record of the case, that the exceptor could not have been prejudiced by the giving of such erroneous instructions, in which case the judgment will not be reversed for said cause. State v. Douglass, 28 W. Va. 303.

e. Misstating Punishment.—The rule in Virginia is that when by the misstating of the punishment in the instruction, the prisoner is injured, such misstatement is reversible error, but if it is apparent that the prisoner was not injured, the judgment of the lower court will not be disturbed.

Thus in Allen v. Commonwealth, 2 Leigh 727, where the offence for which the prisoner was indicted was punishable by confinement in the penitentiary for not less than one nor more than three years; while the clerk charged the jury that the term of imprisonment was for a period of not less than two or more than three years; and the jury sentenced the prisoner to two years. JUDGE FIELD in delivering the opinion of the court says: "The charge given by the clerk to the jury was erroneous, and was well calculated to mislead them as to the legal term of imprisonment. It was equivalent to an instruction from the court; it was given by an officer of the court, in the usual course of his duty, in the presence and hearing of the court; and not having been corrected by the court, must be regarded as sanctioned by it. What effect it had does not appear from anything in the record. But it may have induced the jury to agree upon the term of two years for the prisoner's confinement in the penitentiary, believing that to be the *minimum*, when, if they had been correctly informed of the law, they might have ascertained his imprisonment to be one year only."

In Mitchell's Case, 75 Va. 856, the clerk instructed the jury that the *minimum* punishment was three years confinement in the penitentiary and the *maximum* five years, when in fact the *minimum* was two years, but the jury brought in a verdict sentencing the prisoner to five years confinement; the appellate court in refusing to reverse the judgment, distinguishes Allen's Case, *supra*, as follows: "Now, in the case before us the verdict of the jury fixed the term of imprisonment at five years, which is the *maximum* term of imprisonment fixed by law, and the *maximum* declared by the charge of the clerk to the jury. It cannot be said in this case, as in Allen's Case, that the jury was misled by the charge of the clerk, although it was erroneous, and that they might have found a verdict for a different period if they had been correctly informed of the law. If their verdict had fixed the term of imprisonment at three years, the *minimum* erroneously charged by the clerk, then all the reasoning of the judge held in Allen's Case would apply with full force. But the jury fixed upon the *maximum* period, and that period having been correctly stated in the charge of the clerk, it cannot be said that they were misled. It is plain that if the clerk had also correctly stated the *mini-*

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mum as well as the *maximum* period, the verdict would have been precisely the same.

It is impossible to say that the prisoner was in any way prejudiced by the erroneous charge of the clerk, or to conceive in what respect he could have been benefited if the *minimum* period of punishment had been correctly stated by the clerk. Mitchell's Case was quoted and approved in Whitlock v. Commonwealth, 89 Va. 337.

f. Rule Stated.—So by the great weight of authority in Virginia, if the appellate court can see from the whole record that the appellant was not injured by the refusal of a correct instruction or the giving of an erroneous one, it will not reverse the judgment of the lower court.

VI. PRACTICE.

a. Counsel Arguing Instructions Wrongly.—Counsel in arguing the case before the jury, refers to an instruction given by the court, and represents it erroneously. It is not error in the court to interrupt him, and state to the jury the instruction correctly. Coleman v. Commonwealth, 25 Gratt. 865.

b. Arguing against Instructions.—And where the court has properly refused an instruction, it was not error to refuse to allow counsel to argue to the jury the manifestly erroneous propositions of law embodied in such instruction. Alleghany Iron Co. v. Teaford, 96 Va. 380; Dejarnette's Case, 75 Va. 867, 883; Davenport's Case, 1 Leigh 588.

c. As to Special Verdict.—It is not error for the court to refuse to instruct the jury, after being sworn and before evidence introduced, to render a special verdict. Woodward v. Woodson's Heirs, 6 Munf. 227.

d. Admitting Existence of Evidence.—If a party ask for instructions, on certain evidence, he admits the existence of such evidence, and is estopped from afterwards denying the existence of such evidence. Kimball & Fink v. Friend, 95 Va. 136.

e. As to Marked Lines.—It seems to be matter of law, on which the court, if either party require it, should instruct the jury, that a marked line should prevail over one which was never marked. Dogan v. Seekright, 4 H. & M. 125.

f. Correct Instructions Never Work Surprise.—A correct instruction upon a point which the evidence tends to prove can never work a surprise in law. Sexton v. Aultman, 92 Va. 20.

g. Reading Section of Code.—In Miller *v.* Commonwealth (not officially reported), 21 S. E. Rep. 499, the plaintiff excepted to the action of the lower court in permitting the clerk to charge the jury, by reading a section of the Code. *Held,* "The act referred to contains the law which fixes the punishment visited upon the prisoner for the offence charged, and it was properly read to the jury."

h. Should Specify Points.—A party asking instructions of the court to the jury, should specify the points, and not ask instructions generally as to the law arising out of a complicated mass of evidence. Kitty v. Fitzhugh, 4 Rand. 600.

i. Refusal Not Justified—Instance.—A court cannot be justified in refusing to give an instruction on the ground that the defendant, in his application, has not stated the evidence given in the cause; or that in the court's opinion, the said principles of law does not apply to the case, under the circumstances appearing in proof, for this would be undertaking to judge of the weight of evidence, of which the jury are the proper judges. Wells v. Washington's Adm'x, 6 Munf. 532.

j. Court Not Bound to Reduce Oral Instructions to Writing; Jury Having Retired.—After an oral instruction has been given to the jury without objection, and the jury has retired to consider their verdict, the court is not bound, on the motion of the prisoner, to recall the jury, that the instruction may be reduced to writing; or to send a written instruction to them. Booth's Case, 4 Gratt. 525.

k. How and When Dissatisfied Party Should Except.—"Where instructions are refused, when they ought to be given, or where, in the opinion of the party against whose interest they operate, they are erroneous, his proper course is to introduce into the record, by means of a bill of exceptions, the circumstances under which the instruction was asked, the instruction itself, and the opinion of the court complained of. Then the appellate court is enabled to review the decision, and to determine upon its correctness." 4 Min. Inst. (4th Ed.) 920.

If a party be dissatisfied with an instruction, he ought to state his objection at the time. If no objection be made to an instruction at the time it is given, and no exception taken, or the point saved but objection be made for the first time, after verdict, and in the form of a motion to set it aside; the court will consider whether, under all the circumstances, the party has been prejudiced by the instruction; and if of opinion that a just verdict has been rendered, according to the law and the evidence, will not set it aside on account of that objection. Bull v. The Commonwealth, 14 Gratt. 613.

l. Remedy of Court When Jury Disregards Instructions.—If the jury in a civil case find against the instructions of the court, the court has no remedy but to grant another trial. Thweat *et al.* v. Finch, 1 Wash. 217.

VII. ON APPEAL.

a. Must Appear on the Record.—Court will not notice instruction not appearing in the record. The appellate court will not consider objections to any instructions not excepted to, and which do not appear on the record. Norfolk v. Johnakin, 94 Va. 285. To the same effect Mitchell's Case, 93 Va. 775.

b. Objection Cannot Be First Made in Appellate Court.—A party cannot object to the giving of an instruction for the first time in the appellate court. Richmond & D. R. R. Co. v. Medley, 75 Va. 499; New York, P. & N. R. R. Co. v. Thomas, 92 Va. 772.

c. Instruction Not Appearing in Record, Will Be Presumed to Have Been Correctly Given.—An instruction not appearing in the record will be presumed to have correctly stated the law. Taylor v. Mallory, 96 Va. 30.

"It must be presumed that the court acted correctly in refusing instructions, unless it appears by facts or testimony incorporated in the bill of exceptions that the instructions were relevant or irrelevant to the cause." Shephard v. McQuilkin, 2 W. Va. 90, cited and followed in State v. Swift, 35 W. Va. 542, 14 S. E. Rep. 135.

d. Bill of Exceptions Must Set out Sufficient Matter.—Where the exception, to the action of the court in giving or refusing instructions, does not set out sufficient matter to show whether such instructions were relevant or not, the appellate court will not undertake to decide whether the lower court erred in giving or refusing them. Valley Mutual L. Ins. Co. v. Teewalt, 79 Va. 421, 427, citing and following Fitzhugh's Ex'or v. Fitzhugh, 11 Gratt. 301; Harman v. City of Lynchburg, 33 Gratt. 43; Powell v. Tarry's Adm'r, 77 Va. 260.

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In every case where objection is made to an instruction of the lower court, the first point of inquiry is, whether the jury were misled; and this can be determined only by an inspection of the instruction as a whole, taken in connection with the pleadings and the evidence. And if when so construed it appear probable that the jury were not misled, the judgment will not be reversed, although the instructions in some parts may not be strictly correct. Benn v. Hatcher, 81 Va. 25, 31.

If an erroneous instruction be given to a jury by a court, and it appears, by other bills of exceptions, that the question, on which that erroneous instruction was given, did not arise in the cause, the judgment will be affirmed notwithstanding the erroneous instruction. Hunter v. Jones, 6 Rand. 541.

e. Will Presume Jury Followed.—When an instruction is clearly erroneous, the court cannot presume that the jury did not take into consideration such instruction, but will presume that they did their duty, and followed the instruction. Atlantic & D. R. Co. v. Ironmonger, 95 Va. 633.

f. Will Not Consider Erroneous Instructions Given at Appellant's Instance.—A judgment for the plaintiff ought not to be reversed, on the ground that the court at the instance of the defendant gave an erroneous instruction to the jury. Murrell v. Johnson, 1 H. & M. 450.

"A party cannot invite the court to commit error by asking for an erroneous instruction, and be permitted afterwards to have the verdict set aside for the error into which the court has been thus misled." Home Ins. Co. v. Sibert, 96 Va. 408, citing and following Kimball & Fink v. Friend, 95 Va. 125. See also, B. & O. R. R. Co. v. Few, 94 Va. 82, 89; Richmond Traction Co. v. Hildebrand, 98 Va. —, 5 Va. L. Reg. 691.

The appellate court will not reverse the judgment on account of an erroneous instruction given at the instance of the prisoner, yet it will point it out, in order that the mistake will not occur again. State v. Robinson, 20 W. Va. 713, 744.

g. Instances.—Though verdict be contrary to instructions, yet, if there be no evidence to prove the case supported by them, it will not be set aside. Smith v. Tate, 82 Va. 657.

Instructions are asked by the defendant and refused by the court. As, whether correct or not, plaintiff was entitled to recover upon the evidence in the record, independent of that referred to in the instructions; the refusal to give them is not ground for reversing the judgment. New York L. Ins. Co. v. Hendren, 24 Gratt. 536.

An instruction that makes the defendant's right to a verdict depend upon two events when either if proved is sufficient to defeat the plaintiff's recovery, is erroneous. Va. & N. C. Wheel Co. v. Chalkley, 98 Va. —, 5 Va. L. Reg. 763.

An instruction of a court will not be reversed, when it is right in principle, but the reason assigned is erroneous. Easley v. Craddock, 4 Rand. 423.

If an opinion or instruction of the court given on a former trial is relied on before the jury on the second trial by the party in whose favor it was given, without asking for such opinion or instruction from the court, and a verdict and judgment are rendered for him, the appellate court will consider the opinion or instruction so relied on; and if it is erroneous, will reverse the judgment and award a new trial. Crawford v. Morris, 5 Gratt. 90.

VIII. AT SECOND TRIAL.

When an instruction given at the first trial is on appeal pronounced erroneous, it is error for the court on the second trial to give the same instruction, the evidence being the same. Smith v. Snyder, 82 Va. 614.

Where the appellate court has decided that certain parol evidence is not sufficient to establish adversary possession, in an action of ejectment, and the cause is remanded for a new trial, in the second trial, the evidence being the same the defendant, the appellant in the appellate court, is entitled to have the jury instructed that they must disregard all the parol evidence of the plaintiff. Pasley v. English, 10 Gratt. 236.

Instructions given at a second trial based on the principles of law decided on the first appeal, cannot be questioned on a second appeal. N. Y. Life Ins. Co. v. Clemmitt, 77 Va. 366.

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212 *Pretlow v. Bailey's Ex'x & als.

September Term, 1877, Staunton.

Absent, ANDERSON, J.

1. Statute—Abatement of War Interest—Unconstitutionality.—The act of April 2, 1873, Code of 1873, ch. 173, § 14, p. 1120, which authorizes the abatement of war interest upon debts contracted before the 10th of April, 1865, is unconstitutional and void; and a creditor residing in Virginia during the war is entitled to have interest upon his debt.

2. Appeals—Grounds.—Though the amount of interest disallowed is less than $500, yet the case, involving the constitutionality of a statute, the court of appeals has jurisdiction of it.

This was a bill filed in the circuit court of Albemarle county by Ann Eliza Bailey in her own right and as executrix of Thomas R. Bailey, deceased, for her dower, and the settlement of his estate. The only question involved in the appeal was the propriety of disallowing the interest during the war upon the debt due to Thomas H. Pretlow. It appears that in 1860 Pretlow sold and conveyed to Bailey three pieces of ground near Charlottesville, for the purchase of which Bailey executed to Pretlow his eight bonds, payable on the 1st of January, 1862, and so on annually to the 1st of January, 1869; and conveyed the land in trust to secure them. This deed provides that as soon as default is made in the payment of any one of these bonds, or the interest thereon, the trustee, upon request, should sell, &c. Upon the last account reported by the commissioner, interest upon the debt of Pretlow during
213 the war, amounting to *$419.19, was disallowed; and to this Pretlow excepted. The cause came on to be heard on the 27th of October, 1874, when the court overruled the exception of Pretlow; and he thereupon applied to this court for an appeal; which was allowed.

Watson & Perkins, for the appellant.

William J. Robertson, for the appellee.

Moncure, P., delivered the opinion of the court.

This is a case involving the right of a

See Roberts v. Cocke, 28 Gratt. 20. and *note*.

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creditor to recover what is called war interest, notwithstanding the act approved April 2, 1873, which is the same with the provision on that subject contained in the 14th section of chapter 173 of the Code, page 1120. The same question was involved in several cases recently decided by this court, but not yet reported—at least in the regular report of the decisions of the court—having all been decided too late for publication in the last volume of Grattan's Reports. In those cases the question was solved in favor of such right, and it was held that in its application to such a case the act is unconstitutional and void. Therefore it is unnecessary to repeat here the reasons for such a conclusion, which are fully set out in those cases, and it is sufficient in this case merely to refer to them. They are Roberts' adm'r v. Cocke, &c.; Murphy v. Gaskins' adm'r; Cecil v. Deyerle, &c.; Linkous, &c. v. Shafer, &c.; Garnand v. Childress, &c.; and Kent's adm'r v. Kent's adm'r: the first two and last of which cases are reported in the Virginia Law Journal—28 Gratt. 207, 840; the former in the last March number, page 168, and the latter in the last September number, page 556, of that publication—28 Gratt. 775. The jurisdiction of
214 this court *in those cases and this, is independent of any question as to the value or amount of the matter in controversy, and rests upon one of the exceptions enumerated in the constitution of the state (article VI, section 2), to-wit: the one which relates to controversies concerning or involving the constitutionality of a law.

The court is therefore of opinion that the circuit court erred in overruling, instead of sustaining, the exception taken by the defendant Pretlow to the report of Commissioner Gordon, dated 28th September and filed 2d October, 1872; and that so much of the decree appealed from as is in conflict with the foregoing opinion, ought to be reversed and annulled with costs, and a decree rendered in conformity therewith.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that it has jurisdiction of this appeal, and that the circuit court erred in overruling, instead of sustaining, the exception taken by the appellant Pretlow to the report of Commissioner Gordon, dated 28th September and filed 2d October, 1872. Therefore it is decreed and ordered, that so much of the decree appealed from as is in conflict with the foregoing opinion and erroneous as aforesaid, be reversed and annulled, and that the appellee, Ann Eliza Bailey, out of her own estate, and the appellee, Ann Eliza Bailey, executrix of Thomas R. Bailey, deceased, out of the estate of her said testator in her hands to be administered, do pay to the appellant his costs by him expended in the prosecution of
215 his appeal aforesaid here. And *this court, proceeding to render such decree as the said circuit court ought to have rendered, in lieu of so much of the said decree as is erroneous and reversed and annulled as aforesaid, it is further decreed and ordered that the said exception taken by the said defendant Pretlow to the said report of Commissioner Gordon, be and the same is hereby sustained. And it is ordered that this cause be remanded to the said circuit court of Albemarle county for further proceedings to be had therein to a final decree; which is ordered to be forthwith certified to the said circuit court of Albemarle county.

Decree reversed.

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216 *Lewis & al. v. Davisson's Ex'or.

September Term, 1877, Staunton.

L, C & B, partners under the name of L, C & Co., in April, 1862, gave their note to Mrs. D for $862.50, payable the 1st of April, 1864, the last payment of a tract of land. Before it fell due she authorized P as her agent to collect the note and to receive Confederate currency for it. P saw L, and so informed him, and a few days after L sent the Confederate currency to P. In the meantime P heard that there was to be a new issue of Confederate notes, and therefore when L's agent brought the notes, P refused to receive them, except upon the express agreement that Mrs. D would consent to receive them. Upon that understanding P received the notes, endorsed a receipt upon the note and delivered it to the agent, who handed it to L, and L tore off the name of the makers. Mrs. D declined to receive the notes and returned them to P, but authorized him to receive payment in the new issue. P took the notes at once to the place of business of L, C & Co., and saw B, who informed him L had the note; but he received the notes and gave P a paper acknowledging the receipt of $862.50 they had paid Mrs. D, and which she had refused to receive, and concludes: We now owe Mrs. D the above amount, which we will pay in the new issue of Confederate money after the 1st of April next: signing the firm name. P took this receipt and gave it to Mrs. D. Twice in the year B offered to pay P the debt in the new issue; but P informed him he had given the receipt to Mrs. D, and was no longer her agent. In an action based upon the original note—HELD:

1. **Negotiable Note—Discharge.**—The delivery by B and reception by Mrs. D of the paper given to P by B, is not a discharge of the note, unless it was so intended and agreed by Mrs. D; and this must be clearly shown by the defendants.

217 *2. **Same—Same.**—The delivery of the note by P to the agent of L, and its cancellation and possession by L, will not prevent an action upon it by Mrs. D.

This was an action of debt in the circuit court of Rockingham county, brought by Anne Davisson, and on her death revived in the name of her executor, against John F. Lewis, James M. Crawford and Manasses Blackburn, late partners doing business under the name of Lewis, Crawford and Co., to recover the sum of $862.50, which the plaintiff alleged to be due to her upon a

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note bearing date the 19th of April, 1862, and payable on the 1st of April, 1864.

There was a judgment against Blackburn, without defence. Lewis and Crawford filed the pleas of "nil debet" and "payment." And there was a verdict and judgment for the plaintiff for $862.50, with interest at the rate of six per centum per annum from the 27th of January, 1876, till paid.

On the trial of the cause, the defendant took three bills of exceptions, the first as to instructions given by the court on the motion of the plaintiff, and the refusal to give one asked for by the defendants; the second to the refusal of the court to give an instruction asked for by the defendant, and giving it with an addition; and the third to the refusal of the court to grant a new trial. In this exception the facts are stated by the court, which are substantially as follows:

On the 19th of April, 1862, Lewis, Crawford & Co. executed their note, by which they promised to pay to Anne Davisson the sum of eight hundred and sixty-two dollars and fifty cents on the 1st of April, 1864, the third and last instalment on a tract or parcel of land. Some time before April, 1864, Anne Davisson instructed her agent, James A. Patterson, who had this note in his possession, to apply to John F. Lewis and collect from him
218 *the amount specified in said note, and authorized Patterson to receive in payment thereof Confederate money. Some six months before this Lewis had offered to pay said note in Confederate money; but Mrs. Davisson had refused to receive it. Soon after receiving his instructions, Patterson met Lewis and informed him what his instructions were, and that Mrs. Davisson was then ready to receive Confederate money in payment of the note, as she could then get Confederate bonds for the money. Lewis said he did not have the money with him, but would send it to Patterson in a day or two. Accordingly in a day or two thereafter Lewis did send by H. P. Mason the nominal amount of Confederate money sufficient to pay the note. But between the time of Patterson's conversation with Lewis and his sending the money by Mason, Patterson had learned that Confederate money was to be scaled or reduced one-third by a new issue of Confederate notes; and before he would receive the money, he, on his own motion and without instructions from Mrs. Davisson, made Mason promise and agree that if Mrs. Davisson should refuse to receive such treasury notes they should be returned by Patterson to Lewis, and the note of Lewis, Crawford & Co. should be returned by Lewis to Patterson. Upon this express agreement Patterson endorsed a receipt of payment on the note and delivered it to Mason, who delivered it to Lewis; and Lewis thereupon tore off from it the name of the makers of the note.

A few days after receiving the notes, Patterson sent them by his son to Mrs. Davisson, and caused her to be informed of the rumor he had heard about the new issue, and that she could return the treasury notes sent to her, if she objected to them, or saw proper; and Mrs. Davisson did object to the treasury notes sent to her, and returned them to her agent, Patterson, to take the money
219 *back, and if they would pay "the new issue" she would take it. The day after Patterson received back the said treasury notes, with instructions as aforesaid, he went to the place of business of the then firm of Lewis, Crawford & Co., (which was a new firm doing business under the same name), to see Lewis, but not finding him, he had an interview with the defendant, Blackburn, and informed him that his principal declined to receive the "old issue" notes, but would take the new issue. Blackburn said that Lewis had just left, but would be back in the evening or next morning, and that he had the note with him. Patterson then asked Blackburn whether he would take the money and give him a receipt for it; which Blackburn agreed to do, and thereupon said money was delivered to said Blackburn, who gave him a receipt in which he says:

"Received of Mr. J. A. Patterson $862.50, the money we paid him for our bond to Mrs. Davisson, and she refused to receive at this time. We now owe Mrs. Davisson the above amount, which we will pay in the new issue of Confederate money after the 1st of April next.

Lewis, Crawford & Co.,
Per M. Blackburn."

This receipt was delivered to Patterson, Blackburn agreeing to get the note from Lewis and return it to Patterson. This receipt Patterson delivered to Mrs. Davisson, who received it without objection, and kept it in her possession until June, 1868, when an action of assumpsit was brought upon it; which was afterwards dismissed.

In the month of May, 1864, and also in August, 1864, Blackburn offered to pay Patterson the amount stipulated in Blackburn's receipt in treasury notes of the new issue; but Patterson informed him he had re-
220 turned the paper to *Mrs. Davisson, and that he was no longer her agent; and he therefore declined to receive the treasury notes.

No demand was made upon Lewis by Patterson for the note, and it remained in his custody until it was produced in court after this action was brought; and no notice was given to Lewis by Patterson of the return of the treasury notes to Blackburn, or of any conditions connected with its payment.

After the evidence had been introduced, the plaintiff moved the court to give to the jury nine instructions; but it is only necessary to state the sixth and eighth. These are:

"6th. The jury are instructed that unless they believe from the evidence adduced, that the defendants, Lewis, Crawford & Co., paid to Anne Davisson, or to her authorized agent, the new issue of Confederate States treasury notes in accordance with the stipulation in the receipt marked B in this cause, (Blackburn's receipt), then said receipt is no satisfaction, discharge or extinguishment of the original demand of the plaintiff on which this action is brought, and is no bar to the

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plaintiff's proceedings to recover on her original debt.

"8th. If the jury believe from the evidence, that before the note for $862.50 mentioned in the declaration, became due and payable, the defendants, Lewis, Crawford & Co., through their agent, H. P. Mason, delivered to James A. Patterson, who was in possession of the said note, $862.50 in Confederate States treasury notes of the old issue, to be delivered to said Anne Davisson, the owner of said note, provided she would receive it in discharge of said note, and that said James A. Patterson delivered to said Lewis, Crawford & Co., or their agent, H. P. Mason, the note aforesaid, with the understanding and agreement that said note was to be delivered up to said Anne Davisson, or to said 221 James A. Patterson for her, *in case she refused to receive said Confederate notes, and that said Anne Davisson did refuse to receive said Confederate notes in payment of said note, and returned the same to said Patterson, or to said Lewis, Crawford & Co., or their agent, then the note described in the declaration is not paid, and the jury must find for the plaintiff."

And the defendants asked the court to give an instruction, which it is not necessary to state.

The court refused to give the instruction asked for by the defendants, and gave the nine asked for by the plaintiff. And the defendant excepted.

The defendants then moved the court to instruct the jury as follows:

"If the jury believed from the evidence that the paper was the note of defendants to plaintiff's testatrix, and is the same sued on in this action, and was held by the agent of the plaintiff's testatrix duly authorized to receive the amount of the same in Confederate States treasury notes of the old issue, and he delivered up to the agent of the defendants the said note upon the receipt of the amount thereof in Confederate States treasury notes of the old issue, with the understanding and agreement that if the plaintiff's testatrix, when the said Confederate States treasury notes were offered to her should refuse to receive the same, they should be returned to the defendants, who should redeem the same by the exchange therefor of Confederate States treasury notes of what was known as the new issue of treasury notes, that the plaintiff's testatrix did refuse the said notes of the old issue and return them to her agent, directing him to procure the said notes of the new issue in lieu of them, and the said agent of the plaintiff's testatrix, the said notes of the new issue not being ready for delivery, returned to the defendants the said treas- 222 ury notes of the *old issue, and took from the defendants the receipt and obligation in the words and figures following—

'Received of Mr. J. A. Patterson $862.50, the money that we paid him for our bond to Mrs. Davisson, and she refused to receive at this time. We now owe Mrs. Davisson the above amount, which we will pay in the new issue of Confederate money after the 1st of April next.

Lewis, Crawford & Co.,
Per M. Blackburn.'

—and the plaintiff's testatrix accepted and received the said receipt and obligation as a compliance with her instructions, on the part of her said agent, and ratified his action in that matter, and claimed under said receipt and promise, then the plaintiff cannot recover in this action."

But the court refused to give said instructions as asked for; but gave the same with the addition thereto of the following words: "unless they further believe, from all the evidence in this case, that the plaintiff's testatrix did not receive said receipt and obligation in satisfaction of the note upon which this suit is brought." To which action of the court in refusing to give said instruction as asked for, and in giving it as modified by the court, the defendants excepted.

Upon the petition of the defendants, Lewis and Crawford, this court awarded a supersedeas to the judgment.

Sheffey & Bumbgardner, for the appellants.

William B. Compton, for the appellee.

Staples, J. This is an action of debt upon a promissory note executed by Lewis. 223 Crawford & Co. to Mrs. *Anne Davisson on the 19th of April, 1862, for the sum of eight hundred and sixty-two dollars and fifty cents, payable on or before the 1st day of April, 1864, "being the third and last instalment on a tract of land." At the time this action was brought in the year 1868, the note was in the possession of John F. Lewis, one of the defendants, and a member of the firm of Lewis, Crawford & Co., and had been so in his possession ever since the year of 1864, with the names of the makers torn from the paper. The first question arising here is, whether the action can be maintained under such circumstances. If the note has not been paid, and is improperly withheld from the plaintiff, the mere possession of the defendant cannot affect the plaintiff's right of recovery. It is equally clear, that the unauthorized alteration or even destruction of the instrument by the party executing it, will not preclude the payee or other person entitled from maintaining his action thereon. The authorities upon this point are numerous and decisive. 3 Rob. Prac. 27, 28; 5 Rob. Prac. 758 to 764; Smith Lead. Cases, vol. 1, pt. 2, 279. In the present case, whether the note in controversy had been paid or satisfied by the dealings between the parties, whether the defendants were authorized to cancel the instrument by tearing off the names, was a question or questions of fact for the jury under the instructions of the court. The only point, therefore, we have to consider is, first, whether the instructions were properly given; and secondly, whether the verdict is sustained by the evidence. The court, on the motion of the plaintiff, give the jury nine instructions. The 1st, 2d, 3d, 4th, 5th, 7th and 9th, have no

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special bearing upon the controversy here, and require no particular notice. The defendant's objections relate mainly to the 6th and 8th instructions. It is insisted that they leave out of view the effect of
224 any ratification by Mrs. Davisson; *that they ignore entirely the new or substituted contract of the parties, and confine the jury to the consideration of certain isolated facts as conclusive of the case.

The sixth instruction affirms that the paper known as Receipt B, is no satisfaction or extinguishment of the note upon which the action is founded, unless the jury is satisfied that the defendants paid to Mrs. Davisson the new issue of Confederate currency, as stipulated in that receipt.

The eighth instruction states the facts hypothetically; that is to say, if the jury believe that Mrs. Davisson's agent, James A. Patterson, received the Confederate currency from the defendants' agent, and delivered to said agent the note in controversy, with the understanding that the note was to be returned if Mrs. Davisson declined to receive the currency, and that Mrs. Davisson did refuse to receive the currency, and the same was thereupon restored to the defendants, then the note is not paid, and the jury must find for the plaintiff.

It is not material now to inquire whether these instructions are justly liable to the criticism of defendants' counsel. The instruction given at the instance of the defendants removes the difficulty, if any, growing out of the restricted terms of the plaintiff's instruction. The defendants' instruction fairly presented the question of the operation and effect of Receipt B, as a new and substituted agreement, if the jury believe it was so accepted in lieu of the note now in controversy. The qualification or addition made to that instruction by the court was very proper under the circumstances. The mere fact that Mrs. Davisson had accepted the receipt and claimed under it, and ratified thereby what her agent had done, was not of itself sufficient to discharge the note, unless the receipt was received
225 in satisfaction of *the original demand; and so the court very properly said to the jury.

The plaintiff's and defendants' instructions taken together, with the qualification suggested by the court, fairly state the law applying to the case, and leave no just complaint to either party.

It only remains to inquire whether the verdict is so manifestly in conflict with the evidence as to authorize this court to set it aside. The learned judge of the circuit court has given a certificate of the facts proved on the trial. I do not consider it important to enter into a discussion of these facts. It is only necessary to allude to a few of the most prominent.

It is very manifest throughout that the only question arising in the case is, whether the action can be maintained on the original demand, or whether the plaintiff ought to have proceeded on the receipt or submitted agreement, as it is called. It is not pretended that the note has been paid. The sole ground of defence is that the receipt was accepted in satisfaction of the note, and the action ought to have been brought on the substituted agreement, and not on the note. In support of this proposition, the counsel for the defendants relies upon the doctrine as laid down in certain cases, that although the new agreement may not be good as an accord and satisfaction, it may be good as a substituted agreement, and as such constitutes a discharge of the original demand, although not performed at the time of the suit.

The great weight of modern authority certainly supports this doctrine. Ordinarily, where the debtor's own security, not negotiable and of no higher nature than the simple contract, is taken, it is not considered as a payment or satisfaction, unless there be an agreement so to consider it. In the absence of proof, the natural inference
226 *is that a promise to perform is not a satisfaction unless it be fulfilled. It must be shown that the parties intended the debt to be extinguished, whether the promise was or was not performed. Even where a negotiable note of the debtor is given, it operates only as a conditional payment, unless the parties agree to treat it as an absolute payment. Upon the dishonor of the instrument, if the creditor be in no default, his right of recovery revives upon the original cause of action. The party relying upon the new note as a satisfaction or extinguishment of the original demand, must in all cases make the fact clearly and satisfactorily appear that such was the agreement or understanding. In the absence of such proof, it will not be presumed that a creditor having a perfectly valid claim has surrendered it without consideration, merely to substitute another cause of action in its place. 2 Am. Lead. Cas. 263 to 274; Smith Lead. Cas. Vol. 1, pt. 1, 451, 611-616; 7 Rob. Prac. 531; 5 Rob. Prac. 735-6.

Let us apply these principles to the case in hand. In the first place it is not pretended, there is not even a suggestion, that the note in controversy was payable in Confederate currency, or was even entered into with reference to such notes as a standard of value. No such question is raised anywhere in the record. The verdict of the jury is for the nominal amount of the note, and no exception was taken to the finding upon the ground that the scale of depredation ought to have been applied to the debt. It must, therefore, be assumed that the contract was to pay in a sound currency.

Now, when it is claimed that a creditor has surrendered a perfectly valid claim of this sort without consideration for a mere promise to pay in a highly depreciated currency, the evidence in support of such a pretension ought to be very clear and
227 satisfactory. If the note had *been surrendered and cancelled at the time the receipt was given, there might be some foundation for the claim of a new agreement. But such was not the fact. At that very time it was expressly agreed that the

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note should be returned to Mrs. Davisson. It would have been then surrendered to her agent, but it was in the possession of Mr. Lewis, who was absent. It is obvious that none of the parties regarded the note as satisfied or discharged, and that all of them considered the receipt as a mere voucher for the debt until the note could be returned to the rightful owner. The promise to accept payment in the new issue of the Confederate currency was without any consideration whatever. It was a mere privilege accorded the debtors; and in view of the rapid depreciation of the money, it was incumbent upon them to be prompt and diligent in making the payment. But they never made any such payment to Mrs. Davisson. They never even offered her the money. It is very true that on two occasions they proposed to pay Mr. Patterson, but he informed them that the paper was not in his possession, and that he was no longer Mrs. Davisson's agent. Why did they then not apply to her? They do not tell us. They have not even attempted an excuse for their failure. The only solution of their conduct is that they were unable to use the money more profitably in the business in which they were engaged.

The whole case resolves itself into an attempt to discharge a perfectly valid debt payable in a sound currency, by a mere promise without consideration on either side, to pay in Confederate currency; a promise never performed, or even attempted to be performed.

The plaintiff is to be turned around to another suit on the receipt, which, if not barred by limitation, can only result in a recovery of, perhaps, one-tenth of a per-
228 fectly *valid claim. The verdict is not only fully sustained by the evidence, but it is a just and proper finding.

My opinion is, therefore, to approve the judgment of the circuit court.

The other judges concurred in the opinion of Staples, J.

Judgment affirmed.

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229 ***Pilson, Trustee, & als. v. Bushong & als.**

September Term, 1877, Staunton.

P, as trustee of L and wife, would have in his hands about $5,000, coming in in 1860, '61, '62 and '63; and with their concurrence he, in 1860, purchased of J, agent of B's heirs, a tract of land for about $5,000, payable one-fourth in cash, and the balance on the 1st of September, 1861, '62, '63. He paid the cash payment and gave his own bonds for the deferred payments, and B's heirs, of whom there were eleven, conveyed the land to P in trust for L and wife. Two of these heirs lived in Indiana, one of whom was paid in full his share of the purchase money in the spring of 1861. At that time M and P, two of the heirs, went on a visit to Indiana, and before they went they informed J they would return in the fall, and instructed him to collect the money due them in September, and have it ready for them. He did collect it; but they did not return during the war. J objected to receiving the payment of the bonds due in 1862 and 1863 in Confederate currency, but P told him it was liable to confiscation, and if he did not receive it he would have it confiscated. J then received it and invested it in Confederate bonds, making no use of any of the money himself. Upon the question of who should bear the loss upon the three bonds—HELD:

1. **Principal and Agent.**—J, was justified by the direction of M and P, in receiving payment of the bond due in 1861, and they must bear the loss on that bond.
2. **Threats—Effect.**—J having been induced by the threat of P to receive payment of the second and third bonds, and acting in good faith, he is not to be held liable for the loss upon these bonds.
3. **Same—Same.**—P having induced J to receive the payment of these two bonds by his threat of having the debts confiscated, he is to bear the loss.

230 *4. **Purchase by Trustee—Effect of Giving Bonds in His Own Name.**—P having made the purchase of the land, and given his own bonds for the deferred payments, he must make good the loss to M and P out of his own estate. Whatever equity he may have as against L and wife, must be adjusted between them.

The original bill in this case was filed in the circuit court of Augusta county in 1866, by Samuel, Mary A., and Peter V. Bushong, against John J. Larew, for an account of moneys received by him as their agent. The moneys having been received by Larew in September, 1861-'62 and '63, from Matthew Pilson, the bill was amended and Pilson was made a party defendant; and it appearing that Pilson was acting as the trustee of Jacob Lightner and Mary, his wife, another amended bill was filed, and they were made defendants.

The question in the cause was, who should bear the loss of the Confederate money collected by Larew in September, 1861, 1862 and 1863. This money was purchase money of a tract of land sold by the heirs of Abraham Bushong, through their agent, John J. Larew, to Matthew Pilson, and conveyed by them to Pilson in trust for Jacob Lightner and Mary his wife. Pilson, as executor of John S. Thompson, had sold the land of Thompson, and the payments for the land he bought were made to correspond with those of that he sold; these payments, one-fourth cash, and the residue in one, two and three years. Under the will of Thompson, Lightner and wife were entitled to receive about $5,000, which Pilson was directed to hold in trust for them; and with their concurrence, he purchased the land of the Bushong's for near $5,000; and he gave to Larew his own bonds for the deferred payments. Of the Bu-

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Domicile—What Constitutes.—In Long v. Ryan, 30 Gratt. 718, the principal case is cited for the proposition that to constitute a domicile two things must concur: first, *residence*; secondly, the intention to remain. See also, Brown v. Butler, 87 Va. 625; Lindsay v. Murphy, 76 Va. 429, citing the principal case. In Starke v. Scott, 78 Va. 187, the principal case is cited for the proposition that he who alleges a change of residence must prove it.

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shongs, there were eleven, and all but two of them lived in Virginia. The cash payment was at once paid to the several grantors in the deed, and to Jackson Bu-
231 shong, one of the *non-residents, his whole share of the money was paid in the spring of 1861.

As Pilson received payment for the land he had sold, which he received in Confederate money, he paid off his bonds to Larew in the same money; and this money was received without objection by all the Bushongs, except Samuel, Mary A., and Peter V., the plaintiffs in this cause. The share of Samuel Bushong was confiscated, and paid by Larew to the receiver of the Confederate government.

Mary A. and Peter V. Bushong went in the summer of 1861 to the state of Indiana, professedly on a visit, and with the declared intention of returning the next fall; and they so declared themselves to Larew, and told him they would want their money, which would be due on the bond of 1861, immediately on their return, and they instructed him to collect it. They, however, did not return during the war. In relation to the receipt of the money paid by Pilson to Larew on the bonds due in 1862 and 1863, there is a slight difference in the statements of Larew and Pilson. Larew says in his deposition: "I received the payment that fell due in September, 1861, without a murmur, for the reason stated in my answer—which was, as above stated, that they informed him they intended to return in the fall, &c. The others I received with a great deal of reluctance, particularly the last one, and would not have received them had not Mr. Pilson threatened to have them confiscated." In answer to the question whether or not Mr. Pilson made any threats to have him subjected to any penalties for failure to report to the receiver of the Confederate States debts coming to non-residents, he says—no, sir; he made no threats in that way; he merely stated he would report it himself.

232 *In a deposition given by Pilson before he was made a party in the cause, after stating that he paid the purchase money to Larew as the bonds fell due, he says: "He at one time manifested reluctance to take the money, particularly the last payment, but I told him the shares of the non-residents were liable to confiscation, and would be confiscated unless he took it. My intention was, if Larew did not take the money, to report to the receiver and pay the money to him. Upon learning this, Larew received the money, saying he would do the best he could with it."

Pilson, in his answer to the first amended bill on this question, says: "Respondent has no recollection of any question as to the receipt of the money on any occasion except when the last bond was paid. At that time he remembers that Larew made some remark about the receipt of the money, and that respondent stated in reply that if not received it was liable to sequestration by the Confederate authorities." And he refers to his deposition as giving his recollection of the matter. In his answer to the second amended bill, he denies that any question was raised by Larew about the receipt of the money, except on the occasion of the payment of the last bond. He says there was not an unkind word passed between Larew and himself on the occasion referred to, nor were any threats of any kind made, more than the mere expression of his honest opinion, that the interest of complainants were liable to be sequestrated.

It appeared that in order to have this cause removed to the United States court, the plaintiffs, Peter and Mary A. Bushong, in February, 1872, made an affidavit that for many years before, and at the time of the institution of the suit, they were citizens of Henry county, in the state of Indiana, and that they have resided in said county ever since.

233 *It appeared, too, that Larew, upon receiving the money from Pilson, invested the shares of Peter and Mary A. Bushong in Confederate States bonds, which he held for them, and that he did not apply any part of it to his own use.

A commissioner having stated an account of the money received by Larew, showing what was the share of each of the Bushongs, the cause came on to be finally heard on the 20th day of June, 1874, when the court held that the payments made by the trustee, Pilson, to Larew, agent of the plaintiffs, in Confederate money, in the discharge of the third and fourth land payments, in so far as it concerns the interests of Peter and Mary A. Bushong in said payments, were forced upon said Larew by threats, and that he received the same under moral duress brought to bear upon him by said trustee; and therefore said payments did not operate as a discharge of the claims of said Peter and Mary A. Bushong against said trustee. And it was decreed that Matthew Pilson, trustee, &c., do out of the trust funds in his hands, pay to the plaintiff, Peter Bushong, $457.92, and to Mary A. Bushong $602.12, with interest from the 30th of December, 1865, and their costs. And thereupon Pilson as trustee and Lightner and wife applied to a judge of this court for an appeal; which was allowed.

George M. Cochran, Jr., for appellant Pilson.

A. H. H. Stuart, for Lightner and wife.

D. Fultz, for appellees Bushong.

Sheffey & Bumbgardner, for Larew.

Burks, J. In the month of August, 1860, the appellant, Matthew Pilson, as executor of the will of John S. Thompson, deceased
234 and in the exercise of a power *conferred by the will, made sale of the lands of his testator. The sale was made for one-fourth of the purchase money in cash, and for the residue in three equal annual payments. To whom the sale was made, and how the payments of the deferred instalments was secured, if secured at all, does

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not appear, except that bonds were taken for these instalments.

Pilson was trustee, under the will, of the legacy bequeathed to the appellants, Jacob Lightner and wife, and was required by the will to invest the trust fund as he thought best. This fund, which arose from the sale before mentioned, amounted to a little upwards of $5,000.

Previous to this sale, to-wit: on the 9th day of July, 1860, the appellees, Peter V. Bushong, Mary A. Bushong, and Samuel Bushong, together with the other heirs of Abraham Bushon, deceased, executed to the appellee, John J. Larew, a power of attorney, authorizing him to make sale of their land in the county of Augusta, Virginia, on the same terms precisely on which the Thompson land was sold, to collect the different instalments of the purchase money as they became due, and pay the same over to them, agreeing to allow him a fair compensation for his services.

Pilson, with a view of investing the Lightner trust-fund, on the 7th day of September, 1860, purchased the land of the Bushongs at a price something less than $5,000, upon the terms before stated, corresponding with the terms of sale of the Thompson land. He paid to Larew (the agent) the cash instalment (one-fourth) of the purchase money, also the share of Jackson Bushong in the whole, executed to Larew as agent his individual bonds for the deferred instalments, and on the 14th day of September of the same year, the Bushong heirs, by
235 *deed of that date, conveyed the land to Pilson as trustee for Lightner and wife.

At the date of the purchase by Pilson, all of the Bushong heirs, except Jackson Bushong and the appellee Samuel Bushong, resided in the state of Virginia. The said Jackson Bushong and Samuel Bushong were citizens of the state of Indiana. Larew paid over to the resident parties their respective shares of the cash instalment as soon as he received it from Pilson, and afterwards to Samuel Bushong his share thereof, and to Jackson Bushong his full share of the whole purchase money, which had been collected, as before stated, from Pilson.

Some time in the spring of 1861, precisely when does not appear, the appellees Peter V. Bushong and Mary A. Bushong, went to the state of Indiana. Before leaving Virginia, they informed Larew that they were going on a visit and intended to return in the fall, and instructed him particularly to collect the first deferred instalment of the purchase money for the land owing by Pilson, and have their part ready for them on their return. They did not return at the appointed time, nor at any time during the war.

When and as the bonds of Pilson became due, to-wit: in the month of September, 1861, 1862, and 1863, Larew collected the amounts thereof from Pilson in Confederate States treasury notes. These notes were but slightly depreciated in September, 1861, were considerably depreciated in September, 1862, and were greatly depreciated in September, 1863. Of the collections thus made, he paid to the parties residing in Virginia and present their respective shares, and they were satisfied. By proceedings instituted by some unknown person under the sequestration or confiscation acts of the Confederate States, he was compelled to pay to the receiver under those acts Samuel Bushong's
236 share of the money collected. *This was a valid payment, and a full discharge of all liability for Samuel Bushong's share of the purchase money for the land bought by Pilson. Newton's ex'or v. Bushong & al., 22 Gratt. 628.

The residue of the money in the hands of Larew belonged exclusively to the appellees Peter V. Bushong and Mary A. Bushong. It was invested by him in bonds of the Confederate States, and these bonds, remaining in his hands, perished with the Confederate government. The question is, who shall bear the loss.

One-third of the amount thus invested, was collected by Larew from Pilson in September, 1861, and I have no hesitation in saying that to this extent the loss should be borne by the appellees, Peter V. Bushong and Mary A. Bushong. When they left the state in the spring of 1861 on a visit to the west, they informed Larew that they would return in the fall, and instructed him particularly to collect their money which would be due from Pilson the following September, and have it ready for them on their return. The currency in which he made the collection was not sensibly depreciated, and he was well warranted in receiving it. If these appellees had returned according to promise, the money would doubtless have been paid over to them. By their failure to return, their agent was compelled to make the best disposition he could of the money collected. He did not convert it to his own use, but kept it for a considerable time, supposing that they might and probably expecting that they would still return to the state during the war. At length, as they did not return, he concluded to invest the money in Confederate bonds, as the best thing that could be done for them under the circumstances. He acted in perfect good faith, and with at least ordinary prudence. The loss was occasioned by the default of those entitled to the money, and they only should bear it.
237 *But this is the only part of the loss, which, I think, these appellees should bear. Larew's agency was created before the war, and at a time when war was not anticipated. It extended to the collection of bonds payable at a future time and solvable only in gold coin or in currency equivalent thereto in value. Except under peculiar circumstances he could not lawfully depart from the power of attorney under which he derived his authority, unless specially instructed to do so. He was virtually so specially instructed in regard to the collection of the bond falling due in September, 1861. But he received no special instructions in regard to the collection of the bonds becoming due in September, 1862, and September, 1863. In the absence of such instructions, the power of attorney was his only authority to act, and that gave him power

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only to collect the money which the bonds called for. Ward v. Smith, 7 Wall. U. S. R. 447; Alley & als. v. Rogers, 19 Gratt. 366; Ewart v. Saunders, 25 Gratt. 203.

There were no special circumstances, so far as the record discloses, requiring the collection in Confederate currency in 1862 and 1863. The parties entitled to the money were not present to receive it, and when collected it could not have been remitted to them, and it if could have been remitted, it would have been useless to them in the locality in which they were. These facts were well known both to Pilson and Larew. Nor, so far as appears, was there anything in the pecuniary condition of Pilson (the debtor) which made it proper for the agent to receive from him in discharge of his bonds anything of less value than the bonds called for and the power of attorney authorized to be collected.

The conclusion is that, according to my judgment, either Larew or Pilson should be required to make payment to the appellees, Peter V. Bushong and Mary A. 238 *Bushong, of their respective portions of the bonds of Pilson, which fell due in September, 1862, and September, 1863. The question is, which of the two shall be required to make the payment; and if Pilson, whether he should be required to make payment out of his own estate, or as trustee out of the trust funds in his hands, as the decree appealed from provides.

I think Larew was properly exonerated from liability by the circuit court. He was placed in such circumstances by Pilson that he was compelled to receive the Confederate currency, or by his refusal to receive it to encounter for himself and those he represented, such hazards as no debtor has the right to impose on his creditor. Duress, in a technical sense, is constrained of the will by actual force or threat of it sufficient in severity or apprehension to overcome the mind and will of a person of ordinary firmness; threat of loss of life, of member, of mayhem, imprisonment, and, according to some modern decisions of high authority, of battery to the person, or destruction of property. United States, Lyon & al. v. Huckabee, 16 Wall. U. S. R. 414, 431, 432; Brown v. Pierce, 7 Wall. U. S. R. 205; French *v.* Shoemaker, 14 Wall. U. S. R. 314, 332; 2 Minor's Institutes, 375, et seq.

The means used by Pilson to induce Larew to receive depreciated currency in discharge of bonds payable in gold coin or in a currency equivalent in value to gold, may not have amounted to duress in the strict sense above indicated, but they were designed and were sufficient to control that perfect freedom of will and conduct, which Larew, as agent, was entitled to exercise in the matter. He was unwilling to receive the currency. He refused to receive it. It was his right, and, under the circumstances, his duty to refuse. He did not take it until he was told by Pilson, that if he did not take it, he 239 *(Pilson) would, as stated by Larew in his deposition, "report the facts" to the Confederate receiver, or as Pilson, in his own deposition says, "would report to the receiver and pay the money to him." This was not a direct threat of Pilson to have Larew subjected to the severe penalties of fine and imprisonment imposed by the Confederate acts for the failure of a debtor of a non-resident to report the debt to the receiver; but "the report of the facts," as Pilson professed to believe them, would certainly have exposed Larew to the hazard of such penalties. For Larew then had in hands the money of Peter V. Bushong and Mary A. Bushong collected in September, 1861, and which had been released from confiscation by the receiver on the representation of Larew, that although absent, they were still citizens of Virginia. If, upon further investigation, which would have been necessary under "the report of facts" made by Pilson, the receiver had come to the conclusion that these parties were non-residents and alien enemies, as it is now claimed they were, Larew might, perhaps, have been subjected to the pains and penalties imposed by these laws.

Besides the personal danger which would have been incurred by Larew, if Pilson's threat, for such it was, had been carried out, the debt due the absent parties would have been put to great hazard. Although they may not have been alien enemies, the condition of the country and the temper of the times were not well suited to a calm investigation of a matter of controversy between resident debtors here and creditors absent, though temporarily, in the enemy's territory.

The absence of Peter V. Bushong and Mary A. Bushong on a visit to Indiana did not make them citizens of that state and alien enemies to the people of this commonwealth. Their domicile was in Virginia. To 240 *become citizens of another state, they must have changed their domicile. Residence, with no present intention of removal, constitutes domicile. Mere change of place is not change of domicile. Mere absence from a fixed home, however long continued, canot work the change. There must be the animus to change the prior domicile for another. To constitute a new domicile, two things must concur: first, residence in the new locality; second, the intention to remain there. Until the new domcile is acquired, the old one remains; and whenever a change of domicile is alleged, the burden of proving it rests on the party alleging it. These principles are said to be axiomatic in the law on the subject. Mitchell v. United States, 21 Wall. U. S. R. 350, 353; Story's Conflict of Laws (7th ed.) §§ 43, 44.

The affidavit of Peter V. Bushong and Mary A. Bushong, filed in the cause for the purpose of having it removed to the Federal court, is not sufficient to show that in September, 1862, or Sepember, 1863, these parties had become resident citizens of the state of Indiana, and Pilson had no good cause for his threat of proceedings to have the property of the absent parties confiscated. The circumstances, under which the threat was made, show that his sole purpose was to operate upon the fears of Larew and constrain him to give a discharge from obliga-

tions, which Pilson had no right to demand, and Larew as agent no authority to grant.

It was claimed in argument at bar, that Larew never objected to receiving the Confederate currency until the last payment was made in September, 1863, and that it was then for the first time that Pilson said to him, that if he did not receive the currency, he would report to the receiver. I think the proof is otherwise. It was not until Pilson filed his answer to the last supplemental bill, that he denied in positive terms
241 that he had made the *remark attributed to him when payment was made in 1862. In his answer to the first amended bill, he stated that "he had no recollection of any question as to the receipt of the money on any occasion, except when the last bond was paid." In his deposition before that, he said that Larew "at one time manifested reluctance to take the money, particularly the last payment." These somewhat inconsistent statements are overcome by the positive testimony of Larew that Pilson made the threats as well in 1862 as in 1863.

I do not think that Pilson has ever legally discharged that portion of his bonds falling due in 1862 and 1863, which belonged to Peter V. Bushong and Mary A. Bushong; that he continues debtor to them to that extent, and should be required to make payment, and make it out of his own means. Although he purchased the land of the Bushongs for his cestuis que trust, yet his contract of purchase was wholly a personal one on his part. He gave his individual bonds for the purchase money, gave no other security, and the Bushong heirs conveyed the land to him as trustee without retaining any lien. In the sale, they gave no credit to the trust fund, and have no right to resort to it for the payment of what Pilson alone in his individual character is bound to pay to them.

Whether Pilson is entitled to full indemnity, or to any indemnity, out of the trust fund in his hands, for what he may be required to pay out his own estate, depends upon the equities between himself and his cestuis que trust: equities which have not been developed by the pleadings and proofs in this cause sufficiently for a decree to be made thereon between the co-defendants.

I think, therefore, the circuit court erred in not entering a personal decree against Pilson at the hearing of the cause on the first amended bill, but inasmuch as he was made a party defendant to the last
242 amended bill, *not only in his own character as trustee, but also in his own right, the error in the former decree may be corrected in passing upon the last, which is the final decree in the cause.

Upon the whole matter, I am of opinion to amend the decree complained of by ordering that the principal sums, interest, and costs therein mentioned, be paid by Pilson out of his own estate, instead of out of the trust funds in his hands, as the decree of the circuit court directs, and further to amend it by providing that it shall be without prejudice to any equity which the said Pilson may show himself entitled to as against his cestuis que trust, for indemnity out of the trust funds in his hands in any proper suit which he may be advised to institute for that purpose; and the decree so amended to affirm with costs in this court against the said Pilson in behalf of the appellees (except Samuel Bushong) as the parties substantially prevailing here.

Moncure, P., and Staples, J., concurred in the opinion of Burks, J.

Christian and Anderson, J's, dissented. They thought that the liability should be put upon the Lightners; and therefore that the decree of the circuit court was correct.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said circuit court committed an error in said decree in ordering that the appellant, Matthew Pilson, pay out of the trust funds
243 in his hands, *to the respective parties in said decree named, the several sums of money, interest and costs therein mentioned, instead of ordering, as it should have done, that said Pilson pay said sums, interest and costs, to said parties, respectively, out of his own estate; and that said decree shall be without prejudice to any equity of said Pilson as trustee to indemnity, as hereinafter provided.

The court is further of opinion, that the said decree should be amended by this court, so as to correct the said error, and as amended should be affirmed.

It is, therefore, decreed and ordered, that the said decree be and the same is hereby so far amended as to order that the said Matthew Pilson do, out of his own estate, (instead of out of the trust funds in his hands, as the said decree now directs,) pay to the parties, respectively, in said decree named, the several sums of money, interest and costs, by the said decree ordered to be paid to them respectively, and that the said decree shall be without prejudice to any equity which the said Matthew Pilson may have, as against his cestuis que trust under the will of John S. Thompson, deceased, to indemnity for whatever sum or sums of money he shall pay under said decree as herein amended, and without prejudice to any remedy to which he may be entitled to enforce said equity. And it is further decreed and ordered, that the said decree, as so amended, be affirmed, and that the appellant, Matthew Pilson, out of his own estate, do pay to the appellees, (except Samuel Bushong,) as the parties substantially prevailing in this court, their costs by them expended in the defence of the appeal aforesaid here; which is ordered to be certified to the said circuit court of Augusta county.

Decree reversed.

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244 *Coffman & als. v. Moore's Ex'ors.

September Term, 1877, Staunton.

Contracts—Effect of Bankruptcy.—M holds the bond of C and of E and three others for $13,800, in which C is principal and E and the three others are sureties, due in September, 1869. On the 17th of June, 1870, C and M enter into an agreement under seal by which C sells to M his farm of 628 acres at $50 per acre, in the present currency, the whole to be due on the 1st of September next, when possession was to be delivered. And C agreed that M should pay all claims binding on the land, and the claims that M holds against C, and C agreed to receive as money a note M held against the estate of J, who was one of the sureties. At this time C was very much involved and probably insolvent. M a short time before the 1st of September ascertains C's condition, and fearing he will either go or be put into bankruptcy, and that his debt may be jeopardized, declines to carry out the contract; and a few days after the 1st of September, C conveys the land in trust to secure other debts. M having recovered judgment against C, E and two of the other sureties, the sureties enjoin it, on the ground that M having under his contract bound himself not to enforce his debt until the 1st of September, and by his act failed to have his debt satisfied out of the land, had discharged the sureties—HELD: M was not bound by the contract not to sue upon the bond before the 1st of September; and was not bound under the circumstances to carry out the contract; and therefore the sureties are not released.

This was a suit in equity in the circuit court of Rockingham county, brought in February, 1875, by Erasmus Coffman. D. W. Coffman and C. C. Strayer, to enjoin a judgment for $13,800, with interest from the 1st of September, 1868, which had been re-
245 covered against them *and others in the same court, by the executors of Charles Moore, deceased. The complainants claimed that they were sureties on the bond on which the judgment was recovered, and that the obligee, Charles Moore, had so dealt with two of the principals, S. A. Coffman and M. D. Coffman, as to release the sureties. The grounds on which they relied were that on the 17th of June, 1870, said S. A. Coffman and M. D. Coffman and said Charles Moore had entered into an agreement under seal, by which the Coffmans sold to Moore their farm near Harrisonburg, containing about 628 acres, at the price of $50 per acre, in the present currency, the whole to be due on the 1st of the next September, when possession was to be given. And "the said Coffmans agree that the said Moore shall pay all claims that are binding on the land intended to be sold by this agreement, and the claims that the said Moore holds against the said Coffmans, and the said Coffmans agree to receive as money a note that the said Moore holds against the estate of John H. Hopkins, deceased." Hopkins was one of the parties to the bond aforesaid.

At the time this contract was made S. A. and M. D. Coffman were very much involved in debt and were probably insolvent. Moore seems to have intended until a short time before the 1st of September to complete the agreement; but being informed of the probable insolvency of the Coffmans, and apprehending that they might be put into bankruptcy, and their conveyance to him held to be void, he declined to carry the agreement into effect; though the Coffmans had prepared and executed the deed ready to be delivered to him. A few days after the 1st of September they conveyed the land in trust to secure other debts. And in the same year S. A. Coffman was declared a bankrupt upon his own petition.

246 *The case came on to be heard on the 31st of August, 1876, when the court made a decree dissolving the injunction which had been granted, and dismissing the bill. And thereupon the plaintiffs applied to a judge of this court for an appeal; which was allowed.

James Neeson, Wm. B. Compton and J. C. Liggett, for the appellants.

Robert Johnston and Tucker & Tucker, for the appellees.

Anderson, J., delivered the opinion of the court.

Charles Moore, the testator of appellees, held the joint and several obligation of Samuel A. Coffman and others for a debt of $13,800, upon which he brought suit against all the obligors, except one who had died, obtained judgment and sued out execution. This bill was brought by three of the said obligors, the appellants, to enjoin the judgment and execution, upon the ground that they executed the bond merely as sureties for Samuel A. Coffman, and were released from the obligation by the conduct of the creditor.

The law is well settled in Virginia, that the obligors, in a joint obligation, are alike bound to the creditor as principals, whatever may be the relations between themselves as principal and surety. The obligation of all and each of them to the creditor is absolute and unconditional; and there is no obligation of diligence on the part of the creditor to either of them. In the language of Baldwin, J., in Humphrey v. Hitt, 6 Gratt. 523, "it is the duty of the surety, as well as the principal, to see to the payment of the money, and the forbearance of the creditor is a tacit indulgence given to both, in which the acquiescence of the one is equally signifi-
247 cant with that of *the other." He has no equity against the creditor on the ground of his relation of surety to the principal debtor. But he has equities and remedies against his principal. He may pay the debt and have his action or motion against him for reimbursement; or, if he is apprehensive of loss by the delay of the creditor, he may file his bill in chancery against the principal, to compel him to pay the debt; or he may file his bill in equity against the creditor, to compel him to sue, upon being indemnified against the consequences of risk, delay and expense; or he may, by written notice under the statute (Code of 1873, ch. 114, §§ 4 and 5), be released from his

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liability if the creditor, after the service of the notice, should unreasonably delay to institute suit, or fail to prosecute the same with due diligence to judgment and by execution. He is entitled to these remedies against his principal, in order that he may be indemnified and saved harmless on account of his voltary undertaking in his behalf; and if the creditor acts in a way to deprive him of these remedies against his principal, he releases him from his obligation. Hence, if the creditor makes a binding agreement with the principal debtor to extend the time of payment without the consent of the surety, he makes a new contract with the principal, whereby the surety is deprived of his remedies against the latter during the suspension. A proceeding by notice under the statute would be unavailing to him. He is deprived of his remedy in the meantime, by bill quia timet, and he cannot, even by payment of the debt, proceed against his principal to be reimbursed by action or motion. Accordingly it is held that the creditor, by tieing up his hands by a contract with the principal debtor to extend the time of payment for ever so short a period without the sureties consent, absolves the surety from his obliga-
248 tion, without *even an inquiry as to the amount of loss he has sustained.

It is also held that the surety, as against his principal, is entitled to all the securities which the latter has given the creditor for the purpose of reimbursing him, if he has paid the creditor, and, if he has not, for the purpose of having it paid for his own protection. The surety has a right to stand in the shoes of the creditor in the enforcement of such securities; and the creditor, as to such securities in his hands and under his power, is considered as trustee for the surety, and if he is unfaithful, he not only fails in his duty as trustee, but violates the rights of the surety as against his principal, and is liable for the loss which the surety thereby sustains. These principles are firmly established by repeated decisions of this court. I need only refer to the following cases: Ward v. Johnson, 6 Munf. 6; McKinney's ex'or v. Waller, 1 Leigh, 434; Alcock v. Hill, 4 Leigh, 622; Humphrey v. Hitt, 6 Gratt. supra, in which Judge Baldwin, with the unanimous concurrence of the other judges sitting, gives a clear and forcible exposition of the doctrines on this subject. Then follows Hansbarger adm'r v. Kinney, 13 Gratt. 511; and the recent cases of Shannon v. McMullin, 25 Gratt. 211; Harrison's ex'or & als. v. Price's ex'or & als., Ibid. 553.

The doctrines of the law, as enunciated, are so firmly settled in Virginia that we deem it unnecessary to pursue the inquiry outside of our own courts; but will proceed to inquire how far they are applicable to the case in hand. The appellants who claim to have executed the obligation merely as sureties of Samuel A. Coffman, rely upon an article of agreement which was entered into on the 17th of June, 1870, between Samuel A. Coffman and M. D. Coffman of the one part, and Charles Moore of the other, for the sale and purchase of a farm as absolving them from these obligations.

249 *Does this paper evidence a contract, whereby Charles Moore bound himself to suspend suit or action on the bond for a day or an hour? The vendors agreed to sell him the farm at a fixed ascertained price, fifty dollars an acre, in the present currency, the whole to be due on the 1st of September next (1870), at which time the vendors agreed to give possession. After some other stipulations not important to notice, it provides as follows: "The said Coffmans hereby agree, that the said Moore shall pay all claims that are binding on the land intended to be sold by this agreement, and the claims that said Moore holds against the said Coffmans; and the said Coffmans agree to receive as money a note that the said moore holds against the estate of Colonel John H. Hopkins, deceased." This is the clause relied on by the appellants to make good their claim. There can be no question that it gives the privilege to the vendee to retain the debt due himself, out of the purchase money, in the execution of the contract. But does it limit him to that means of collecting his debt? Does he, by the terms of this clause, covenant or agree that he will suspend the right of action, to recover the debt until the first of September, or for an hour? We may presume that he would, by reason of it, consider it unnecessary to sue, and would not be likely to sue. But did he bind himself not to sue? He may not have deemed it necessary to sue, and have been disposed to await the result of this executory contract for the purchase of the land, with the hope and expectation that it would be satisfactorily executed; as in that event, it would be unnecessary to sue. But did he bind himself not to sue in the meantime?

If he had received written notice under the statute from the solvent sureties to sue, so that the question was presented to him, to surrender the ample security he had
250 *already for the debt, by failing to sue, and to rely alone upon a contract of sale, which was not recorded, and not witnessed or acknowledged so as to be recorded, and which was uncertain in its execution, or to sue, can there be any question as to what his determination would have been? And to have elected to sue, under those circumstances, would have been, we think, no violation of any legal or moral obligation. By entering into this incomplete and executory contract for the land, he did not intend a surrender of any subsisting security he held. (hence he retained in his own hands the bonds he held against them), before he got a title, or knew that it would in his power to get a title. If such had been the intention of the parties, we think it would have been so expressed. We are of opinion, therefore, that a contract, to the effect that he would surrender the security he had. by obligating himself to give the principal debtor further time for its payment. until the 1st of September, 1870, cannot be implied from the face of the article, or the surrounding circumstances. And for the same reasons we think there is nothing in the agreement which would have precluded the sureties from filing their bill quia timet.

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either against the principal debtor or the creditor.

But it was argued with some apparent earnestness by appellants' counsel, that if the money had been tendered to Charles Moore, by the sureties, after he entered into this agreement, he could not have honestly received it. Why not? As we have seen, he never agreed and bound himself to postpone the collection of his debt. Coffmans agreed, that he should pay it out of the purchase money. That was a privilege to him as we construe the article. It does not appear that it was then known what was the amount of liens upon the land; and if it was, it certainly was not known what would be 251 *the amount of liens by the 1st of September. The vendors seem to have been largely indebted, above the price of the land. The liens had been greatly augmented before the 1st of September. They are reported by the commissioner to have amounted to $64,577.70 on the 15th of September, 1872; whilst he reports only 638¾ acres of land, which at $50 an acre would have amounted to only $31,937.50, which would not have paid fifty cents in the dollar of the liens, with which it was charged at the date designated in the report. Whether there was anything to prevent, at the date of this contract, the creditors for the larger portion of this debt from acquiring judgment liens before the 1st of September, 1870, the record does not show. Suppose they had acquired liens to the amount of $31,937, the price of the farm, the vendee would have been obliged to have discharged those liens, in order to clear the title from incumbrance. And that he had the privilege of doing by the express agreement of the vendors. It would hardly be contended that he would have to surrender his debt too. He assumed no such obligation. It was only a privilege accorded to him, of paying the purchase money with the Coffman bond, and the bond of Hopkins which he held. And if the sureties had, at any time after the said article of agreement had been entered into, tendered payment to him, he having informed them of said article of agreement, and he had received the money from them, it would have violated no contract between him and his vendors, and in fact would not have prejudiced them. There is, therefore, nothing in the said articles of agreement between the creditor and the principal debtor which infringes on or impairs the equities or rights and remedies of the sureties against the latter.

Nor did the debtor thereby acquire securities which he was bound to apply in 252 the exoneration of the sureties *from their liability for his debt, it was a contract which he had entered into with Samuel and M. D. Coffman for the purchase of their farm, and, although they agreed to receive the debt for which the appellants were bound as sureties for Samuel Coffman, on the completion of the contract in part payment of the purchase money, it was only a privilege as we have seen, accorded to the vendee, and was a transaction entirely aside from and independent of the obligation in question. It was no security for the discharge of that obligation, for it was incomplete and unexecuted, and in fieri, and whether it was ever executed would depend upon the will and pleasure of the parties. They might, at any time, have cancelled it by consent. It was unrecorded, and was not attested nor acknowledged so as to be recorded, and the vendee had no guarantee that the vendors might not convey the same lands to other innocent purchasers. He did not know that other liens might not be acquired on the land before the 1st of September, which would exceed the price he was to pay for it, or at least not leave enough to pay his (Coffman's) debt, and the Hopkins' bond which he held. He did not know that in the embarrassed condition of the vendors, it would be in their power to make him a clear title, free from all encumbrance and embarrassment. If it had been regarded as a security for his debt, there is no reason why his bonds had not been given up at the time in part payment of the purchase money. Why withhold them until the 1st of September, until the agreement was to be consummated, when all the purchase money was to be due and possession delivered, if their payment was already secured? Because until then, there was uncertainty as to whether it would ever be consummated. The vendors might then refuse to execute the agreement, or the purchaser might feel justified under the circumstances to refuse. The sure- 253 ties *had no right to complain; they had no right to require the creditor to purchase the land; and they were no worse off than they would have been if the agreement had never been made. None of their rights had been infringed by it. The expectation of its consummation may have caused the creditor to delay his suit, though he was under no obligation to delay. And the sureties had no right to complain of that. He was under no obligation of diligence to them. When the 1st of September arrived, it seems that he was unwilling to complete the contract of purchase, and for reasons satisfactory to himself, under the facts and circumstances of this case, the sureties had no right to complain. They had, as before said, no right to require him to purchase the land, or to complete the purchase of it, if he were not so disposed; their rights against the principal debtor not being infringed by his not doing it. The testimony of the plaintiffs in the cause shows that for some time after the purchase it was the bona fide intention of the plaintiff to do what was necessary on his part to be done, in order to its consummation. But when the period for its consummation arrived, the financial embarrassments of the vendors, the augmentation of the liens upon the land since the date of the contract, the large indebtedness of the vendors, the number of suits which were depending against them and pressing them, and the grounds to apprehend that Samuel Coffman would go into bankruptcy, either voluntarily, or involuntarily, which he did a short time after; and the danger of completing the contract

and taking a conveyance under such circumstances, of being involved in a suit in the bankrupt court, and of having his conveyance impeached for fraud in such suit, and the loss of his debt, were well calculated to change his resolution with regard to the purchase of the farm, and to bring him
254 to the conclusion, *in this changed state of the case, to decline to carry out the contract. It does not appear that any tender of executing the contract was made by the vendors, and a refusal on his part. On the contrary, they in sixteen days after the 1st of September, utterly incapacitated themselves to make such a tender, by conveying the same property in trust to secure the debts of others, and also utterly and forever from asserting any claim for specific performance, or for damages for non-performance of the contract.

Upon the whole, the court is of opinion that there is no error in the decree of the circuit court, and to affirm the same with costs.

Decree affirmed.

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255 *Southern Mut. Ins. Co. v. Trear.

September Term, 1877, Staunton.

1. **Fire Insurance—Evidence.**—In a suit on a policy of insurance, the plaintiff was asked what valuation the agent of the insurance company put on the property insured and destroyed by fire? The answer was, the valuation stated in the policy by the agent; which was objected to by the counsel for the company on the ground that it was parol evidence offered to vary or explain the written contract of the parties—HELD: The testimony was admissible, as it did not tend to vary the contract of the parties, but was in confirmation of it.

2. **Irrelevant Evidence—Reversal.**—To authorize the reversal of a judgment for error in admitting irrelevant evidence, not only must the evidence be irrelevant, but it must be of such a nature, as that its admission may have prejudiced the adverse party. If he may have been so prejudiced, even though it be doubtful whether in fact he was so or not, it is sufficient ground for reversing the judgment.

3. **Same—Necessity for Exceptions.**—To render the admission of illegal evidence sufficient ground for the reversal of a judgment, it must be excepted to, and must be such as may have been prejudicial to the exceptant.

4. **Damages—Province of Jury.**—Where the question before the jury was as to the *quantum* of damages to which the plaintiff is entitled, and there is evidence tending to sustain the verdict found by the jury, although there is evidence strongly indicating that the damages assessed by the jury were excessive, the question is one of fact for the jury; and the court will not disturb the verdict, even though on the same testimony, it would have found differently from the jury.

This case was argued at Richmond; but was decided at Staunton. It is sufficiently stated in the opinion of the court delivered by Moncure, P.

258 *J. A. Meredith and George B. Harrison, for the appellant.

W. W. Henry, for the appellee.

Moncure, P., delivered the opinion of the court.

This is a supersedeas to a judgment of the circuit court of the county of Prince Edward, rendered in an action of assumpsit, brought by Peter Trear against the Southern Mutual Insurance Company, on a policy of insurance whereby the said company, in consideration of a cash premium of $30, and a premium note of $63.75, received by said company from said Trear, insured the said Trear against loss or damage by fire and lightning to the amount of $1,500, on his dwelling-house in said county, from the 6th day of August, 1872, (at 12 o'clock at noon), unto the 6th day of August, 1877, (at 12 o'clock at noon). The declaration was in the general form authorized by the statute, and the said policy, which was referred to in and filed therewith, was in the usual form. It was averred in the declaration, that after the issuing of the said policy, and while it was in full force, to-wit: on the 8th day of April, 1873, the said dwelling-house was wholly destroyed by fire, of which said burning the said defendant had notice, as required in said policy; and that the plaintiff had performed all the conditions, and violated none of the prohibitions, of the said policy. The defendant plead non assumpsit to the action; to which plea the plaintiff replied generally. The issue was tried by a jury, which found a verdict in these words: "We the jury find for the plaintiff, and assess his damages at fifteen hundred dollars, with interest from the 24th day of July, 1873, till paid." Whereupon, the defendant moved the court to set aside the verdict and grant a new trial, on
257 the ground that the verdict was *contrary to the law and the evidence; which motion the court overruled, and judgment was rendered according to the verdict.

Four bills of exceptions were tendered by the defendants to rulings of the court in the progress of the trial, and were signed and sealed by the court and made a part of the record. These bills of exceptions present all the questions arising in the case, which will be considered in the order in which they arise; at least, such of them as seem to be relied on.

The first bill of exceptions was taken to the action of the court in overruling a motion of the defendants for a continuance. There was no error in this action of the court; but as no reliance seemed to be placed upon this exception by the counsel for the defendant, either in the petition for a supersedeas or in the argument of the case in this court, no further notice will be taken of it here.

The second bill of exceptions states, that on the trial of the cause the plaintiff, Peter Trear, was introduced as a witness, and after stating that Mr. Jones, the agent of the company whose name is signed to the policy, insured the house, on being asked

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what valuation said Jones put upon the property, the defendant's counsel objected to the witness relating anything which occurred between himself and the agent at the time he took the insurance, which objection was overruled by the court, and the witness proceeded and said: "The agent, after examination of the premises, proposed to take it at a valuation of $2,500, the same mentioned in the insurance policy, and witness paid the money down which was required, and gave the note required:" to which ruling of the court, overruling the said objection and admitting the said statement, the defendant excepted.

The objection taken to the testimony referred to in this bill if exceptions is, 258 that it was parol evidence which *was offered to vary or explain the written contract of insurance, and which is inadmissible for such a purpose. Nobody will deny the rule of law as stated by Judge Green in Crawford v. Jarrett, 2 Leigh, 630, that "parol evidence cannot be admitted (unless in cases of fraud or mistake), to vary, contradict, add to, or explain the terms of a written agreement, by proving that the agreement of the parties was different from what it appears by the writing to have been." Nor, as stated by Judge Baldwin in Watson v. Hurt, 6 Gratt. 633, that "the terms of a written contract cannot be varied by parol evidence of what occurred between the parties previously thereto, or contemporaneously therewith." But it does not appear that this rule was at all violated by the admission of the testimony referred to in this bill of exceptions. It did not at all tend to vary the written contracts of the parties to-wit: the policy of insurance. It is not in conflict with the written contract, but consistent therewith, and in affirmance thereof. The question was as to the value of the property insured at the time of the insurance. The testimony was, that the agent of the company, after examination of the premises, proposed to take it at a valuation of $2,500, the same mentioned in the insurance policy, and the contract was accordingly made upon that basis.

The court is of opinion that the circuit court did not err in overruling the defendant's motion to exclude the testimony.

The third bill of exceptions states that in the further progress of the trial, the plaintiff introduced a witness, Colonel Joseph T. Ligon, who, having stated that his house was insured in the same company, and by the same agent, Jones, at a valuation of $1,000, and was assessed for taxation only at $500, was asked by plaintiff's counsel if, when he insured his house, the agent, 259 Jones, asked *what his property cost, or was assessed at for taxation; and that the defendants by counsel objected to any conversation of witness, and the defendants' agent in insuring witness' house; and the court overruled the objection to the witness answering the said question, when he replied "No," and added that agent, Jones, measured his house at time of insuring it, and fixed the valuation thereof, and a policy of $1,000 was effected thereon; to which ruling of the court, in permitting the witness to answer the question, the defendant excepted.

The evidence in regard to what transpired between the agent, Jones, and the witness, Ligon, in the insurance of the property of the latter was, certainly, irrelevant evidence in this action between the plaintiff, Trear, and the Southern Mutual Insurance Company. What so transpired was res inter alios actae; and if objected to by the defendants, it ought therefore to have been excluded. Whether the judgment ought to be reversed for not excluding it, may not be so clear a question. If the only objection to the evidence was its irrelevancy, and it could not possibly have prejudiced the defendants, then the judgment ought not to be reversed, for the error in not excluding it; for to authorize the reversal of a judgment for error in admitting irrelevant evidence, not only must the evidence be irrelevant, but it must be of such a nature as that its admission may have prejudiced the adverse party. If he may have been so prejudiced, even though it be doubtful whether in fact he was so or not, that is a sufficient ground for reversing the judgment.

If in this case the defendant's motion had been to exclude all the evidence in regard to what transpired between Jones and Ligon, and the court had overruled the motion, such action of the court would not only have been erroneous, but would have been sufficient ground for the reversal of the judg- 260 ment; for although it was res *inter alios actae, and so not relevant or admissible evidence, and ought not to have had any effect on the minds of the jury, yet it would be impossible to say that it might not have had some effect to the prejudice of the defendants. But the defendant's motion was not to exclude all the evidence in regard to what transpired between Jones and Ligon. It is stated in the bill of exceptions that in the further progress of the trial "the plaintiff introduced a witness, Colonel Joseph T. Ligon, who having stated that his house was insured in the same company and by the same agent, Jones, at a valuation of $1,000, and was assessed for taxation only at $500," &c. Now, down to this point in the statement of the witness, there was no objection to his evidence by the defendants. It is then further stated in the bill of exceptions as follows: "Was asked by plaintiff's counsel if, when he insured his house, the agent Jones asked what his property cost, or was assessed at for taxation, and the defendants, by counsel, objected to any conversation of witness and the defendants' agent in insuring witness' house; and the court overruled the objection to the witness answering the said question, when he replied 'no,' and added that agent Jones measured his house at time of insuring it, and fixed the valuation thereof, and a policy of $1,000 was affected thereon, to which ruling of the court, in permitting the witness to answer the question, the defendants, by counsel, excepted." There

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might have been an answer to the question which might have been prejudicial to the defendants, but the only answer in fact made to it was "no," which could not have been prejudicial to the defendants. To be sure, it is stated in the bill that the witness "added that agent Jones measured his house at time of insuring it, and fixed the valuation thereof, and a policy of $1,000 was affected thereon." But this was no part of the reply to the question, and the exception was only to the ruling of the court in permitting
261 *the witness to answer the question.

It is also stated in the bill that the defendants "objected to any conversation of witness and the defendants' agent in insuring witness' house;" but it does not appear that any such conversation was admitted as evidence in the case. All that was said by the witness in answer to the question was "no," and to add, "that agent Jones measured his house at time of insuring it, and fixed the valuation thereof, and a policy of $1,000 was effected thereon."

The court is therefore of opinion that while the circuit court erred in permitting the witness to answer the question, such error was not to the prejudice of the defendants, and it not sufficient ground for the reversal of the judgment. To render the admission of illegal evidence sufficient ground for the reversal of a judgment, it must be excepted to, and must be such as may have been prejudicial to the exceptant.

The fourth and last bill of exceptions is to the action of the court in overruling the motion of the defendants to set aside the verdict as being contrary to the law and the evidence.

The question before the jury upon the evidence was only as to the question of the damages, and though the court, if on the jury, might have been for a much less amount of damages than was found by the jury, yet it was a question of fact for the jury, and there was evidence before them tending to show that the amount of damages actually sustained was at least equal to the amount found by the jury. Although there was also evidence before the jury strongly tending to show that the building insured was actually of much less value than that at which it was fixed by the agent of the defendants at the time of the insurance, and even than that at which it was estimated by the jury assessing the damages in the case, yet the verdict of the jury was
262 legally warranted *by the evidence, and cannot, therefore, be set aside by the court upon the ground that it is contrary to the law and the evidence.

The court is therefore of opinion that there is no error in the judgment to the prejudice of the defendants, and the same is accordingly affirmed.

Judgment affirmed.

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263 *Patterson & Wife & als. v. Horsley, Trustees, & als.

November Term, 1877, Richmond.

In 1857 M conveyed to H with other property $9,000 of the Virginia and Tennessee railroad company bonds, secured by mortgage and guaranteed by the city of Lynchburg, for the use and benefit of Mrs. M and her husband N and their children—in trust: 1. During the life of Mrs. M and her husband N and of the survivor of them, the said property and money to be held and the income thereof applied to the support of them and the survivor of them and their children. 2. At the death of the survivor the property and its increase to be divided among the issue of Mrs. M and N *per stirpes*. 3. During the life of M any of the property may be exchanged for other property by the trustee by and with the written consent of M, and after her death by and with the written consent of N. In 1859 H, without the written consent of M, sold these bonds to G for $8,200, for which G gave his bond payable in July, 1863, and interest payable semi-annually, and a deed of trust on land to secure it. In 1863, when the bond fell due, G proposed to pay it in Confederate money, and M having given her written consent. H accepted the money, and P having been in 1864 substituted as trustee, H transferred the money to him. Upon a bill filed by the children of M and N against H and G—HELD:

1. **Provisions of Trusts—Sale of Property.**—Under the trusts of this deed the property could only be sold or exchanged, by a decree of a court of equity, or with the written consent of M given at the time, or previous to the sale or exchange.
2. **Same—Trustee's Discretion.**—Even the the written consent or request of M would not be sufficient to authorize and justify a sale of the property; but the trustee must have the sanction of his own judgment to it.

264 *3. **Same—Same—Breach of Trust.**—The bonds being a permanent investment, well secured and paying interest regularly on the par value, it was a breach of trust in H to sell them and take a bond having only four years to run; and especially to sell them without the written consent of M.

4. **Same—Same—Same—Liability of Vendee.**—As G knew, or might have known if he had inquired, that H was committing a breach of the trust in the sale to him without the written consent of M, and he was a party to that act, both H and G are liable to the *cestuis que trust* for any loss which accrued to the trust fund by said sale.
5. **Same—Same—Receiving Depreciated Currency.***—Even if by said sale the bond of G had become a part of the trust fund, it was a breach of trust in H to receive payment of it in Confederate money in July, 1863, when they had depreciated in value as nine to one of gold; though M did consent in writing to the receipt of them; and G participated in such breach of trust; and they are jointly and severally liable to indemnify the beneficiaries in the deed against all loss and damage sustained by reason of such breach.
6. **Same—Same—Extent of Liability.**—H and G are chargeable in account with said bene-

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***Payment to Fiduciary of Confederate Money—Liability of Debtor.**—Upon the question of the liability of a fiduciary who receives depreciated currency in payment of a well-secured specie debt together with the liability of the *debtor* who makes the payment, see Helsley v. Fultz, 76 Va. 674 and Patteson v. Bondurant, 30 Gratt. 94, and *note*.

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ficiaries with the price of the bonds sold by H to G, viz: $8,280, with interest thereon from the date of said sale, payable semi-annually, subject to all credits to which they, the said H and G, are properly entitled on account of the same.

7. **Same—Same—Same.**—In the settlement of the trust account H is to be credited with the scaled value of the Confederate money paid by him to P as at the time of such payment; and P will be chargeable in his trust account with that amount.

8. **Accounting.**—As between H and G, G is primarily liable for the value of said bonds, except so much thereof, or of his bond therefor, as has been actually paid by him to H in good money; and to that extent G is entitled to credit in his account with H; but not in the account of said H and G with the beneficiaries of the trust fund.

This was a bill filed in January, 1866, in the circuit court of Buckingham county, by Camm Patterson and Mary E., his wife, and three others, by said Patterson as 265 *trustee and next friend, against John Horsley, G. A. Hancock, William A. Turner and Nicholas Mills, Jr., for the settlement of the accounts of Horsley, as trustee, under a deed executed on the 4th of June, 1857, by Mary C. Horsley, by which she conveyed to said John Horsley and Charles Y. Horsley, (but under which said Charles declined to act,) a tract of land, some slaves named, and $7,898 in money, in trust for the benefit of Ann E. Mills and Nicholas Mills, Jr., and their children. The deed and the trusts are set out in the opinion of Moncure, P.

The only subject of controversy in this court, was in relation to what is called money in the deed. That consisted of $9,000 of the coupon bonds of the Virginia and Tennessee railroad company, guaranteed by the city of Lynchburg, and secured by mortgage. In May, 1859, John Horsley, the acting trustee, sold these bonds to G. A. Hancock for $8,280, for which Hancock executed to him his bond, payable on the 1st of July, 1863, with interest which was to be paid semi-annually, and gave a deed of trust on land to secure it. This sale was made without the written consent of Mrs. Mills. When the bond fell due in 1863, Hancock proposed to pay the balance due upon it in Confederate money; and Horsley having obtained the written consent of Mrs. Mills and her husband, Nicholas Mills, Jr., accepted payment in that currency. The depositions of Nicholas Mills, Jr., and Mrs. Mills, were taken in the cause. Nicholas Mills says that Horsley came to his house and told him that Hancock wished to pay in Confederate bonds; that witness objected to the receipt of them, they being depreciated. He then mentioned he was acting under legal advice. Mrs. Mills being asked what induced her to sign the paper, says: "I though I was obliged to do so, as Mr. Horsley told me he had legal advice 266 from *William M. Cabell to that effect, and that he had also been advised by Mr. William A. Turner and D. J. Hartsook, whom I considered business men, to take the money." And she says she would not have signed the paper but for these representations of Horsley. Horsley, who filed his answer after these depositions, were taken, denied these statements; and the depositions were excepted to, and excluded by the court below.

The cause came on to be heard on the 12th of May, 1871, when the court held that the dealings of Horsley with Hancock in respect to the said bonds was in good faith by both of them, and upon sufficient authority from Ann E. Mills, and that neither of them was liable for any loss which had resulted to the trust fund from said dealings; and Horsley was directed to settle his accounts as trustee under said deed.

The commissioner having returned his report, the cause came on again to be heard on the 13th of October, 1871, when the court decreed that Horsley should pay to Camm Patterson, who had been substituted as trustee in the said deed, $764.54, with interest from the 1st of January, 1871; that being the amount of principal reported by the commissioner as due from him to the trust fund. And Patterson, as trustee, was directed to pay to Horsley out of the income of the trust fund, after providing for the support of the cestuis que trust, $356.36, as of the 1st of January, 1871, as the excess of disbursements over receipts. And thereupon Patterson and his wife and the other three children of Nicholas Mills, Jr., and his wife, by said Patterson as their trustee and next friend, applied to this court for an appeal; which was allowed.

The case was argued with signal ability, both orally and in printed notes, by 267 R. T. Hubbard, Jr., and Camm *Patterson, for the appellants, and by H. H. Marshall and L. R. Page, for the appellees; but the number of cases directed to be reported precludes the possibility of giving a note of the argument.

Moncure, P., delivered the opinion of the court.

By the deed of the 4th day of June, 1857, of which an official copy, marked "Exhibit A," is filed with the bill in this case, the land, slaves and money therein mentioned (except the slaves Harriet, Fanny and Mary Susan), were conveyed by the grantor, Mary C. Horsley, to the grantees, her sons, Charles Y. Horsley and John Horsley, in trust, for the use and benefit of her daughter, Ann E. Mills, and Nicholas Mills, Jr., husband of the said Ann E., and the children of the said Ann E. Mills and Nicholas Mills, Jr., then living or which might be thereafter born, upon the trusts recited in said deed, as follows, to-wit:

"1. During the life of the said Ann E. Mills and Nicholas Mills, Jr., and the survivor of them, the said property and money shall be held and the income thereof applied to the support of them and the survivor of them and their children born and to be born.

"2. At the death of the survivor of them the said property and its increase shall be

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divided among the issue of the said Ann E. Mills and Nicholas Mills, Jr., per stirpes.

"3. During the life of the said Ann E. Mills any of the above granted property may be exchanged for other property by the trustees, by and with the written consent of the said Ann E. Mills, and after her death it may be so exchanged by and with the written consent of Nicholas Mills, Jr.

"4. At the death of the survivor of the said Nicholas Mills, Jr., and Ann E.
268 Mills, all the property hereby *granted, (except the slaves Harriett, Fanny and Mary Susan, and they, in the event of their several owners dying childless or unmarried,) shall be divided according to the laws of descents and distributions. If the said Nicholas Mills, Jr., and Ann E. Mills shall die without children of their marriage, then all the above property shall go to the next of kin of the said Ann E. Mills," &c., &c.

The property described in the said deed as "money" consisted of bonds of the Virginia and Tennessee Railroad Company to the par amount of nine thousand dollars, secured by mortgage and guaranteed by the city of Lynchburg, on which interest at the rate of six per centum per annum was payable semi-annually, and it seems was then and continued thereafter, so long as the said stock was held under the said trust, to be paid punctually, though the market value of the said bonds did not exceed ninety cents in the dollar, if it equalled that rate.

The court is of opinion that such was the nature of the trust created, and such the strictness of the settlement made in regard to the said property by the said deed, that no disposition could be made of the principal of the trust subject, or any part thereof, without the agency and decree of a court of chancery, except in the mode expressly prescribed by the deed. In that mode only could the trustees and beneficiaries, or any of them, dispose of the said property or any part thereof.

That mode is prescribed by the third article of the declarations of trust aforesaid, to-wit: "3. During the life of the said Ann E. Mills any of the above granted property may be exchanged for other property by said trustees by and with the written consent of the said Ann E. Mills, and after her death it may be so exchanged by and with the written consent of Nicholas Mills, Jr."

269 *Now, here it will be observed that power is given to the trustees, not to sell any of the above granted property, but to exchange it for other property, and not to do even that of their own accord only, however well satisfied they might be of the advantage of such exchange to any or all of the beneficiaries. They could do it only "by and with the written consent of the said Ann E. Mills," or after her death "by and with the written consent of Nicholas Mills, Jr."

The grantor in the deed had a right to withhold from the trustees and beneficiaries any power of disposition whatever, of the principal of the trust subject during the continuance of the trust, and of course she had a right to give such a power of disposition subject to such conditions and restrictions as she might choose to prescribe, however capricious or unmeaning such conditions and restrictions might seem to be. Cujus est dare ejus est disponere.

But it was no capricious or unmeaning condition or restriction imposed on the power of disposition given to the trustees in this case, to require that any exchange made by them of any part of the principal of the trust subject should be "with the written consent of the said Ann E. Mills," &c. She, in her own right and as one of the heads of the family, was deeply interested in the trust, and it was reasonable to require that any act of disposition by the trustees of any part of the principal of the trust subject should be sanctioned by her written consent.

While an "exchange" may seem strictly to imply that one subject of investment should be directly given for another, yet a more liberal and reasonable construction would no doubt authorize an exchange to be made indirectly by selling one subject, and with the proceeds of sale buying another in its place, if the act were done bona fide.

270 *The court is further of opinion, that while such a limited and restricted power of disposition was given to the trustees as aforesaid, they ought only so to have disposed of any part of the trust subject when, in their judgment and according to their discretion, such disposition would be beneficial to the parties interested in the trust; and they would not have been warranted in making such a disposition merely by the written consent of the said Ann E. Mills. That was a safeguard and precaution which the framer of the trust chose to superadd to the judgment and discretion of the trustees. She authorized such an exchange to be made only when thus determined on and sanctioned. Any other disposition of any part of the trust subject made by the trustees in any other manner, was a breach of trust by them for which they were responsible, as also were any other persons who may have knowingly participated with them in such breach of trust.

The court is further of opinion, that the transaction between the trustee and appellee, John Horsley, and the appellee, Gustavus A. Hancock, on or about the 2nd day of May, 1859, whereby the said trustee sold to the said Hancock the said bonds of the Virginia and Tennessee railroad company, guaranteed by the city of Lynchburg, amounting to the principal sum of $9,000, in consideration of the bond of the said Hancock for the sum of $8,280, payable on or before the 1st day of July, 1863, with interest from the 1st day of July, 1859, to be paid semi-annually on the 1st of January and July in each year, secured by deed of trust on real estate in the county of Albemarle, was a breach of trust in the said

trustee, in which the said Hancock participated, having notice, actual or constructive, of the facts which constituted such breach of trust, and the same having been committed at his instance and for his benefit; and that the said trustee and the said Hancock are therefore liable to the
271 beneficiaries *in the said trust for all damages sustained by them in consequence of the said breach of trust. It is at least doubtful whether the said transaction could be considered as an exchange of property within the meaning of the third clause of the declarations of trust aforesaid, even if every requisite of the said clause had been complied with. But such was not the case. It was an indispensable requisite of the said clause that any exchange of property thereby authorized should only be made "by and with the written consent of the said Ann E. Mills," and there was no such consent.

That fact alone is conclusive of the proposition that the transaction was a breach of trust. But even if it had been in literal pursuance of the third clause of the declarations of trust in that respect, it is at least doubtful whether the said transaction would not have been a breach of trust. The bonds of the Virginia and Tennessee railroad company, secured as they were by mortgage, and guaranteed by the city of Lynchburg, were a permanent investment, and as safe a one as could well be made. The whole par amount of the bonds, $9,000, bore interest at the rate of six per cent. per annum, payable semi-annually. What good motive then could there have been for exchanging such an investment for a temporary one, of only four years' duration? It was a great advantage in such a case to have a permanent investment, especially if it was, as in this case, perfectly safe, and yielding legal interest payable semi-annually. A loan for four years, though it might be perfectly safe, as was the case here, necessarily involved the necessity of making another investment in very short time, which might not be so easily made, nor so safe. It is obvious, therefore, that this transaction must have been occasioned by a desire of the trustee, or of Mr. and Mrs. Mills, to accommodate Hancock, and not with a view of pro-
272 moting *the interest of the beneficiaries in the trust, several of whom were infants. The only motive for such an exchange as was authorized by the trust ought to have been, to promote the interest of those beneficiaries; and it ought to have been made, if at all, in strict pursuance of the requisitions of the trust. Mrs. Mills' consent to the transactions, if given at all, was not given in writing, and was given with reluctance, and on persuasion, to accommodate Hancock. She was not the only party interested in the trust. Her children were also interested, all of whom were then infants. And they were interested, not only as remaindermen after the death of their parents, but also in the income of the trust subject during the lives of their parents. She held a trust power for their benefit as well as her own, and in inseparable connection with her own. She ought, therefore, to have exercised it faithfully, as a conservative, and not a destructive power. If the transaction had not occurred, there would in all probability have been no loss of any part of the trust fund; whereas there has been a loss of the whole or greater part of the amount of the $9,000 invested in railroad bonds when the trust was created.

The court is further of opinion, that even if the said transaction had been done in strict pursuance of the power, and the bond of Gustavus A. Hancock for $8,280, with interest as aforesaid, had become, properly and regularly, a part of the said trust subject, in lieu and instead of the said bonds of the Virginia and Tennessee railroad company, it was a breach of trust in the said John Horsley to receive payment of the said bond of Hancock, which was a gold debt, in July, 1863, in Confederate currency at par, which was then depreciated in value, in comparison with gold, as nine to one. The impropriety of that, as a fiduciary
273 act, must have been *obvious; and it was done by the trustee, as appears from the record, in opposition to the advice of his counsel, William M. Cabell, Esq. To be sure, Mills and wife appear to have given their written consent to this act of the trustee. They say in their depositions that they gave it under the influence of representations of the trustee to them that he was bound to receive payment of Hancock's bond in Confederate currency, and that his counsel, Mr. Cabell, had so advised him. The trustee in his answer denied that he made any such representations to them, and he expected to their depositions as incompetent testimony, and the court below accordingly so decided. This court, without deciding the question as to the correctness of that decision, and considering the said depositions as not in the case, is decidedly of opinion that the said trustee, in receiving payment of the said Hancock's bond in Confederate currency at par, was guilty of a breach of trust, and that said Hancock, in making such payment, under the circumstances of this case, participated in such breach of trust, and that both of them are jointly and severally liable to indemnify the beneficiaries in the said trust against all loss and damage sustained by them by reason of such breach.

The court is further of opinion, that the said trustee, John Horsley, and the said Gustavus A. Hancock, are chargeable, in account with the beneficiaries under the said trust, with the price at which the said Horsley sold to the said Hancock the said bonds of the Virginia and Tennessee railroad company, to-wit: $8,280, with interest thereon from the date of the said sale, payable semi-annually, subject to all credits to which the said Horsley and Hancock are properly entitled on account of the same.

The court is further of opinion, that as between the said Horsley and Hancock,
274 the said Hancock is primarily *liable for the value of said bonds of the Virginia and Tennessee railroad company,

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except so much thereof, or of his bond therefor, as has been actually paid by him to the said Horsley in good money, to the extent of which actual payment the said Hancock is entitled to credit in his account, with the said Horsley, but not in the account of the said Horsley and Hancock with the said beneficiaries for the trust fund.

The court is further of opinion, that the said Horsley is liable for his breach of trust aforesaid, although he may not have actually intended thereby to injure the beneficiaries in the trust. The grantor in the deed had a right to guard, as she did, the rights and interests of the beneficiaries under the trust; and while the persons named therein as trustees had a perfect right at their option to accept or refuse the burthen of the trust, and one of them did refuse, while the other accepted it, yet it was the duty of the one who accepted it to become well informed and advised, as he easily might, in regard to his duties as trustee, and to execute the same according to the rights of the beneficiaries; and he must be regarded as having been so informed and advised, when we come to consider whether he was guilty of a breach of trust or not.

The court is further of opinion, that whether the appellants are entitled to the benefit of the deed of trust to William A. Turner in the proceedings mentioned, and if so, to what extent and against what persons, to enforce the balance which may be found against said Horsley and Hancock, or either of them, on account of the trust subject, are questions which cannot be determined until such persons are made parties to the suit, and have an opportunity of making their defence; and the appellants should be permitted, if they desire, 275 when the cause gets back to *the court below, to make such persons defendants to the suit.

The court is further of opinion, that in the settlement of the trust account, the trustee, Horsley, ought to be credited with the scaled value of the Confederate money paid by him to Camm Patteson, substituted as trustee in his place, as at the time of such payments, with which scaled value with interest from that time, the said Patteson will be chargeable as such trustee to the beneficiaries in the trust.

The court is therefore of opinion that so much of the decrees appealed from as is in conflict with the foregoing opinion, is erroneous, and ought to be reversed and annulled, and the residue affirmed, and the cause remanded to the court below for further proceedings to be had therein to a final decree in conformity with the said opinion.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that such was the nature of the trust created, and such the strictness of the settlement made by the deed of the 4th day of June, 1857, of which an official copy, marked "Exhibit A," is filed with the bill in this case, in regard to the land, slaves and money therein mentioned (except the slaves Harriet, Fanny and Mary Susan), that no disposition could be made of the principal of the trust subject, or any part thereof, without the agency and decree of a court of chancery, except in the mode expressly prescribed by the said deed. That mode is prescribed by the third article of the declarations of trust contained in said deed, and is as follows, to-wit: "3. During the life of the said Ann E. Mills any of the above granted property may be exchanged 276 for other property *by said trustees by and with the written consent of the said Ann E. Mills, and after her death it may be so exchanged by and with the written consent of Nicholas Mills, Jr."

The court is further of opinion, that the transaction in the proceedings mentioned between the trustee and appellee, John Horsley, and the appellee, Gustavus A. Hancock, on or about the 2nd day of May, 1859, whereby the said trustee sold to the said Hancock the bonds of the Virginia and Tennessee railroad company, guaranteed by the city of Lynchburg, amounting to the principal sum of $9,000, in consideration of the bond of the said Hancock for the sum of $8,280, payable on or before the 1st day of July, 1863, with interest from the 1st day of July, 1859, to be paid semi-annually on the 1st of January and July in each year, secured by deed of trust on real estate in the county of Albemarle, was a breach of trust in the said trustee, in which the said Hancock participated, having notice, actual or constructive, of the facts which constituted such breach of trust, and the same having been committed at his instance and for his benefit; and that the said trustee and the said Hancock are therefore liable to the beneficiaries in the trust for all damages sustained by them in consequence of the said breach of trust. It was an indispensable requisite of the said third article of the said declaration of trust, that any exchange of property thereby authorized should only be made "by and with the written consent of the said Ann E. Mills," and there was no such consent to the said transaction. Such consent could only have been given before or at the time the transaction occurred, and would have been invalid if given afterwards. But no such consent was given before, at the time, or afterwards.

The court is further of opinion, that even if the said transaction had been done 277 in strict pursuance of the *power conferred by the said deed of trust, and the bond of Gustavus A. Hancock for $8,280, with interest as aforesaid, had become properly and regularly a part of the said trust subject in lieu and instead of the said bonds of the Virginia and Tennessee railroad company, it was a breach of trust in the said John Horsley to receive payment of the said bond of Hancock, which was due and payable in specie, in July, 1863, in Confederate currency at par, which currency was then depreciated in value, in comparison with gold, as nine to one. To be sure Mills and wife appear to have given their written

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consent to this latter act of the trustee. They say in their deposition that they gave it under the influence of representations of the trustee to them, that he was bound to receive payment of Hancock's bond in Confederate currency, and that his counsel had so advised him. The trustee, in his answer, denied that he made any such representations to them, and he excepted to their depositions as incompetent testimony, and the court below accordingly so decided. This court, without deciding the question as to the correctness of that decision, and conceding its correctness for the purposes of this case, is yet of opinion that the said trustee, in receiving payment of the said Hancock's bond in Confederate currency at par, was guilty of a breach of trust, and that said Hancock, in making such payment under the circumstances of the case, participated in such breach of trust, and that both of them are jointly and severally liable to indemnify the beneficiaries in the said trust against all loss and damage sustained by them by reason of such breach.

The court is further of opinion, that the said trustee, John Horsley, and the said Gustavus A. Hancock are chargeable in account with the beneficiaries under the said trust with the price at which the said Horsley sold to the said Hancock the 278 said bonds of the Virginia and *Tennessee railroad company, to-wit: $8,-280, with interest thereon from the date of the said sale, payable semi-annually, subject to all credits to which they, the said Horsley and Hancock, are properly entitled on account of the same.

The court is further of opinion, that in the settlement of the trust account, the trustee, Horsley, ought to be credited with the scaled value of the Confederate money paid by him to Camm Patteson, substituted as trustee in his place, as at the time of such payment; with which scaled value, with interest from that time, the said Patteson will be chargeable as such trustee to the beneficiaries in the trust.

The court is further of opinion, that whether the appellants are entitled to the benefit of the deed of trust to William A. Turner in the proceedings mentioned, and if so, to what extent and against what persons, to enforce payment of the balance which may be found against said Horsley and Hancock, or either of them on account of the trust subject, are questions which cannot be determined until such persons are made parties to the suit, and have an opportunity of making their defence; and the appellants should be permitted, if they desire, when the cause gets back to the court below, to make such persons defendants to the suit.

The court is further of opinion, that as between the said Horsley and Hancock, the said Hancock is primarily liable for the value of said bonds of the Virginia and Tennessee railroad company, except so much thereof, or of his bond therefor, as has been actually paid by him to the said Horsley in good money, to the extent of which actual payment the said Hancock is entitled to credit in his account with the said Horsley, but not in the account of the said Horsley and Hancock with the beneficiaries of the trust fund.

279 *The court is therefore of opinion that so much of the decrees appealed from as is in conflict with the foregoing opinion is erroneous, and it is decreed and ordered that the same be reversed and annulled, and the residue thereof affirmed, and that the appellees, Horsley and Hancock, pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here.

And it is further decreed and ordered, that this cause be remanded to the said circuit court for further proceedings to be had therein to a final decree in conformity with the foregoing opinion; which is ordered to be certified to the said circuit court of Buckingham county.

Decree reversed.

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280 *Cromer v. Cromer's Adm'rs.

November Term, 1877, Richmond.

I. J, the surety of M, who was the guardian of R, paid R $4,000 of the indebtedness due from M to R, as guardian. J dies and his administrators sue M in *assumpsit* for the amount so paid, and M pleads his discharge in bankruptcy in bar to recovery. The administrators of J reply that the debt due by M to their intestate is a *fiduciary* debt from which he is not discharged under section 32 of the bankrupt act—HELD:

1. **Discharge in Bankruptcy—Fiduciary Debt.**—The debt due by M to the estate of J is *not* a *fiduciary* debt, and his discharge in bankruptcy is a bar to the recovery of the same. The debt due by M to J's estate was a simple contract debt, provable under the bankrupt act and discharged by it.

II. **Same—Same.**—What are *fiduciary* debts within the meaning of the phrase "while acting in a fiduciary character," mentioned in section 33 of the bankrupt act? *Quaere.*

III. **Sureties—Subrogation.**—A bond on which principal and surety are both bound, once paid by the surety in the lifetime of the principal, without assignment by the creditor, or an agreement to assign, is forever dead as a security as well in equity as at law. There can be no subrogation in such a case.

This case was heard at Staunton, but decided at Richmond. It was an action of assumpsit in the circuit court of Rockingham, brought by Joseph Cromer's administrators against Martin Cromer, to recover the sum of $4,000 which Joseph Cromer had paid in his lifetime as the surety of Martin Cromer in a guardian's bond. On the 21st of April, 1845, Martin Cromer qualified as the guardian of Josephine Cromer, the 281 daughter of *Joseph Cromer, in the county court of Rockingham, gave bond in the penalty of $6,000, with said Joseph Cromer and others as his sureties. Afterwards the ward, Josephine Cromer, intermarried with J. F. Ritchie, and on the 19th January, 1869, Joseph Cromer, her father, and one of the sureties as aforesaid,

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paid to Ritchie $4,000 as a part of the amount due by the guardian, Martin Cromer, to his said ward. After the death of said Joseph Cromer, March 26th, 1873, his administrators instituted their action of assumpsit to recover the said $4,000, with interest from the day of payment, from said Martin Cromer. The plaintiffs, in their declaration, include several counts, and present prominently the relations between the parties and the character in which the sum of money was paid by their intestate. To this action Martin Cromer pleaded in bar his final discharge in bankruptcy from the district court of the United States for the western district of Virginia, dated May 14th, 1874. To which the plaintiffs replied "that their intestate, in his lifetime, paid said sum of money as surety for the defendant, Martin Cromer, in a fiduciary bond due from him as guardian of Josephine Cromer, the wife of J. F. Ritchie, in the payment of which the defendant, Martin Cromer, had made default, and that said liability was excepted by the bankrupt law from the operation of a discharge in bankruptcy." To this replication the defendant, Martin Cromer, demurred, but the demurrer was overruled, and issue joined, and a verdict and judgment rendered in favor of the plaintiffs for the $4,000, with interest and costs. From this judgment a writ of error was taken to this court, the main questions being, first, whether or not the debt due by the plaintiff in error was a fiduciary debt; and secondly, whether it was discharged by the bankrupt act. There were instructions asked for by the plaintiff
282 and given by the *court, and there were others asked for by the defendant and refused, but they involve no question of any importance except that involved in the plea, replication and demurrer. There was also a motion by the defendant for a new trial, which was refused, and an exception, which also involved the same question.

Johnston, Compton & Haas, for the appellant.

J. N. Liggett, for the appellees.

Burks, J., delivered the opinion of the court.

Section 19 of the act establishing a uniform system of bankruptcy throughout the United States, approved March 7th, 1867, (14 Stat. at Large, ch. 176, p. 517, Revised Statutes of United States, § 5067), declares what debts and claims are provable against the estate of the bankrupt in the bankruptcy proceedings under that act. Section 32 of the same act, (Rev. Stat. U. States, §§ 5114, 5115), provides for the discharge of the bankrupt and a certificate of discharge "from all debts and claims which by said act are made provable against his estate, and which existed on the day on which the petition for adjudication was filed by (or against) him; excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy."

The debts "excepted from the operation of the discharge" are described in section 33 of the same act, (Rev. Stat. U. States, § 5117), which enacts "that no debt created by the fraud of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary character, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt."

283 *The debts excepted from discharge by the bankrupt act of 1841 were, by the first section of that act, described as "debts which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity."

This section of the act of 1841, as far as it relates to debts of a fiduciary nature, was construed by the supreme court of the United States in the case of Chapman v. Forsyth, 2 How. U. S. R. 202. One of the questions considered by the court in that case was, whether a factor, who retained the money of his principal, was a fiduciary debtor within the meaning of the act; and it was decided that he was not. Mr. Justice McLean, in the opinion of the court delivered by him, says: "If the act embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies, and, indeed, all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the act. The cases enumerated, 'the defalcation of a public officer,' 'executor,' 'administrator,' 'guardian,' 'or trustee,' are not cases of implied but special trusts, and the 'other fiduciary capacity' mentioned must mean the same class of trusts, and not those which the law implies from the contract. A factor, therefore, is not within the act."

This reasoning of the learned justice is strongly persuasive that the act of 1867, although more general in its terms than the act of 1841, should receive the same
284 construction; *and it has been accordingly held in Massachusetts that the meaning of the phrase "fiduciary capacity" having been ascertained and declared by a judicial construction of the act of 1841, is affixed to the general term, and that this definition is carried into the new statute, (1867). Cronan v. Cotting, 104 Mass. R. 245.

It is not necessary, however, in the case before us, to decide, and we do not decide, whether this construction of the act of 1867 be the correct one or not, for we are all of opinion that under no reasonable construction which can be given to that act is the debt claimed in this case a fiduciary debt.

There can be no doubt that the debt which

the guardian owed to his ward was a fiduciary debt within the meaning of the act, and if it had been unpaid at the time of the commencement of the proceedings in bankruptcy by the guardian, it would not have been affected by his discharge. But it was not unpaid at that time. It had been fully paid to the ward, and the guardian discharged from any and all liability to the ward for it. True it is, his surety paid it for him. This matters not. As soon as the debt was paid to the fiduciary creditor the guardian ceased to be a fiduciary debtor. He became at once debtor by simple contract to the surety; not debtor as guardian, but in his individual character. There is no fiduciary relation (of necessity) between principal and surety. Carr, J., in Blow v. Maynard, 2 Leigh, 41.

When the surety becomes liable for the principal at his request, there is an implied promise on the part of the latter to repay the surety any money which he may be compelled to pay for the principal on account of such liability. For the recovery of the money so paid, and when paid, the surety has his remedy by action at law, and, under some circumstances, by bill in equity. Among his equitable remedies is that 285 of subrogation to the securities *of the creditor, to whom he has paid the debt. These, though extinguished at law by the payment made by the surety, are generally revived in equity for the surety, and may there, by him, be enforced for his indemnity. But it is not every security which may be thus revived and enforced. A bond on which principal and surety are both bound, once paid by the surety in the lifetime of the principal without assignment by the creditor, or agreement to assign, is forever dead as a security as well in equity as at law. There can be no subrogation in such a case. Powell's ex'ors v. White & others, 11 Leigh, 309, 324; Kendrick & al. v. Forney, 22 Gratt. 748.

It is plain enough from the pleadings and proofs in this case, that the debt in suit was a debt provable against the bankrupt's estate; was not a debt created by the bankrupt "while acting in a fiduciary character," and therefore not excepted from the operation of the bankrupt's discharge. It follows that the plaintiff's special replication to the defendant's plea of discharge was not sufficient in law, and the court is therefore of opinion that the circuit court erred in overruling instead of sustaining the demurrer of the defendant to said replication.

From what has been said it is manifest that the said circuit court further erred in the giving and refusing instructions to the jury, and in overruling the defendant's motion for a new trial. The instructions given should have been refused, and those asked for by the defendant, which were refused, should have been given, except the latter part of the third instruction commencing with the words, "if the jury believe from the evidence that J. F. Richie," &c., and ending with said instructions. This part should have been excluded, and the residue of the defendant's instructions should have been given as asked for.

On the defendant's motion the verdict of the jury should have been set aside and a new trial awarded.

286 *The court is of opinion that for these errors the judgment of the circuit court should be reversed, the verdict of the jury set aside and a new trial granted; and on the authority of Hamtramck v. Selden, Withers & Co., 12 Gratt. 28; Strange v. Floyd, 9 Gratt. 474, and other cases, and according to the settled practice of this court, the cause should be remanded to the circuit court with directions to sustain the demurrer to the plaintiff's replication, and render judgment thereon for the defendant, unless the plaintiff withdraws his said replication, which he should have liberty to do, if he asks it, and file a sufficient replication in its stead.

The judgment was as follows:

This cause, which is pending in this court at its place of session at Staunton, having been fully argued, but not determined at its said place of session, this day came here the parties by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the special replication filed by the plaintiff to the defendant's plea of discharge under the bankrupt law of the United States, is not sufficient in law, and that the said circuit court erred in overruling, instead of sustaining, as it should have done, the demurrer of the defendant to the said replication.

The court is further of opinion, that the instructions asked for by the defendant should have been given to the jury as asked for, except the latter part of the third of said instructions, commencing with the words, "if the jury believe from the evidence that J. F. Ritchie," &c., and ending with said third instruction, which said 287 latter part *of said instruction should not have been given; and that the instructions which were given by said circuit court to the jury should have been refused; and that the said circuit court erred in giving the last mentioned instructions, and in refusing to give the said instructions asked for by the defendant, except the latter aforesaid of the third exception.

The court is further of opinion, that the verdict of the jury was contrary to the law and the evidence in the cause, and that the said circuit court erred in overruling the motion of the defendant to set aside said verdict and grant him a new trial.

It is therefore considered that the said judgment be reversed and annulled, the verdict of the jury and all the proceedings in the cause, subsequent to the demurrer of the defendant to the plaintiff's special replication aforesaid, be set aside and a new trial awarded; and that the defendants in error, out of the estate of their intestate in their hands to be administered, pay to the plaintiff in error his costs by him expended in the

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prosecution of the writ of error aforesaid here. And on the authority of the cases of Hamtramck v. Selden, Withers & Co., 12 Gratt. 28; Strange v. Floyd, 9 Gratt. 474, and other cases; and according to the settled practice of this court, this cause is remanded to the said circuit court with directions to said court to sustain the demurrer of the defendant to the plaintiff's special replication aforesaid, and render judgment thereon for the defendant, unless the plaintiff withdraw his said replication, which he should be allowed to do, if he ask it, and file a sufficient replication in its stead; and upon the filing of such sufficient replication, if any such be filed, and issue joined thereon, that such issue and any other issues joined in said cause be tried in said circuit court, and the cause be otherwise proceeded
288 *in in conformity with the opinion and principles hereinbefore expressed and declared; which is ordered to be certified to the said circuit court of Rockingham county.

Judgment reversed.

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289 *Preston v. Stuart & als.

November Term, 1877, Richmond.

Absent, ANDERSON and STAPLES, J's.*

1. **Trustees' Sales—Liens and Priorities.**—P conveys to G a large amount of property, real and personal, some of it covered by prior liens to secure specific debts, other part of it an undivided interest, with full power to sell when and how G shall think best, and out of the proceeds of the trust fund to pay the debts of P, which are very numerous and some of them large. The principle that the prior liens must be ascertai ed and the priorities of debts fixed before sales can be made by a trustee, does not apply to the case. G is the agent of P, as well as trustee, and as P could sell without having the liens ascertained and the priorities fixed, he may authorize G to do so.
2. **Fraud—Proof.**—A charge of fraud in G in making a sale to S, in which S participated, must be clearly sustained by proof, to authorize the setting aside the sale. And in this case the evidence fails to sustain the charge.
3. **Trustees' Account—Error.**—Where a bill does not specify errors in the accounts of a trustee regularly settled by the commissioner of the county court and confirmed, but only charges generally that there are errors in them, the court will not direct a re-settlement of the accounts.

This was a suit in equity in the circuit court of Washington county, brought in 1870, by Thomas L. Preston, to set aside a sale made by Robert Gibboney, as his trustee and agent, to William A. Stuart, George W. Palmer and George B. Parker, of a large amount of property, including what is known as Preston's salt
290 *works, in Smyth county, with several thousand acres of land, which Preston had conveyed to Gibboney in July, 1859, in trust, to sell and pay the debts of the grantor. The bill sets out in great detail the circumstances and condition of the plaintiff at the time of the conveyance and subsequently, his confidence in Gibboney and Gibboney's action, and charges that Gibboney had committed a gross fraud upon him in making the sale, in which the purchasers, especially William A. Stuart, who was the active party in the transaction, participated, and that by the continued fraud and deception of said Gibboney said Preston had been induced afterwards to confirm the said sale. He refers to the accounts of the trustee, settled by Gibboney before the commissioner of the county court, and charges that they are erroneous and fraudulent, but he does not set out the errors. And in conclusion he recapitulates the leading grounds upon which he bases his demand for the rescinding and setting aside of the sale made by his trustee on the 10th of June, 1862, to Stuart, Palmer and Parker. These are as follows:

1. Because the trustee fraudulently concealed from other parties who desired to purchase the property, and who had so informed the trustee, the fact of his intention or wish to sell the salt works; thus designedly preventing competition.

2. Because the price was not only less than other parties were willing to give, but was actually less than the trustee was offered for the property.

3. Because there was corrupt and fraudulent collusion between the trustee and William A. Stuart and his associates, by which the trust property was sacrificed, that the trustee might share the spoils.

4. Because the price obtained for the property in Confederate currency, at a
291 time when that property was *peculiarly valuable, was less than two-thirds of its value in gold.

5. Because, as Gibboney well knew, there existed no pretext in June, 1862, for selling the salt works in order to satisfy creditors, while by fraudulent representations he made your orator believe that a sale was necessary.

6. Because the confirmation relied upon was obtained by false and fraudulent representations made to your orator, and was but another link in the long chain of fraud by which he has been deceived and robbed.

And making Stuart, Palmer, Parker's personal representatives, Gibboney's executrix, and many others interested as creditors parties defendants, he asked that the sale aforesaid might be set aside, that Stuart, &c., might be held to account for all the profits they had made; that Gibboney's accounts might be corrected, and for general relief.

Stuart demurred to the bill, and also answered at great length. He said he was the party acting in the purchase; and denied in strong terms the fraud imputed to him and his copurchasers. He replied to the several grounds of fraud stated in the bill, and expresses the belief that he will be able to repel

*They had been so connected with the case that they could not sit in it.

all these charges and any evidence offered in support of them, by the most convincing proof of the fairness and good faith of his conduct throughout the whole of these transactions.

Palmer and Gibboney's executrix also answered, denying the fraud, and the latter insisting upon the zeal and fidelity with which her testator had performed the arduous duties of his trust.

The pleadings in the case were of great length; the bill covering forty-three pages of close print, and the answer of Stuart extending to thirty-eight pages; and these with the exhibits and depositions making a volume of nine hundred and eleven
292 pages. Of course it is *impossible to give a statement of the evidence offered by the plaintiff to sustain the charges of fraud made in the bill, or of that offered by the defendants to repel these charges. The conclusions of the court will be seen in the opinion delivered by Moncure, P.

The circuit court dismissed the bill, and Preston thereupon applied to this court for an appeal; which was allowed.

The case was argued by John R. Tucker, W. W. Gordon and N. H. Massie, for the appellant; and by John W. Johnston and D. S. Pierce, for the appellees.

Moncure, P., delivered the opinion of the court.

1. The court is of opinion that Robert Gibboney, trustee in the deed from Thomas L. Preston and wife, bearing date the 7th day of July, 1859, in the proceedings in this cause mentioned, was fully empowered by the said deed to make the sale, which, as such trustee, he made to W. Alexander Stuart, George W. Palmer and George B. Parker, by an agreement under the hands and seals of the parties, bearing date the 10th day of June, 1862, in the said proceedings also mentioned.

By the said deed the grantors conveyed to the said trustee "all that tract or parcel of land lying in the county of Smyth, on the waters of the North Folk of Holston, and commonly known as the Preston Salt Works estate, with all the appurtenances and appendages thereto belonging, and containing six thousand nine hundred and ninety-five acres, be the same more or less; all their right, title, claim and interest at law, as in equity, in and to the tract of land lying in the county of Washington, adjoining the first mentioned tract, and commonly known as the King's Salt Works estate, with
293 all the appendages and *appurtenances thereto belonging, and containing five thousand two hundred and fifty-six acres, be the same more or less;" and a great many other tracts and lots of land described in the said deed, and a great many slaves and choses in action, and a great deal of other personal property therein described. After which description the deed thus proceeds:

"It is the express intention and desire of the parties of the first part to convey to the party of the second part (the said trustee) all their real and personal estate of every description, wherever situated, and if through inadvertence or mistake anything may have been omitted in the foregoing enumeration and description of property, the same is hereby as fully and absolutely conveyed to the party of the second part as if it had been specifically mentioned; all debts and choses in action which it is impossible to specify, as many are in the hands of agents, the names of obligors and the amounts, the parties of the first part cannot now here more particularly designate:

"In trust to secure the just creditors, and to indemnify the sureties of the said Thomas L. Preston in manner and form, and with the priorities hereinafter set forth and provided in this deed.

"1st. To sell either at public or private sale, and upon such terms as, in the opinion of the party of the second part, will best promote the objects expressed in this deed, and convey the same, the said Preston Salt Works estate, and from the proceeds of sale to pay, satisfy and discharge the following encumbrances and liens now resting upon said estate:

"John S. Preston, about - - -	$110,000
"William C. Preston, about - -	25,000
"Mrs. Sally B. Floyd, about	12,000
294 *"The estate of Gov. James McDowell, dec'd, about -	13,000
"Mrs. Sally P. Miller, about - -	3,500
"Wade Hampton, about - - -	12,000
"Philip St. George Cocke, about	50,000

"Secondly. After the payment and satisfaction of the said encumbrances above recited upon the said Preston Salt Works estate, it is expressly understood between the parties to this deed, that for and in consideration of the relinquishment of the right to dower in the real estate hereby conveyed by Anna M. Preston, the sum of $25,000 is to be raised and set apart out of the surplus remaining in the hands of the party of the second part, after payment of the said encumbrances upon the said Preston's Salt Works estate, and from the residue of the real estate hereby conveyed, and paid over by the said party of the second part to Peter Saunders, the brother of the said Anna M. Preston, who is hereby appointed trustee for that purpose, for the sole use and benefit of the said Anna M., untrammelled by the obligations and free from the control of her husband, the said Thomas L. Preston, neither liable for any debts the said Thomas L. may now owe, or may hereafter contract.

"Thirdly. To sell, either at public or private sale, the real and personal estate hereby conveyed, upon such terms, with the reservations and exceptions hereinbefore made, as in the opinion of the party of the second part may best promote the objects set forth in this deed, and convey the same; and after payment of the sums mentioned in the first and second clauses of this deed, and after discharging such debts as may now operate as liens, either by judgment or otherwise, thereon, the party of the second part shall pay to the South Western Bank of Virginia,

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at Wytheville, a debt due by nego-
295 tiable note *of about $5,300, which said note is endorsed by V. S. Morgan and P. C. Buchanan."

Then follows an enumeration of many other debts, no doubt being all the debts of said Thomas L. Preston, for which others were bound as his endorsers or sureties; at the end of which enumeration the deed proceeds in these words:

"In the event of the proceeds in the hands of the party of the second part, after the payment of the encumbrances on the real estate provided for in the first clause, and the payment to Peter Saunders, Jr., trustee for the benefit of Mrs. Anna M. Preston, provided for in the second foregoing clause, shall not be sufficient to pay and discharge all the debts secured in the third clause, then the party of the second part is to pay and discharge the debts enumerated in the said third clause pro rata.

"Fourthly. After payment of the foregoing enumerated and specified liens and debts with the reservations and exceptions hereinbefore made, to pay :

"A debt due Richard T. Davis by bond dated the — of —, 18—, of about seven thousand dollars."

Then follows an enumeration of a great many other debts, no doubt being all the debts of said Thomas L. Preston that could be remembered by him. After which are several other clauses, among which are the following, to-wit:

"The parties of the first part, confiding in the diligence, skill and ability of the party of the second part, and being desirous to render the trust fund hereby conveyed ample for the payment and satisfaction of the liens, obligations and debts herein secured, with the least possible delay, hereby authorize and empower the said party of the second part in the management and control of the said trust fund, to exercise a sound discretion, subject only to the provisions heretofore made.

296 *"In the event the proceeds of the sale of the property hereby conveyed, after paying the encumbrances and liens enumerated in the first clause, upon the real estate, the payment provided for in the second clause to Peter Saunders, Jr., trustee for Anna M. Preston, and the debts to which priority is given in the third clause, shall be insufficient to pay and discharge all the debts enumerat.d in the fourth clause, then the said party of the second part shall, out of the proceeds, pay the debts enumerated in the fourth clause pro rata."

Thus it appears that the most ample powers and enlarged discretion are conferred on the trustee by the deed of trust, and the power to sell, either at public or private sale, is thereby expressly given.

2. The court is further of opinion that there was no fraud in regard to the said sale on the part either of the trustee or of the said purchasers, or either of them.

As to the said trustee, Gibboney, he was a gentleman of the highest character for integrity, for capacity for business, for diligence, promptness and punctuality, and on account of all those traits, which he possessed in so eminent a degree, he was selected by the grantor in the deed, the said Thomas L. Preston, by the advice and recommendation of his friends, to be the trustee in the said deed to execute the most important and difficult trusts thereby created, and was invested as we have seen, with almost unlimited discretion and powers for that purpose. "Confiding implicitly," as the said Preston says in his bill, "in the fidelity and integrity of his said trustee, and believing, as did those whom he consulted upon his affairs, that Mr. Gibboney was one of the most discreet and sagacious financiers of that portion of Virginia, your orator placed everything in his hands, divesting himself of all supervision of his property, and from any chance of receiving any revenue from the
297 *same, agreeing to allow the trustee a commission of three per cent. upon his receipts, which it was known would be very large, and clothing him with well nigh unlimited power—power at least broad enough to cover any fair and honest contract which his trustee might be called upon to enter into in the proper and faithful discharge of his important trust."

This high character of the trustee, admitted by the plaintiff Preston himself in the bill, is fully sustained by the evidence in the cause. General Terry, a witness for the defendants, who had long known him and been intimate with him, says in his deposition: "I regarded him as one of the most punctual, accurate and reliable business men of my acquaintance, and I think this was the estimate in which he was generally held. He had been a very active business man and was very systematic. At the time of his death he was a member of the Virginia legislature." Joseph W. Caldwell, another witness for the defendants, concurs in the said statement of General Terry. Beverley R. Johnston, another witness for the defendants, says: "I was particularly well acquainted with the character and business habits of Robert Gibboney. I knew him from boyhood, and had the fulliest opportunities for knowing and appreciating his character and business habits and capacity during the residue of his life. I was long a lawyer practicing in courts in which he was sheriff or marshall, and had a great many transactions of a business character with him; very few men had equal opportunities of knowing him as thoroughly in all respects." Being asked, "What was his reputation for capacity, integrity and fidelity in business transactions;" he answered: "In those particulars no man in the southwestern region of Virginia stood higher —indeed, I will say none so high."

298 *Fraud must be proved by strong and clear evidence, and will never be presumed from facts which are consistent with honesty on the part of a person implicated by a charge of fraud. And such is especially the case when the person so charged, as

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here, is a person of excellent general character.

Now let us apply that principle to this case, and inquire whether upon the pleadings and proof in the cause the parties to whom fraud is imputed in this case, or any of them, are guilty thereof.

It is charged in the bill that the trustee, Gibboney, and the purchasers, or at least one of them, Stuart, conspired together that the property in controversy should be sold for less than its value and what could have been gotten for it from others, by the trustee to the purchasers, for the joint benefit of all of them; and that it was accordingly so sold with a secret understanding between the parties to that effect. Such in effect is the charge repeatedly made in both bills, without here repeating the literal terms in which it is therein expressed. This charge is as positively denied by the only defendant who can deny it, the defendant Stuart. Gibboney, the trustee, was dead more than three years before the suit was brought, and his widow and administratrix had no personal knowledge on the subject. Stuart was the only acting party in making the purchase, and is therefore the only purchaser whose personal information enables him to deny the charge. His denial of it in his answer is in this strong language: "On the part of the purchasers, respondent was the principal actor in the transaction of the business; and while he does not profess to have a personal knowledge as to all the details upon which complainant relies to found his grave charge of fraud and conspiracy, he claims to have as full a knowledge as any man could have as to the truth or falsehood
299 of the charge itself. *With this full knowledge, and in view of all the responsibilities, legal, moral and personal, which he assumes, respondent declares the charge made by complainant, in all its length and breadth, and in every form and shape which it has assumed or may hereafter take, to be not only false, but to be so entirely without foundation in any reasonable probability, that its author will find it impossible to escape from the responsibility which, in the estimation of all good men, attaches to the wilful and reckless defamer of the living and the dead."

After such a denial in an answer, of a charge made against the respondent in the bill, at least two witnesses, or one witness and corroborating circumstances, are required to sustain the charge; and a fortiori does this rule apply when the charge, as is in this case, is one of fraud?

There is certainly no such evidence in this case to prove the charge of fraud as is required by the rule aforesaid, or as is required to prove a charge of fraud in any case. There is not a particle of evidence in the cause to show that Gibboney, the trustee had any interest whatever in the property sold to the purchasers, either after or before such sale. If any such interest had been provided for him by any understanding between the parties, according to the pretension of the complainant, surely there would have been some trace of it in the record. But there is none whatever. There has never been, so far as the record shows, any claim to any such interest, either by the trustee, Gibboney, before his death in 1867, five years after the sale, or by his representatives since his death; nor has any paper been found, either among his papers or elsewhere, tending to show that such an interest had been, or was ever contemplated to be, provided for him.

300 *It is charged in the bill that there was no necessity for a sale of the property when the sale was made; that the sale was made for a less price than could have been gotten for the property at the time of the sale by selling it to others; and that the trustee became the agent of the purchasers in buying up claims against the trust fund, and actually furnished them money for that purpose, to enable them to become purchasers; and, it is insisted, that these alleged facts show that the trustee was interested in the sale as one of the purchasers; and that he and they were therefore guilty of fraud in regard to the sale, which makes it null and void.

The court is of opinion, that these charges are unfounded in fact; that there was a necessity for a sale at the time it was made; at least, such a necessity as made the sale proper; that the sale was made for the best price that could then be gotten for the property, so far as the record shows; and that the trustee did not become the agent of the purchasers in buying up claims against the trust fund, and did not furnish them money for that purpose.

As to the purchasers, it is specially charged that they, or at least one of them (Stuart), stifled competition with William King Heiskell as a bidder for the property, and were thus guilty of a fraud which avoids the sale. The court is of opinion that this charge also is unfounded in fact. The character of this individual, his agency in this transaction, the conduct of the trustee towards him, and the motives of such conduct, are so clearly and truly set forth in the opinion of the learned judge (Keith) who decided this case in the court below, that we adopt and embody in this opinion his statement on the subject, which we entirely approve. It is as follows: "The burden of this case, however, rests upon William King Heiskell. He figured very conspicuously in this whole
301 *transaction, from beginning to end. At an early period he appears as an importunate creditor, complaining that the trustee is acting in the interests of General Preston and the complainant; that the trust subject should, in justice to small creditors, be sold; and notifying the trustee that in case of loss on account of his failure to sell he would be held to personal responsibility; then as a bidder for himself, then for himself and others; then selling his debts on the estate in the spring of 1862 to the defendants. Again, a bidder representing the Hurts and Dunns; then acting as the friend of Stuart, and seeking to purchase for his benefit; and now, since the war, placing the property at

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a valuation greatly in excess of any one else; and swearing that at the very time of the sale to Stuart he was satisfied there was something wrong about it, and yet at this very moment of time advising Stuart that he is no longer a bidder, and that he thinks he (Stuart) can buy the property, and in the same letter calling upon him for a pecuniary favor, and within a month after the sale meets with Colonel Preston, and is 'as silent as the tomb' about his doubts and suspicions. Taking his entire appearance in this case from his first introduction into it, until his connection with it is closed with his deposition, and it strikes me as a tissue of improbabilities, inconsistencies, and contradictions. He is said to have been of high courage and unquestioned veracity, but intense prejudices, a bitter partisan, and very inimical to Stuart; this may serve to explain his conduct, without imputing to him intentional falsehood. This explanation protects his character as a man, but adds no strength to his statement as a witness. The inconsistencies and contradictions still exist, and tend greatly to impair, if they do not destroy, the value of his testimony. To what does his deposition amount, after all? That he desired to purchase
302 this vast estate, when *he and those with whom he acted gave in to the assessor taxable property less than $50,000 in amount. The trustee would have been justified in not considering for one moment any offer from such a source. His duty and desire was to sell to men able and willing to comply with their engagements; not to men who had no single requisite necessary in a purchaser, except a readiness to assume responsibilities, which the trustee, extensively acquainted as he was with the people of that section, must have known they were unable to discharge. But suppose Heiskell had been able to purchase; how was he hindered, or 'stifled,' as the phrase is, by Stuart? Heiskell contracted with Stuart to buy the salt works from Gibboney, and Stuart agreed to take them from Heiskell at 200,000 bushels of salt. Heiskell was not limited or trammelled in any way by this arrangement; he could bid as much as he pleased; the fact is, the arrangement enabled Heiskell, for the first and only time, to become a bidder. But with him as a bidder is Stuart's position compared, when it is charged that the conduct of Gibboney, whether by design or otherwise, had placed Stuart in a position of advantage as a bidder.

"There is a proposition in the papers to sell Heiskell the salt works for $425,000; he says it was not communicated to him, and that he was prepared to give more. In the first place, all the intrinsic evidence points to the fact that the substance of that offer, if not the identical paper, was disclosed to Heiskell, and that he quarrelled with Gibboney, as appears from J. W. Johnston's deposition, because the trustee would not accept currency, regardless of the wishes of creditors. Was not the trustee right in this matter? Could he properly have accepted a purchaser who could not satisfy the creditors? If he could provide for the payment of the debts he could have done so as well in Stuart's hands as though they remained
303 *with the original holders; indeed more conveniently, for he would have dealt with one man instead of many. If he could not provide for payment of debts satisfactorily to creditors, then he was a bidder the trustee was right in not accepting. How was the complainant injured?"

3. The court is further of opinion, that there was no breach of trust on the part of the said trustee in making the said sale, or in regard to the same in any respect.

We do not mean to question at all the principles in regard to the duty of trustees declared by this court in the case of Rossett v. Fisher, &c., 11 Gratt. 492, cited and so much relied on in the argument of the appellant's counsel in this case. On the contrary, we here reaffirm those principles as sound and salutary in their proper application. It is therefore true, as was there said, that "a trustee in a deed of trust is the agent of both parties, and bound to act impartially between them; nor ought he to permit the urgency of the creditors to force the sale under circumstances injurious to the debtor at an inadequate price. He is 'bound to bring the estate to the hammer,' as has been said by Lord Eldon, 'under every possible advantage to his cestui que trusts;' and he should use all reasonable diligence to obtain the best price." Those principles were clearly applicable to that case; which was decided accordingly.

But they have little or no application to this case; the facts and circumstances of which are very different. Here, at the time of the execution of the deed of trust on the 7th day of July, 1859, Thomas L. Preston claimed to be the owner of the Preston salt works in the county of Smyth, and many thousands of acres of land thereto attached, supposed by some to be then worth little, if any, less than a half million of dollars: and also the owner of an undivided interest in the King's salt works, and many thousands of acres of land thereto attached in
304 the adjoining *county of Washington, which latter works and their appurtenances were supposed to be worth little, if any, less than the former, and were owned by the heirs of King or their assigns, of whom there were a great number, the said Preston being himself the assignee of some of them. These properties adjoin each other; and he had for many years carried on the operations of both, having rented the King's salt works as tenant thereof, under a decree of a court of chancery which had control of the same, in a suit brought for that purpose. The result of his connection with the subject and his operations, was to involve him in an immense amount of debt, for most of which the property or his interest in it was encumbered by deeds of trust, judgments and otherwise. Finding it to be difficult, if not impossible no doubt, in his involved and hampered situation to continue the said operations, he leased out both

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works to lessees residing in New York, for the term of ten years from and after the 1st day of January, 1859, at the annual rent of fifty thousand dollars, including in such lease the whole of the King's works; although he had, comparatively, a small interest therein, and only a portion of the other parties interested gave their consent to such lease: and although the "King's works" were then under the control of a court of chancery, whose consent to the lease was neither obtained nor asked for. This lease had not been more than about six months in existence when the pressure of the pecuniary troubles and embarrassments of said Preston became so great that he found it necessary to make an immediate arrangement to have his whole estate converted into money, and the proceeds of sale and collection applied, as soon as possible, to the payment of his debts, at least so far as the said proceeds would go. And he accordingly determined to pursue that course.

The question then arose whether he
305 would pursue that course *by his own agency or that of another. He had acted only in proper person in his management of his affairs before; but his signal failure in that respect admonished him of the necessity of finding, if possible, a suitable person to act for him in attending to business of so great importance and of such difficulty. In considering what person it would be best to select for so important an office he and his friends met with no difficulty, but determined at once, and with singular and wonderful confidence and unanimity, to select for that purpose Robert Gibboney of the county of Wythe, a gentleman of fortune and of the highest character for integrity, diligence, energy, punctuality and business capacity generally. And he consented to accept and undertake the agency. Accordingly the deed of the 7th day of July, 1859, before referred to and described, was executed.

It is only necessary to read that deed to form a correct idea of the extremely important and difficult agency which Gibboney accepted in agreeing to become the trustee in the deed. So many persons were interested in it that it was extremely important that the trustee selected should have, if possible, the confidence of all of them; and yet such seems to have been the fact. And what is of infinitely more importance is, that he seems fully to have deserved it. He was clothed by the deed with the greatest powers and discretion in the execution of the trusts thereby declared; almost if not quite equal to those possessed by the grantor before its execution. And yet nobody complained that too much power or discretion was thereby given him, and nobody attempted to arrest him in the execution of the trusts, or seemed at all to doubt that the very best possible thing had been done in the execution of the deed, for the benefit of all persons concerned therein; and what is most remarkable is, that numerous as were the creditors secured by the deed, great as was the amount
306 of the debts *due them, various as was the nature of their encumbrances and claims, none of them have ever brought a suit against the trustee, or shown or felt, so far as has ever been heard, the least dissatisfaction with the trustee's management of the business. There is but one person interested in the trust who has shown any such dissatisfaction, and that is the grantor; and he never showed any such dissatisfaction until several years after the trustee's death, which was in 1867, eight years after the execution of the deed. On the contrary, although he was perfectly familiar with the trust subject, having managed it for many years, and knew all about the debts secured by the deed, and saw how the trustee was executing the trust, yet he found no fault and made no complaint, but seemed to be perfectly satisfied with what was done until shortly before the institution of this suit in 1870, eleven years after the date of the deed of trust.

Perhaps there never was a trust attended with more difficulty or managed with more success than the trust in this case. It was believed, no doubt by many, and certainly by the grantor himself, that the trust subject, with the best possible management, could not be made to afford enough money to discharge the debts thereby provided for, much less to leave a surplus for the benefit of the grantor. He believed himself to be hopelessly insolvent, but honestly surrendered all his property for the payment of his debts. The trust was managed during a period of unparalleled difficulty. It commenced shortly before the war and continued during the whole war, and yet it was managed with such extraordinary success that not an atom of the vast trust subject was lost by being turned into Confederate money or otherwise, and not a dollar of the vast amount of debts secured by the deed remains unpaid or unprovided for, and not one of the numer-
307 ous creditors thereby secured *has made any complaint, or has any cause of complaint. On the contrary, the trust was managed by the trustee with such signal success, that only a few years after the creation of the trust, say three or four, it was nearly completed; the trust subject, or nearly all of it, was converted into money, the debts secured by the deed were all paid, or provided for; twenty-five thousand dollars were paid to the grantor's wife in consideration of her release of her contingent right of dower in the trust subject, and a large surplus, amounting to about $75,000, was left for the grantor himself. No one seems to have been more surprised at or better satisfied with this result than the grantor. He expressed himself in very strong terms on the subject to his friends, especially to General Joseph E. Johnston. Beverly R. Johnston, a brother of the General, in his deposition, says: "Mr. Preston came, I believe, to see my brother at his lodgings, and found him and me together. Mr. Preston was on intimate terms with General Johnston, and seemed to have come to communicate with him a transaction which had then very recently occurred, which was the subject of extreme gratification and rejoicing to him. I was present

during the entire conversation, which, from its subject, was interesting to me, and the substance of which I distinctly recollect. Mr. Preston addressed himself to General Johnston; said that he had had a settlement with Robert Gibboney, his trustee, to whom his entire estate and effects of every description had been conveyed. He said that when the assignment to Gibboney was made he had very little expectation of the trustee achieving more than the payment of his debts, but that owing to the singular skill, energy and fidelity of Mr. Gibboney, a result had been reached altogether beyond his own hopes or the expectation of his friends. He then proceeded to state what that result was. He said that it appeared that there remained to
308 *him, after satisfying or providing for all debts and liens, upwards of $70,000 in his own right. This was exclusive of $25,000 which was secured by the said deed to Mrs. Preston (his wife) in consideration of her relinquishment of her contingent right of dower. Of course at this distance of time (his deposition was taken in January, 1871,) I do not profess to give Mr. Preston's language, but the substance of his statement in my words. No language could be stronger than that which he used in regard to Mr. Gibboney's skill, diligence and fidelity in the execution of the trust, and his own gratitude for the services rendered by him." Another witness, R. M. Page, county judge of Washington county, in his deposition, says: "I am acquainted with complainant; about the time James C. Campbell was appointed trustee in the room of Gibboney (who had died), I think a short time thereafter complainant was in the county clerk's office of Washington county, myself and James C. Campbell being present, and said to us, speaking of his failure, that it was the largest failure and grandest pay out that had ever occurred in this section. I do not pretend to give the exact language, but what complainant said was in effect what I have stated. The impression made upon me was, that Mr. Preston congratulated himself that his estate had been more than sufficient to discharge his indebtedness. I think that Mr. Preston said that about the sum of $75,000 had been realized over an amount sufficient to pay his debts."

After such strong evidence of the trustee's faithfulness and success, and of the grantor's entire satisfaction with his management of the trust, and the result of it, manifested during the whole of the trustee's life after the date of the trust deed, he surely ought not to be convicted of a breach of trust except upon the strongest evidence.

309 *The complaint of the grantor now is that the trustee sold the salt works too low; that he might have sold them at a higher price than he did; that he sold them at a private instead of a public sale, and without giving public notice of the sale or affording others who wished to buy an opportunity of doing so; and that he favored Stuart over all other competitors for the property, by assisting him, and him alone, in becoming the owner of debts secured by the deed by paying Confederate money for them. Let us consider these objections briefly.

We think that the trustee sold the property at the highest price he could obtain for it. There were very few who could and would buy it. There were only two persons who seemed to be able to do so and were that way disposed—General John S. Preston, and Stuart for himself and his associates. General Preston had control of $170,000 of the debts charged on the property by the first lien thereon, which enabled him to buy it. He considered the property to be worth $300,000, and no more; but for the sake of his brother, Thomas L. Preston, he offered $350,000 for it. He would, however, give no more. And when the trustee refused that offer because too low, and informed him that Stuart was willing to give $425,000 for it, he expressed his satisfaction on his brother's account, and seemed to be anxious that a sale should be made to Stuart accordingly; which was done. That Thomas L. Preston considered that an ample price, and as much as could be gotten for it, is evident from the fact that he was very anxious that the property should be sold to his brother, General Preston, at a much less price. But the trustee was unwilling, because the highest price that General Preston would have given would not have been enough to pay the debts. And Gibboney, being the agent of both parties, debtor and creditors,
310 felt *himself bound to get the highest price possible for the property, and at least enough, if possible, to pay all the debts.

As to others who have been referred to as likely to have become purchasers or bidders, if an opportunity had been afforded them, we have seen how improbable, if not impossible, it was that Heiskell would have become a purchaser; and Palmer, of Richmond, was hardly able to become himself the sole purchaser, and had formed no connection with others to make the purchase. He never made an offer for the property, even on his own account, and what he said to the trustee on the subject long before the sale, was no doubt regarded by the latter as not being serious, and forgotten by him long before the sale was made.

As to the objection that the sale was a private and not a public one, and was made by the trustee without giving public notice thereof, the deed expressly gave him power to sell publicly or privately, as he might deem best, and he deemed it best, as it certainly was best, to sell at private sale. The fact is, a public sale could not have been effected, at least without endangering a great sacrifice of the property. The debts charged on the property, and indeed all the debts secured by the deed, were good money debts, and of course could not be paid in Confederate money—at least without the consent of the creditors. A public sale for good money could not have been effected at all, and at

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least not without a very great sacrifice, and a public sale for Confederate money without any previous agreement of the trust creditors to receive such money in payment of the debts due to them, would have been a palpable breach of trust. A private sale, if any sale was to be made, was therefore necessary. In fact no person knew that better than the complainant himself,
311 who had co-operated *with the trustee in endeavoring to effect a private sale, first to the commonwealth, and then to General Preston. As to giving public notice that the property was for sale, there was no fact more notorious about the time the sale was made. The deed was made for the very purpose of having the property sold and the trust debts paid out of the proceeds of sale. So that it was for sale from the very date of the deed and until it was sold. The only motive for delay was to receive offers for it until one was made which the trustee might deem sufficient to warrant its acceptance. It was most notorious that an effort had long been made by the trustee and the grantor to sell the property to the state legislature, and few in the state could have been so ignorant of public affairs as not to be aware of that negotiation, and therefore that the property was for sale. Certainly nobody who had the remotest idea of ever becoming a purchaser of it, could have been ignorant of the fact. There could, then, have been no occasion for any further notice that the property was for sale.

As to the objection that the trustee favored Stuart over all other competitors for the property, by assisting him and him alone, to become the owner of debts secured by the deed by paying Confederate money therefor, we think this objection is not well founded. So far as the trustee may have given any aid or countenance to Stuart in this respect, it was not with a view of serving two masters, within the meaning of the maxim of law or language of scripture, on that subject on which so much reliance has been placed in the argument. The agent, Gibboney, seems to have had but one master in the whole transaction of this agency, and that was his principal, Thomas L. Preston. If he seemed at any time or in anything to serve Stuart in the matter, it was only that he might render more
312 effectual service to Preston. *As was said by Gibboney in announcing to Preston the sale that had been made to Stuart, he, Gibboney, in making said sale, had no doubt been governed alone by what he conceived to be the interest of Preston. That was certainly his duty, and he could not have been governed by any other motive without the most criminal breach of trust and treachery. He certainly had no interest of his own to conserve by such a course. Under such circumstances, why would he have preferred the interest of Stuart to that of his principal, Preston? To convict him of doing so ought certainly to require the strongest evidence.

The trustee seems to have set out in the execution of the trust with two principles for his especial guidance, viz: to sell the salt works only for such money as would be received by the creditors in the discharge of their debts, and only at such price as would be at least sufficient to discharge all the trust debts, if not leave a surplus for the benefit of the grantor. These were wise and just principles, and were strictly adhered to by the trustee. We have seen the beneficial result.

The fact is the trustee could not otherwise have made a sale of the property which would have attained that result. General Preston, the only other person than Stuart who could have made the purchase, had made his highest offer, which was not sufficient for the purpose which the trustee had in view. He (the trustee) had therefore to find another person who could and would be a purchaser at a sufficient price. And Stuart was the only person whom he could find to answer that description. Stuart could do so only because he had acquired a very large amount of the trust debts, by negotiating with the creditors for payment of them in Confederate money. This operation required a great deal of time. Stuart, therefore, who desired to purchase the
313 property, commenced *the operation of acquiring trust debts at an early period, and persisted in it until he was in a condition to make the purchase. Gibboney seeing that Stuart was the only person who was likely to be able and willing to make the purchase at a sufficient price, and considering it his duty to sell as soon as he could do so at such price, may have facilitated as far as he could, and properly so, the desire and intention of Stuart to become the purchaser. If he did, it does not at all follow that he thereby violated his duty as trustee, but he may have pursued that means of promoting a sale, and thus have done his duty.

Two of the preferred creditors to whom large amounts were due by Preston, were his brothers-in-law, Colonel Watts and Mr. Saunders. They received payment of the debts due them in Confederate money from Stuart, to whom they assigned the said debts. Preston must have known of these transactions at the time, for he frequently saw and conversed with his said brothers-in-law, and was in the army with one of them, Colonel Watts, when the said transactions occurred. In fact, he no doubt knew of most of the like transactions, which were not concealed from him and were obviously for his benefit.

There are various other grounds on which it is contended that the trustee was guilty of a breach of trust in making the sale.

They are thus summed up in the amended and supplemental bill.

"First. Because the legal title was outstanding.

"Second. Because the liens anterior to the deed of trust were unascertained.

"Third. Because the debts under the deed of trust were neither ascertained by the

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deed not otherwise, and had been reduced by payments.

"Fourth. Because the property sold was subject to a lease, which had seven
314 years to run, and was a reversion *dependent thereon, and according to the opinion expressed by the defendants, the lease was a clog to the sale.

"Fifth. Because the King's salt works was an undivided reversionary interest, in litigation in the courts, and the rents passed with the reversion, and was, as defendants themselves claim, subject to set-off for damages, which made it uncertain and a source of controversy.

"Sixth. Because the stay law forbade it, and a sale under its provision was made under a cloud.

"Seventh. Because the other assets in hands of the trustee, with the accruing rents in gold, would have paid all the debts which were due (except the Preston and Cocke debts, which had been postponed by agreement), and a sale of no part of the corpus was needed. Of all these facts the purchasers had full notice.

"For these reasons complainant charges that the trustee not only had no power to sell, but was by law and rules of equity forbidden to sell, and was by his duty required to refuse to sell, and if he did not refuse, could have been enjoined from selling, and that his duty required him to apply to a court of equity to have the trust administered and sale made under its decree."

It is a sufficient answer to all these grounds (though other answers might be made), that this is not a case of an ordinary deed of trust to secure creditors, to which the principles aforesaid, or some of them, might be applicable, but it is a case of an agency voluntarily created by a debtor for the immediate conversion of his whole estate into money and the application of the proceeds thereof to the payment of his debts. It is a case between a principal and his agent, to which none of the creditors of the principal are parties, and the terms of the agency and the duties of the agent are pre-
315 scribed by the deed *of trust. There can be no doubt but that the debtor, without making any deed, might have proceeded in proper person to convert his estate into money and apply the proceeds to the payment of his debts, according to the liens and claims of his creditors; at least unless they interposed to prevent him, and at all events if they acquiesced and concurred therein. Certainly the debtor could not in such a case, on any of the grounds before stated, cause a sale made by him to be set aside by a court of chancery. For the same reason and upon the same principle, a debtor may make such a conversion of his estate and application of the proceeds by means of an agent constituted by him for the purpose, and if the creditors are satisfied and do not complain, the debtor cannot undo the act of his agent any more than he could his own act if he had done it in proper person. No creditor is complaining in this case. The debts are all satisfied or provided for, and the controversy is confined to the debtor and trustee, the principal and his agent. The acts of the agent, complained of by the principal, were expressly authorized and required in the deed of trust to be done. There could, therefore, be no breach of trust in doing them.

In regard to the charge in the bill, that the sale in June, 1862, was made too soon, and that the trustee ought to have adopted the suggestion made to him by the complainant Preston, in two letters dated in April, 1862, proposing that the sale be deferred one year longer—suppose it had accordingly been so deferred by the trustee, and the public enemy had in the meantime captured and destroyed or materially damaged the salt works, and thereby prevented the payment of a large amount of the trust debts—how could the trustee have defended himself against the claims of the disappointed creditors upon the ground that he had violated his duty in not selling
316 *the salt works in June, 1862, at the cash price of $425,000, payable in gold or its equivalent, which was sufficient to pay all the trust debts and afford a surplus of seventy-odd thousand dollars for the grantor; and, instead of doing that, in deferring a sale for one year, when the property was exposed to so many dangers in the meantime, and especially the danger from the act of the public enemy before referred to? There was no property in the Confederate States the destruction of which was more desired by our enemy than these salt works; for there was none which contributed more to the support of our armies and the sustenance of our people during their great struggle for independence. It was greatly to be feared, therefore, that this property might, at any time, be so captured and destroyed. In fact, it was captured and greatly damaged by the enemy at a later period, and after it was purchased by Stuart. To be sure it was not so captured and destroyed or damaged within a year after the sale; and it might have been better if the sale had been deferred for a year. But we must judge as to the propriety or impropriety of the conduct of the trustee, not from our present standpoint, but by placing ourselves in his situation when he made the sale, and looking at all the circumstances which then surrounded him.

4. The court is, therefore, of opinion that as the trustee had power to make the said sale, and there was no fraud in regard to the said sale, on the part either of the trustee Gibboney, or of the said purchasers or either of them, and no breach of trust on the part of the said trustee, as aforesaid, it follows as a necessary consequence, that the said sale is valid.

5. But the court is further of opinion that even if the said sale had been voidable and invalid it would have been confirmed and made valid by the agreement executed
317 *by the said Thomas L. Preston for that purpose on the 1st day of October, 1862, as well as by numerous other acts of

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confirmation and acquiescence on his part.

By deed of that date, the said Preston expressly ratified and confirmed the sale of the Preston salt works, and the interest of the said Preston in the King salt works estate, as made by his trustee, Robert Gibboney, to Stuart, Palmer and Parker. And that deed was made upon valuable consideration received by said Preston from said Stuart, Palmer and Parker; though no such consideration was necessary to its validity. That ratification and confirmation was never denied and repudiated by said Preston until long after the death of Gibboney, in 1867. On the contrary, after that event, and on the 18th day of April, in that year, the said deed of confirmation was acknowledged by the said Preston for record before a justice of the peace, upon whose certificate of such acknowledgment, the said deed was afterwards duly recorded. All the material facts connected with the said sale were well known to the said Preston and his counsel at the time of the said confirmation; for he had the aid of able counsel in making the said confirmation. He and his said counsel had ample time and opportunity fully to inform themselves of every material fact of the case of which they may possibly have been ignorant; and it will be presumed that they did, as they certainly ought to have done so, at least in the absence of very strong evidence to the contrary. There was no concealment nor any attempt at concealment, by Gibboney, or Stuart, or any other person, of any material fact of the case, from said Preston, nor was there any conceivable motive for any such concealment.

Without enumerating other acts of confirmation of, and acquiesence in the said 318 sale, on the part of the said *Preston, we may now well ask how it can be said that the sale, even if not otherwise valid, was not fully ratified and confirmed by the said Preston?

In any view which can be taken of the case we are therefore of opinion that the said sale is a valid sale, and that the decree of the court below to that effect must be affirmed.

The original and amended and supplemental bills also seek to surcharge and falsify the settled accounts of the trustee, Gibboney, and to obtain a decree for a further and final settlement of the account of his trusteeship. The circuit court considered that the complainant is entitled to no relief in that respect, and therefore dismissed the bills in regard to that matter also; and this court is of opinion that the circuit court did not err in so doing.

The trustee was not only active, diligent and prompt in the execution of his duties in making sales and collections of the trust property and money, and payment of the trust debts, and disposition of the surplus, but was prompt and regular in settling his trust accounts. Five settlements were made of the said accounts—four of them in the lifetime of the trustee and the fifth after his death. All of them were made by a commissioner of the court, were returned and filed for exceptions, and all of them but the last were unexcepted to, and were confirmed and recorded. Copies of these accounts are filed as exhibits with the original bill, and are marked X, Y, Z, Z2 and Z3. X, Y and Z are the main accounts, and embrace almost all the trust transactions. They were settled by Commissioner Matthews, who seems to have been a very skillful commissioner. The dates of these settlements respectively are September 5th, 1860, 21st September, 1861, and 4th November, 1862. The last of these three accounts embrace, among many other items, a 319 credit to *the trustee for $40,907.45 paid by him to Thomas L. Preston out of the surplus of the trust fund, and other similar credits are embraced in the subsequent settlements. There can be no doubt but that the complainant, Preston, was fully aware of the settlements at the time they were made, being deeply interested in them, and could have informed, and no doubt did inform himself as to every item of the accounts which did not fully explain itself; and he did not except to any of the accounts, except the one last settled as aforesaid, but silently acquiesced in the confirmation by the court of all the rest. The strong, if not the irresistable, presumption, therefore is, that he considered all the rest to be right.

Still, he may not have been concluded, according to the authorities, from filing a bill to surcharge and falsify these accounts; but in order to do so it devolved on him to specify in his bill the grounds of surcharge and falsification, and to prove them by evidence, unless, indeed, there are errors on the face of the account, in the manner of stating it, which will not admit of explanation by evidence, dehors the account. There are no charges in the bill, much less is there any evidence in the record, of any such grounds of surcharge and falsification. The only grounds relied on in the bill are certain supposed errors on the face of the accounts. But these are either no errors at all, or at all events they may not be, and will be presumed not to be in the absence of evidence to prove that they were. As to the cross entries complained of, they were proper if not necessary. As to the charge of the trustee's commission of three per cent. on the amounts charged to the trustee in these cross entries as having been received by him, it was a proper charge, at least under the circumstances of this case. Though the complainant examined these accounts, 320 together with his counsel, in *1865, and often afterwards before he determined to institute the suit, yet he never objected to any charge against him in them prior to the last settlement, except a charge of commission on the debts as to which the creditors refused to receive the amount of them in Confederate money; and he had previously agreed in writing to that charge.

In regard to any right of the complainant to a decree for a further settlement of the trusteeship account, the court is of opinion that such a decree was unnecessary, and

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would have been improper under the circumstances of the case. Gibboney was the trustee and agent of Preston for the conversion of the latter's estate into money and the payment of his debts as far and as soon as possible. As soon as this could be done, the surplus, if any, of the trust property or money would result and belong to Preston. The purpose of the trust would then be accomplished. The trustee succeeded in three or four years in converting the estate into money, or at least enough of it to pay all the debts. But he could not pay all, because some of the creditors refused to receive Confederate money in payment of their debts. And, moreover, there was a controversy as to the persons entitled to the amount of the debt which had been claimed by General Preston, or at least as to some of them, and the proportions in which they were so entitled. If this difficulty had not existed, or could have been surmounted, there would no doubt have been a final settlement and mutual releases in regard to the trust account in 1863 or '64. But as that was not the case, the trustee had to settle his account as far as possible, and leave the balance of the purchase money of the salt works in the hands of the purchasers for the payment of the remaining trust debts as soon as the controversy in regard to them could be settled. The matter then became a matter between Preston, Stuart, and the trust
321 creditors who had refused *to receive Confederate money, and had to await the determination of the controversy between them. That matter can and will be determined by the court below in the decision of the suit upon the cross bill, which is still pending in that court.

The court is further of opinion, that the circuit court properly declined to dispose of the case upon the cross bill; not only on account of the controversy aforesaid, but also because it is a proper and necessary bill for specific execution by the purchasers aforesaid.

Upon the whole, the court is of opinion that there is no error in the decree of the circuit court, and that the same ought to be affirmed.

Decree affirmed.

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322 *Stark & als. v. Lipscomb.

November Term, 1877, Richmond.

L dies in 1840, and by his will says, "I give to my niece E, wife of B, the sum of $400, which said sum I wish put to interest, and that paid to E annually during the lifetime of her husband B, and at his death, should she be the longest liver, then I wish the principal paid over to her, said E." S, the executor of L, paid the interest to E until 1862, when he died. B, the administrator of S, in April, 1863, paid to the administrator *de bonis non* of L, the $400 and interest in Confederate money. E died in 1866, leaving her husband surviving her—HELD:

1. **Legatees—Husband and Wife.**—E took an absolute estate in the legacy, to which, upon her death in the lifetime of her husband B, he was entitled.
2. **Same—Payment to Administrator.**—The payment by B to the administrator *de bonis non* of L, was no satisfaction of the legacy as to B, but the estate of S is liable to pay it, principal and interest, and B being the only child of S, and having ample assets, the decree may be against him personally.
3. **Judgment without Prejudice.**—The administrator *de bonis non* of L not being a party to the suit, it was error to direct an inquiry as to what he had done with the Confederate money paid to him by B; but the decree against B should be without prejudice to his right to proceed against the said administrator *de bonis non* to have an account of it.

This was a suit in equity in the circuit court of King William county, brought in April, 1872, by Bartlett Lipscomb, the former husband of Elizabeth Lipscomb, deceased, Miles B. Lipscomb, his assignee, and others, children of said Elizabeth Lipscomb, deceased, against Bolivar Stark, in his own right and as administrator of
323 *Thomas Stark, who was the surviving executor of Henry Lipscomb, deceased, and his sureties, to recover a legacy of four hundred dollars bequeathed by Henry Lipscomb to Elizabeth Lipscomb.

Henry Lipscomb died before June, 1840, when his will was admitted to record, and Thomas Stark and Allen King qualified as his executors. He was unmarried, and by separate clauses gave to his nephews and nieces small legacies ranging from two to five hundred dollars, and all these, except that to Elizabeth, were given directly and absolutely.

The third clause of the will is as follows: "I give to my niece, Elizabeth Lipscomb, the wife of Bartlett Lipscomb, the sum of four hundred dollars, which said sum I wish put to interest, and that paid to said Eliza annually during the lifetime of her husband, Bartlett Lipscomb, and at his death, should she be the longest liver, then I wish the principal paid over to her, said Eliza."

By the last clause of his will he gave to his nephew, Allen King, the remainder of his estate, both real and personal, in fee simple.

Allen King died before 1860, and Thomas Stark, the surviving executor, paid the interest upon the legacy to Mrs. Lipscomb until 1862. He died in that year, and Bolivar Stark, his only son and heir, qualified as his administrator.

In April, 1863, the estate of Henry Lips-

Conveyance by Will—Subsequent Words of Revocation.—In Gaskins v. Hunton, 92 Va. 531, the principal case is cited to sustain the following statement, "It is a settled rule of construction, both in deeds and wills, that if an estate is conveyed, or an interest given, or a benefit bestowed in one part of the instrument, by clear, unambiguous, and explicit words, such estate, interest, or benefit is not to be diminished nor destroyed by words in another part of the instrument, unless the terms which diminish or destroy the estate before given be as clear and explicit as the terms by which it was created." Citing also, Rayfield v. Gaines, 17 Gratt. 1; Barksdale v. White, 28 Gratt. 224; Haymond v. Jones, 33 Gratt. 317; 2 Min. Inst. (4th Ed.) 1057.

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comb was committed to William M. Turner, sheriff of the county of King William, and in April, 1863, Bolivar Stark paid over to Turner $431.80 on account of the legacy of Mrs. Lipscomb, the payment being made in Confederate money.

Mrs. Lipscomb died in 1866, and in 1870, Bartlett Lipscomb assigned all his interest in the legacy to Miles B. Lipscomb.

324 *The cause came on to be heard on the 18th of May, 1872, when the court held that Elizabeth Lipscomb, took the absolute right and property in the said legacy of $400, and that on her death her surviving husband, Bartlett Lipscomb, succeeded to it, principal as well as interest remaining unpaid at her death, which was transferred to Miles B. Lipscomb by the assignment to him. And the court further held that the estate of Thomas Stark, deceased, was not discharged from the obligations devolved upon him by the will of Henry Lipscomb in consequence of the alleged payment to William M. Turner, but that estate in the hands of Bolivar Stark, the administrator, was liable for the legacy, principal and interest. And a commissioner was directed to settle the accounts of Thomas Stark, as executor of Henry Lipscomb, of Bolivar Stark, as administrator of Thomas Stark, and of Turner, as administrator de bonis non of Henry Lipscomb.

The commissioner returned his report, showing ample assets of Thomas Stark in the hands of his administrator, Bolivar Stark, and that the legacy of $400, with unpaid interest up to November 1st, 1872, amounted to $660. He reported an account of Turner's administration, showing but the one item of $431.80, which he received from Bolivar Stark in April, 1863, and which, scaled, with interest amounted at the same date to $123.25.

The cause came on to be again heard on the 19th of November, 1872, when the court confirmed the report, and made a personal decree against Bolivar Stark in favor of Miles B. Lipscomb for four hundred dollars with interest from the 1st of January, 1862, and costs. And the commissioner was directed to inquire and report what disposition Turner had made of the sum of $431.80 turned over to him by Bolivar Stark,

325 administrator *of Thomas Stark, deceased. And thereupon Bolivar Stark, in his own right and as administrator of Thomas Stark and the next of kin of Allen King, applied to a judge of this court for an appeal; which was allowed.

Montague, Hart and C. White, for the appellants.

Griswold, Aylett and L. R. Page, for the appellees.

Christian, J., delivered the opinion of the court.

The question upon which, in the main, the controversy in this case must be determined, arises upon the true construction to be given to the third clause of the will of the testator, Henry Lipscomb, which is in these words: "Item 3d. I give to my niece, Elizabeth Lipscomb, the wife of Bartlett Lipscomb, the sum of four hundred dollars; which said sum I wish put to interest, and that (i. e. the interest) paid to said Eliza annually during the lifetime of her husband, Bartlett Lipscomb, and at his death, should she be the longest liver, then I wish the principal paid over to her, the said Eliza."

The testator being unmarried and having no children, devised and bequeathed his estate, real and personal, to his sister and to his nieces and nephews. To all of them (except the bequest to Mrs. Lipscomb) the bequest and devises are without any condition whatever; the legacies being given absolutely and the devises of his land being in a fee simple absolute estate to the devisees.

The question we have to determine is, what is the nature of the legacy which the testator bequeathed to his niece, Elizabeth Lipscomb? Was it an absolute gift to her, or did she take only a life estate, which, upon her death, reverted to the residuary legatee and devisee?

326 *The court is of opinion that the bequest to Mrs. Lipscomb was an absolute bequest of the sum of four hundred dollars; which sum, during her life, was to be held by the testator's executor, and the interest paid by him annually to Mrs. Lipscomb, and at the death of her husband the principal to be paid over to her.

The bequest was an absolute bequest to Mrs. Lipscomb. The condition imposed by the will was not one which affected the character of the bequest, but only provided that during the life of her husband she should receive the interest, and upon his death the principal should be paid to her. But no provision is made in the will for the contingency of Mrs. Lipscomb's death before her husband. Mrs. Lipscomb died before her husband, and the question now to be determined is, who takes the bequest upon her death. Does it pass to the residuary legatee and devisee, or does it survive to the husband?

We think it is clear that the testator, having by the third clause of his will given to his niece an absolute bequest of four hundred dollars, only limiting his executors to the payment of interest during the life of her husband, and giving the principal to her at his death, conferred upon her an absolute estate, and that at her death this legacy survived to her husband.

This construction is fully sustained by the opinion of this court in Barksdale et al. v. White et als., 28 Gratt. 224, in which this court said: "It is a settled rule in the construction of instruments, that if an estate is conveyed, an interest given, or benefit bestowed in one part by clear, unambiguous explicit words upon which no doubt could be raised, to destroy or annul that estate, interest or benefit, it is not sufficient to raise a mist or doubt from other terms in another part of the instrument. The terms to rescind or cut down the estate or interest

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before given must be as clear and de-
327 cisive as the terms by which *it was created." There is nothing in the provisions of this will to limit or control the operation of the third clause of the will. The limitation in that clause as to the disposition of the interest during the life of the husband is a limitation of the quality, but not the quantity of the estate. The estate conferred is absolute, and upon the death of Mrs. Lipscomb survived to her husband, and his assignee is entitled to it.

The court is further of opinion, that it was the duty of Thomas Stark, the executor of Henry Lipscomb, to invest the fund of $400 bequeathed to Mrs. Elizabeth (or Eliza) Lipscomb, in a safe interest-bearing fund, of which she was entitled to the interest during the life of her husband, and to the principal at his death.

The court is further of opinion, that the payment by Bolivar Stark, the administrator of Thomas Stark, to William M. Turner, committee administrator of Henry Lipscomb, of this legacy of $400 in Confederate money, was, as far as the appellee is concerned, a void payment of said legacy. Mrs. Lipscomb had an absolute estate in this legacy, payable in good money; and those claiming under her are entitled to the same. And no payment by Bolivar Stark to William M. Turner in Confederate money can discharge such claim upon the said Bolivar Stark for payment in a sound currency.

The court is further of opinion, that the decree of the said circuit court, while it was correct in holding the said Bolivar Stark personally responsible, because it is shown he had in hands as administrator of Thomas Stark, sufficient assets to pay said legacy, yet said decree, instead of requiring William M. Turner (who was no party to the suit) to settle his account as administrator of said Lipscomb, ought simply to have entered said decree without prejudice to said Stark to institute his suit against the said William M. Turner, to make him
328 liable for the *value of the Confederate money paid by Stark to said Turner.

The court is therefore of opinion that the decree of the said circuit court, after being amended in the mode herein indicated, be affirmed.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that there is no error in said decree, so far as it holds that under the third clause of the will of the testator, Henry Lipscomb, Mrs. Elizabeth Lipscomb took an absolute estate in the legacy of four hundred dollars bequeathed to her, and that upon her death the said legacy survived to her husband, and passed by his assignment to his assignee.

The court is further of opinion that there was no error in said decree declaring that the payment of $400 in Confederate money by Bolivar Stark to William M. Turner, committee and administrator de bonis non of Henry Lipscomb, was a void payment, so far as the appellee is concerned, and did not discharge said legacy; and that said Bolivar Stark is personally responsible for said legacy. But the court is of opinion that the said circuit court erred in so much of said decree as required its commissioner to ascertain and report what disposition William M. Turner, committee and administrator de bonis non of Henry Lipscomb, made of the sum of $431.30, turned over to him by Bolivar Stark, administrator of Thomas Stark.

William M. Turner was no party to the suit, and instead of directing such inquiry by one of its commissioners as aforesaid, the court should have simply decreed against said Bolivar Stark the payment of said legacy with its accumulated interest,
329 without prejudice *to him, to institute, if he so chooses, his suit against the said William M. Turner to recover from him the value of the Confederate money paid to him by said Bolivar Stark.

The court is therefore of opinion that the said decree amended in the particular herein indicated, be affirmed; and the appellee, Miles B. Lipscomb, being the party substantially prevailing here, it is decreed and ordered that the said appellee recover against the appellant, Bolivar Stark, his costs by him expended in the defence of his appeal and supersedeas here; all of which is ordered to be certified to said circuit court.

Decree amended and affirmed.

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330 *Staples v. Turner Adm'r & als.

November Term, 1877, Richmond.

Absent, STAPLES, J.*

Equitable Jurisdiction.†—S, who is executor of his father, A, and M, who is administrator of T, have a settlement of accounts between S individually and as executor of A and T in his lifetime, extending through a number of years and embracing many items. All these items, whether as individual or as executor, are brought into the statement, and there is a balance against S of $1,176.10. At the foot of the statement S says he is only to be individually responsible for what appeared to be due from him in his individual character. M sues S upon this account, and S applies for an injunction to stay proceedings; which is granted upon his confessing judgment. In his bill he points out a number of what he alleges are errors in the account, and items which are against his testator's estate—HELD:

1. **Same.**—It is a proper case for relief in equity.
2. **Injunctions to Action at Law—Confessing Judgments.**‡—The injunction should

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*He was related to the appellant.

For sequel of the principal case see Turner v. Staples, 86 Va. 300.

†**Equitable Jurisdiction.**—On the question of equitable jurisdiction the principal case is cited in Penn v. Ingles, 82 Va. 70; Barton's Ch. Pr. (2d Ed.) 33.

‡**Injunction to Action at Law—Confessing Judgment.**—See Thornton v. Thornton, 31

have been granted without requiring S to confess a judgment in the action at law.

3. **Accounts.**—The court should direct the account as individual and as executor to be taken separately.

4. **Effect of Erroneously Requiring Confession of Judgment.**—Though S should not have been required to confess a judgment in the action at law, it may be held as a security for any amount found upon settling the accounts, to de due from him individually.

This case was argued at Wytheville, but was decided at Richmond. It was a bill filed in the circuit court of Patrick county by Samuel G. Staples, to enjoin Mur-
331 ray *Turner, administrator of Rufus Turner, deceased, and others, from proceeding in two actions brought in said court against the plaintiff by said Turner for the benefit of Hardin W. Reynolds and James H. Rangely. The injunction was granted on the plaintiff's confession of judgments in the cases.

The plaintiff in his bill states, that at the instance of Murray Turner, administrator of Rufus Turner, deceased, a partial settlement was made of outstanding mutual accounts between the estate of plaintiff's testator, Abraham Staples, deceased, and between said Rufus Turner and the plaintiff, which he files as an exhibit with his bill; that plaintiff at the time informed said Turner that such a settlement could, under no circumstances, be regarded as final, and inasmuch as the large amount involved was against the estate of plaintiff's testator, plaintiff was to be held individually responsible only for what appeared to be due from him in his individual character; to which Turner agreed, and this agreement was embraced in the statement of the account.

The plaintiff then proceeds to set out a number of errors which he insists exist in the statement, and also items of charge against Abraham Staples. And in consequence of the complicated character of the transactions as set forth in the bill, the large amount involved, the length of time during which these transactions have been standing, the difficulty that must attend a settlement, the plaintiff has only an adequate remedy in equity. He therefore prays that a separate account may be taken of all transactions between Rufus Turner and the plaintiff individually, and also between Murray Turner, as administrator of Rufus Turner since his death, and complainant as executor of Abraham Staples, deceased, and between said Murray, as administra-
332 tor of *Rufus Turner and the plaintiff individually. And he prays for an injunction and for general relief.

Murray Turner demurred to the bill, and also answered. He says that after the settlement referred to in the bill, the balance found due to him was assigned to his codefendants, Reynolds and Rangely, with the distinct approval and consent of the plaintiff Staples, and as a favor to him, because he was surety on Russell Turner's sheriff's bond, Turner's estate of doubtful solvency, and the said bond being liable to the codefendants' debts. He says the settlement was carefully made, and both were prepared for it. That plaintiff was particularly anxious for it, because he wished to get the benefit of the vouchers in a settlement of his accounts then being made by the commissioner in a suit against him as executor of Abraham Staples. They set down to work with all the papers before them, and the calculations were all made by the plaintiff himself. He denies that the admission of illegal vouchers was afterwards to be corrected, but insists that there were none such. He denies that it was a partial settlement. He denies that the plaintiff informed him that said settlement could, under no circumstances, be regarded as final. He says Rufus Turner died ten years ago, and there could have been nothing that the plaintiff could not then have known. He denies that the greater part of the amount is against A. Staples' estate, and says every dollar was due then from the plaintiff individually, or he has since made himself so liable by settlements and assumpsit; and he says when the settlement complained of was made the plaintiff took possession, and has now every voucher or charge against him individually, and against each and all of the distributees of his father's estate, and against him as executor, and he
333 has been allowed *credit with full interest, as respondent has been informed and believes, for every dollar in his settlement made by commissioner Clark, now filed in the case of Martin v. Staples' ex'or. He refers to said settlement in proof of this allegation; and he says that the object of the plaintiff in making the settlement was to get possession of these very claims and vouchers so as to get credit therefor in said settlement. He then proceeds to contest the objection of the plaintiff to the several items in the statement of account.

By the statement made out by the plaintiff and Murray Turner, which was made in 1871, the charges against the plaintiff, including his own and the claims against A. Staples' estate, amount to..... $2,881 99
This is credited by amount of S. G. Staples' executorial and individual account..... 1,705 89

Leaving the amount due from Staples $1,176 10

At the foot of this account is the following:

The above settlement made this day between me and Murray Turner, administrator of Rufus Turner, deceased, embracing claims, tickets, &c., against me individually, as executor of A. Staples, deceased, against Mary P. Kellog, C. P. Mendenhall,

Gratt. 212, and *note*, for a discussion of the question of requiring a plaintiff who seeks to have the proceedings in an action at law enjoined to confess judgment. See also, Whitehead v. Coleman, 31 Gratt. 788; Barton's Ch. Pr. (2d Ed.) 56; Parsons v. Snider, 42 W. Va. 517, 26 S. E. Rep. 285.

N. G. Hairston and Waller R. Staples, showing a balance in favor of said Turner, administrator, of eleven hundred and seventy-six dollars and ten cents, any errors in calculations and of papers admitted to be corrected. I am only hereby bound for what is charged against me individually.

Samuel G. Staples,
Executor of A. Staples, deceased.
November 2d, 1871.

334 *At the September term, 1872, of the court, the cause came on to be heard, when the court made a decree directing a commissioner to settle and adjust the matters embraced in the statement filed in the cause as made between plaintiff and defendant, and correct any errors and mistakes in the same, and state any matters pertinent to a settlement between said parties, and report the same to the court.

The commissioner made his report in September, 1873. He did not state an account against Staples in his own right, and another as executor of A. Staples, deceased, but blended all the items in one account, and he reported a balance against him as of the 2d of November, 1871, of nine hundred and sixty-four dollars and one cent. To this report the plaintiff excepted because he had not severed the accounts, and stated one with him individually and another with him as executor.

The cause came on to be heard on the 25th of September, 1873, where the court overruled the plaintiff's exception to the report, and made a decree dissolving the injunction as to $964. as of the 2d of November, 1871. And Staples thereupon applied to a judge of this court for an appeal; which was allowed.

J. A. Gilmore, for the appellant.
A. M. Lybrook, for the appellees.

Anderson, J., delivered the opinion of the court.

The court is of opinion that the decree of the circuit court of September, 1872, directing an account, is erroneous in not requiring the individual and the executorial account of Samuel G. Staples to be stated separately. And the report of the commissioner, for the same reason,

335 *is erroneous. The said accounts are blended in the statement made by the parties, which is the foundation of the suits at law; but in that alleged settlement, it appears upon the face of the paper, that any errors in calculations and of papers admitted, were to be corrected, and that appellant was only bound for what is charged against him individually. And he filed his bill in chancery, as the most appropriate jurisdiction for correcting errors in the account so stated, and for separating the individual and fiduciary accounts, and ascertaining the amount for which he was individually bound. It is at least questionable whether this could be done in a court of ordinary jurisdiction. It was clearly more appropriate to the chancery jurisdiction; and to the attainment of justice and the enforcement of what had been agreed by the parties, it was essential that the individual and fiduciary accounts of Samuel G. Staples should be stated separately.

The court is also of opinion, that the decree of the 25th of September, 1873, is erroneous. It is erroneous in overruling plaintiff's first exception to Commissioner Clark's report, upon the ground that in the statement of the account he blended the plaintiff's individual matters with his accounts as executor of Abram Staples, deceased. The court will not now pass upon the other exceptions to the commissioner's report. Those matters of exception should be left open, inasmuch as the whole account is stated on wrong principles. The said decree is erroneous in toto, inasmuch as it proceeds upon the idea that Samuel G. Staples is personally liable for the whole account, although it was agreed that he should only be bound for what was charged against him individually; and because it dissolves the injunction for $964.10, which was the balance due R. Turner's ad-

336 ministrator in the *opinion of the circuit court, upon the whole account, individual and fiduciary.

The court is further of opinion, that in the light of the Great Falls Manufacturing Co. v. Henry's administrator, 25 Gratt. 575, and authorities therein cited, the case was not a proper one for requiring the confession of judgments by the appellant in the suits at law as a condition upon which the injunction would be awarded. Although such condition is not expressed in the injunction order, the application for and the order granting the injunction and the confessions of judgment were made on the same day in open court, and the inference is that the injunction was awarded upon the condition that the judgments were confessed. The presumption is that the judgments were confessed with the understanding that then the injunction would be awarded, and being already confessed, it was unnecessary to express the condition in the injunction order. It cannot be presumed that the appellant would have voluntarily come forward and confessed judgment for demands which he was contesting, and to resist which he had brought his bill to injoin the proceedings at law, if he had not been required to do it, in order to get the injunction.

But the judgments are under the control of the chancery court, (cases cited supra), and the court is of opinion that the judgments may stand as security for so much as shall be found to be due from the defendant individually, upon an account to be taken by a commissioner of the court, and that the injunction should be dissolved as to so much as shall so appear to be due from him individually, to be apportioned between said judgments, and should be perpetuated as to the residue; and for such sum as may appear to be due from the estate of Abram Staples, deceased, if any, upon the taking of said accounts, the appellees should

337 *have a decree against Samuel G.

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Staples, the executor, to be paid ratably out of any assets of his testator in his hands to be administered.

It is therefore adjudged, ordered and decreed, that the decree of the circuit court of the 25th of September, 1873, be reversed and annulled, and that the decree of September, 1872, be amended and modified in conformity with this opinion; and that the appellee pay to the appellant his costs expended in the prosecution of his appeal here; and the cause is remanded to the said circuit court for further proceedings to be had therein, in conformity with this opinion.

Decree reversed.

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338 *Edison v. Huff & al.

November Term, 1877, Richmond.

Absent, BURKS, J.*

At the February term, 1857, of the court, a judgment was recovered against S and H as his surety, on a forthcoming bond, and it was docketed on the 1st of April, 1857. An execution was issued on this judgment, and it was paid by H. On the 8th of October, 1856, S, by written agreement under seal, sold to E a house and lot, and delivered possession, and on the 18th of the same month S conveyed the same to E. This deed was acknowledged on the same day, H being one of the justices who took the acknowledgment; but it was not presented in the clerk's office for record until March 9th, 1857. Upon a bill by H, against E and S, to be substituted to the lien of the judgment against S—HELD:

1. **Sureties—Subrogation.**—H is entitled to be substituted to the lien of the judgment.
2. **Registry Laws—Docketing.**—The judgment having been docketed within twelve months from the date of its being rendered, and the deed not having been recorded within sixty days from its acknowledgment, the judgment is a lien upon the house and lot as against the deed.
3. **Sale of Land—Unrecorded Agreement—Effect as to Creditors.**†—The agreement not having been recorded, it is void as to the creditor, and as to H claiming under him, though H had notice of the deed and E had possession of the house and lot.
4. **Same—Same—Same.**—Notice of a deed or written agreement for the sale of land does not affect a creditor of the grantor.

339 *This case was argued at Staunton, but decided at Richmond. It was a suit in equity in the circuit court of Augusta county, brought in March, 1860, by John M. Huff against Henry Eidson and Eliza J., his wife, Samuel Shelby and others, to subject a house and lot in Churchville in said county to satisfy the lien of a judgment. The facts are, that at the February term, 1857, the Central Bank of Virginia obtained in the county court of Augusta a judgment upon a forthcoming bond against Samuel Shelby, the plaintiff, and another, for $1,049.26, to be discharged by the payment of $524.63, with interest from the 29th December, 1856, and this judgment was docketed on the 1st of April, 1857. Execution was issued on this judgment, and it was paid by John M. Huff, the plaintiff, who was the surety of Shelby.

In 1856, Samuel Shelby was the owner of the house and lot in Churchville, and on the 8th of October of that year he entered into a written agreement, under seal, with Mrs. Eidson, who was then Mrs. Hanger, by which he sold the house and lot to her for $1,200, and delivered to her possession in part; and on the 18th of the same month Shelby and wife conveyed the same to her. Though this deed was acknowledged by the grantors on the day of its date, one of the justices taking the acknowledgment being the plaintiff, it was not presented in the clerk's office for record until March the 9th, 1857.

The plaintiff in his bill claims that the judgment had priority over the deed to Mrs. Hanger, and that having paid it he is entitled to be substituted to the rights of the judgment creditor. The defendants rely upon the written agreement, with payment of the purchase money and possession, as giving them the prior and better equity, upon their deed, and upon the notice of the sale and conveyance to Mrs. Hanger, 340 which the plaintiff had at *the time, as shown by his having acted as one of the justices who certified the acknowledgment of the parties to the deed.

The cause came on to be heard on the 29th of June, 1874, when the court held that the judgment was a lien on the property; and a report having been made under a previous order showing the amount of the plaintiff's debt, and that the rents of the house and lot would not pay it in five years, it was decreed that unless Samuel Shelby, or some one for him, should, within sixty days, pay to the plaintiff $717.57, with interest on $384.31, part thereof, from the 1st of June, 1874, and the costs of this suit, commissioners named should proceed to sell the said house and lot in the mode and on the terms stated in the decree. And thereupon Henry Eidson (Mrs. Eidson being then dead) applied to this court for an appeal; which was allowed.

D. Fultz, for the appellant.

G. M. Cochran, for the appellee.

Staples, J. The principal question before us is, whether the appellee's judgment is a lien upon the house and lot in the possession of Mrs. Hanger or her alienees. The position of the appellant is, that although the deed to Mrs. Hanger may be invalid as to creditors of Shelby for want of recordation in due time, the executory contract of

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*The case was argued before he was elected.

†**Sale of Land—Unrecorded Agreement—Effect as to Creditors.**—For a discussion of the effect of sale of land under an unrecorded agreement as to creditors, see March, Price & Co. v. Chambers, 30 Gratt. 299, and *note;* Long v. Manf. Co., 30 Gratt. 665; Young v. Devries, 31 Gratt. 304; and *note;* Dobyns v. Waring, 82 Va. 170; Snyder v. Martin, 17 W. Va. 290; Price v. Wall. 97 Va. 336; McNeil v. Miller, 29 W. Va. 433, 2 S. E. 337.

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8th October, 1856, although never recorded, vested in Mrs. Hanger an equitable title paramount to the lien of the judgment. This pretension is based upon the decision of this court in Withers v. Carter, 4 Gratt. 407, in which it was held that although the statute avoids an unrecorded deed as against creditors of the grantor, it does not affect a pre-existing equitable estate
341 acquired by purchase from *him. Since that decision was made an important change, as is well known, has been made in the laws relating to the registration of deeds. This change was effected at the revisal of 1849. The statute then adopted, and which is still in force, declares that every contract in writing in respect to real estate shall be void as to creditors and subsequent purchasers for valuable consideration, without notice, until and except from the time that it is duly admitted to record in the county or corporation wherein the real estate embraced in said contract or deed may be.

By a subsequent section it is provided that if the writing is admitted to record within sixty days from the time of its being acknowledged before and certified to by a justice, notary public or other person authorized to certify the same for record, it shall, unless it be a mortgage or deed of trust, be as valid as if it had been recorded on the day of its acknowledgment. Code of 1860, chapter 119, sections 4, 5, 7.

These provisions effectually abrogated the rule laid down in Withers v. Carter, so far at least as executory contracts in writing for the sale of land are concerned, and placed them upon precisely the same footing as conveyances of the legal title. See the case of Hart et als. v. Haynes, decided by the special court of appeals, and reported in the number of the Law Journal for February, 1877, p. 109.

It has been argued, however, that Mrs. Hanger's possession of the house and lot was sufficient notice to all the world of her title, and was equivalent in law to the recordation of the deed and title bond. To sustain this position the learned counsel for the appellant has cited certain cases of other states in which it has been held that possession is notice of the purchaser's equity. Whatever may be the rule elsewhere, it is perfectly clear that in Virginia the possession of the grantee or vendee does
342 *not dispense with the necessity of recordation so far as creditors are concerned. Whether such possession is sufficient to put a purchaser upon inquiry, and thus affect him with notice, is a question we are not called on to decide. We are now dealing with the rights of creditors only. As to them both the deed and title bond are void unless recorded, whether they (the creditors) have or have not notice. This distinction between creditors and purchasers was made at an early day in the registration laws, and has been recognized for more than forty years, through all the amendments and revisals of our statutes, and by the decisions of our courts. The unrecorded deed or contract is only void as to purchasers for a valuable consideration without notice, and it is void as to creditors also, even though they may have notice. It is not our province to consider whether this distinction rests upon any just or solid ground. It is sufficient for us that it exists and is the well settled law. It does not matter, therefore, that Mrs. Hanger had actual possession of the premises; and it is equally immaterial that the appellee had actual notice of the deed to Mrs. Hanger. He being the surety of Shelby and having paid the debt to the creditor, must stand in the shoes of the latter with the right to enforce all his remedies; and as the creditor is not affected by notice, neither is the appellee as surety.

The learned counsel relies upon the case of Hill et als. v. Rixey & als., 26 Gratt. 72. Upon a careful examination of that case, it is not perceived that it is at all in conflict with anything here said. There the deed was executed on the 21st November, 1865, but was not admitted to record until the 6th November, 1867.

It was held that the deed had priority over the judgment of Rixey & Starke, because that judgment, although rendered in November, 1860, was not docketed until 11th December, 1868, more than twelve
343 months after the *recordation of the deed. But it was also held that the other judgments had priority over the deed, although not docketed until after the execution of the deed, but before it was recorded: and the reason was they (the judgments) were docketed within twelve months from the time they were rendered. The doctrine laid down in Hill v. Rixey is therefore in direct conformity with the views here expressed, and lead inevitably to the same conclusion.

In the present case the only question is as to the necessity of recording a title bond and deed as against a creditor whose judgment has been duly docketed. By the provisions of the 8th section, chapter 186, Code of 1860, the judgment lien is preserved if it is docketed within a year from its date, or ninety days before the conveyance of the estate to a purchaser. Here the judgment was rendered at the February term, 1857, and was docketed on the 1st of April thereafter. On the other hand the title bond was never recorded. The deed to Mrs. Hanger bears date 18th October, 1856. It was acknowledged before and certified to by two justices of the peace on the same day, but was not recorded until the 9th March, 1857, nearly five months after such acknowledgment; so that the judgment was recovered before the deed was recorded. If the deed had been recorded within sixty days from its acknowledgment it would be held valid as a recorded deed from the time of such acknowledgment. But not being so recorded, it is only valid as to creditors and purchasers, without notice, from the day of its actual admittance to record. It is very true that the deed was recorded before the judgment was docketed, but it must be borne in mind that the judgment having been

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docketed within less than twelve months from the time of its rendition, has precisely the same effect as if docketed on the day of its date. The lien must therefore be
344 treated as effectual at *and from the February term, 1857, which was a month or more before the recordation of the deed. It is difficult to see how these conclusions can be avoided. If any injustice is done the appellant, it is in a great measure due to the negligence of the parties under whom he claims. The law pointed out a plain duty to Mrs. Hanger—that of promptly recording the evidences of her title. Having failed to do so, the loss must fall upon her or her alienee. This court cannot construe away a plain statute to avoid cases of individual hardship. The legislature has thought proper to place all written contracts for the sale of land upon the same footing with deeds of conveyance, so far as they come within the influence of the registration acts, and we have no alternative but to enforce the law as it is written.

It is proper to add that since this case was argued in Staunton, the case of Floyd v. Harding, 28 Gratt. 401, has been decided by this court. It was there held that a bona fide purchaser of real estate in possession under a parol contract, who is entitled to a specific performance as against his vendor, is also entitled to hold against the judgment creditor of the vendor; that the statutes of registration only apply to deeds and contracts in writing for the sale of land, and not to mere parol contracts, which could not be recorded. Throughout the argument of that case, which was very ably conducted, it was conceded on all sides that the present statute had placed title bonds and other contracts in writing upon the same footing as deeds; and to that extent certainly had abolished the rule laid down in Withers & Carter.

In the present case there is no claim or pretense of a valid equitable title prior to and independent of the title bond. The contract between Shelby and Mrs. Hanger was, at the time it was entered into, reduced to writing. The writing is the sole evi-
345 dence of the contract. If it *be a nullity there is no semblance of an agreement upon which Mrs. Hanger can rely; no valid parol contract so far performed as to be capable of specific execution. The principle of Withers & Carter and of Floyd & Harding is, that the purchaser having a good equitable title prior to and independent of the writing, will not forfeit it merely because he may afterwards attempt to consummate his right by a deed or title bond. In other words, when there is a parol agreement under which the purchaser is in possession, and which is valid without a writing, the subsequent execution of a writing cannot invalidate the title previously acquired without it. This principle is adverted to and relied upon in Withers & Carter as distinguishing that case from McClure v. Thistle's ex'ors, 2 Gratt. 182. Judge Baldwin, in commenting upon that case (McClure & Thistle), said it was one in which there was no evidence of any executory contract or possession prior to the deed, nor was any asserted by the defendant's answer. He relied simply upon his deed, his possession under it, and his payment of the purchase money. "I recollect distinctly," said he, "that two of the judges who sat in that cause—the president and myself—were decidedly of opinion that if it had appeared from the record that the defendant, prior to the execution of the deed, had acquired by his purchase a good equitable title, he ought to be protected against the judgment." And so, in the present case, the appellants rely simply upon the title bond, possession under it, and payment of the purchase money. In other words, they rely wholly upon a written contract, and as that contract is utterly void by the express terms of the statute, as against judgment creditors, for want of recordation, the inevitable result is that the lien of the judgment attaches.

346 *The propriety of excluding mere parol contracts partly performed from the operation of the registry acts, and the reasons probably influencing the legislature in confining those acts to deeds and other written contracts, are discussed at length in Floyd & Harding, and need not be again considered here. That case shows the anxiety of this court to protect the rights of the real owner of property, and its indisposition to extend the operation of the recording acts as against bona fide purchasers, to a single case not plainly within their provisions. But it has never gone so far as to disregard the express provisions of a statute upon grounds of real or imaginary hardship. For the reasons stated, we are of opinion the decree of the circuit court must be affirmed.

Moncure, P., and Christian, J., concurred in the opinion of Staples, J.

Anderson, J., dissented.

Decree affirmed.

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347 *Long & al. v. Weller's Ex'or & als.

November Term, 1877, Richmond.

1. **Judicial Sales—Objections to Title.***—An objection to the title of land by a purchaser at a judicial sale, must be made before the sale is confirmed by the court. Ordinarily an objection after confirmation comes too late.

2. **Titles—Easement—Rules That Govern.**—The title to an easement on the land to which it

***Judicial Sales—Objections to Title.**—The rule laid down in the first headnote to the effect that an objection to the title of land by a purchaser at a judicial sale must be made before the sale is confirmed by the court, is affirmed in Hickson v. Rucker, 77 Va. 139; Redd v. Dyer, 83 Va. 331. The principal case was distinguished in Easley v. Barksdale, 73 Va. 286. And in Watson v. Hoy, 28 Gratt. 698, it was held that this rule does not apply to the equity of a purchaser arising from after-discovered mistake, fraud, or other like matter. See also, Redd v. Dyer, 83 Va. 331.

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is appurtenant is necessarily connected with the title to the land, and an objection referring to such easement must be governed by the same rules.

3. **Judicial Sales—Fraud.**—An objection by such a purchaser, after the sale has been confirmed, that owing to his misinformation as to the boundaries of the land, he does not get certain water privileges which he would have had if he had been correctly informed as to the said boundaries, can only be sustained on the ground of fraud or mistake; and if mistake is relied on, it must be the mistake of both parties.

4. **Same—Same—Time to Object.***—An objection of the kind should be made to the court as soon as it is discovered by the purchaser.

5. **Same—Failure to Pay Purchase Money.**†—Where a judicial sale of land is made upon a credit, and the title retained as a security, upon a rule against the purchaser to show cause why the land should not be resold for his failure to pay the purchase money before making a decree for the sale, the court should ascertain how much of the purchase money is due, and should in the decree give him a day in which to pay it; and if not paid in that time, the commissioner to sell.

6. **Same—Same—Discretion of Court.**‡—Whether the whole or only a part of the land should be sold, or whether as a whole or in parcels, must be referred to the discretion of the court, and his act will not be disturbed unless plainly erroneous.

This case was heard at Staunton, but decided at Richmond. It was a cred-
348 itor's bill filed in April, 1871, in *the county court of Rockingham, by Samuel R. Allebaugh, executor of John Weller, deceased, to subject the property of William W. Carpenter to the payment of his debts. Of this property there was a tract of six hundred acres of land, with a mill upon it. After an account of debts had been taken, at the June term, 1872, there was a decree appointing commissioners to sell the land at public sale, upon the terms of enough in hand to pay the expenses of sale and the costs of the suit, and the residue in four equal annual payments, bond with approved security to be given by the purchaser, and the title retained.

The commissioners reported a sale of two parcels of the land; but this sale was set aside. At the October term, it appearing that a part of the land had been sold, it was ordered that a survey be made of the different parcels of the said lands, as well as of that portion yet to be sold, when sold, and a report of the surveys made to the court at a future term, showing the number of acres, roods, &c., in each parcel, and to whom sold.

The commissioners reported six parcels of land sold, describing the sixth parcel as "the mill and buildings, with about ten acres of land, more or less, metes and bounds pointed out on day of sale." There having been an advance bid made for this property, the court set aside the sale and directed the commissioners to re-advertise the mill property for sale again, and when it was put up it was to be started at the price offered in the additional bid.

The commissioners made another report, in which they set out a number of sales of parcels of land to different parties. They say the mill property and about thirteen acres of land was sold to Mary J. Barley, A. R. Whissen and Peter Long, at the sum of $2,932.63. At the January term, 1873, these sales were confirmed, and it was ordered that Samuel Shacklett, the general
349 *receiver, do withdraw the bonds filed in the papers in this case, and collect them as they fall due, and hold the proceeds subject to the future order of the court.

The cause having been transferred by operation of law to the circuit court, at the October term, 1876, a rule was directed to issue against Peter Long, Mary J. Barley, &c., to show cause why the said mill property and land should not be resold for the purchase money. To this rule Long and Mary J. Barley appeared and filed their answer. They say that the property is only valuable as a mill property, and that its value in that particular was the only inducement to purchase it; that no plat of the property was exhibited on the day of sale, or at any other time previous thereto, so far as they knew; that they purchased under the full belief and understanding, gathered from the representations made on the day of sale, and from the fact that a road to the mill had long been used, that said road was a part of the property; that the line of the road ran on the south side of Smith's creek, and that the full and complete control of the water-power of Smith's creek, from the extreme upper end of said tract to a point nearly opposite the mill, was sold with the property; in all which they fear they have been mistaken. And they set out the importance of the road, the line and the water-power to the property. They say they have paid of their purchase money the hand payment of about $150, and the first deferred payment of $700, and that they have erected improvements to the amount at least of $1,500. And they insist they shall not be required to pay any more until the title to all the privileges, rights, easements, as well as to the land itself, may be perfected, or

*Same — Caveat Emptor. — In Hickson v. Rucker, 77 Va. 139, the principal case is cited as authority that the maxim *Caveat Emptor* strictly applies to all judicial sales. See Smith v. Wortham, 82 Va. 945; 2 Min. Inst. (4th Ed.) 701.

†Constructive Notice.—The principal case is cited frequently in subsequent decisions for the proposition that "means of knowledge, with the duty of using them, are in equity, equivalent to knowledge itself." Jameson v. Rixey, 94 Va. 348; Carneal v. Lynch, 91 Va. 120; Effinger v. Hall, 81 Va. 106; Lamar v. Hale, 79 Va. 160; Shelton v. Ficklin, 32 Gratt. 727; Armentrout v. Gibbons, 30 Gratt. 651; Wood v. Krebbs, 30 Gratt. 708, and *note*.

‡Judicial Sales—Discretion of Court.—As sustaining the rule laid down in the 6th headnote of the principal case, in regard to what extent the decision of the question of whether to sell the whole or part of a tract subject to a judicial sale is within the discretion of the judge, see Johnson v. Wagner, 76 Va. 587; Glenn v. Blackford, 23 W. Va. 185; Fidelity Ins. Co. v. Shen. V. R. Co., 32 W. Va. 244, 9 S. E. 190.

if not perfected, that they have an abatement from the purchase price, for the damage to the said property sustained by them in failing to receive all they purchased.

350 *The case came on to be heard upon the rule on the 24th of November, 1876, when the court held that the answer was not sufficient cause shown, and decreed that a commissioner named do proceed, after advertising the time, terms and place of sale for four weeks, to resell the said mill property and land thereto attached, on the premises, on the terms of $1,500, and all costs of suit and sale, including the costs at law, to be paid in hand on the day of sale, and the balance in two equal payments of nine and eighteen months, with interest from the day of sale, the purchaser giving bond, &c., and a lien retained on the land. From this decree Peter Long and Mary J. Barley obtained an appeal. But before the appeal was perfected, viz: on the 26th of January, 1877, the court modified the decree and directed that unless Peter Long, &c., or some one for them, do pay to A. B. Irick, receiver, all the purchase money now due upon their purchase of the property, and all costs at law and in this proceeding, within thirty days from this date, that then the said commissioner shall proceed, &c., as set forth in the decree of November 24th, 1876.

O'Ferrall, for the appellants.

William B. Compton and B. G. Patterson, for the appellees.

Burks, J. The appellants were purchasers at a judicial sale of a small parcel of land with valuable mill buildings upon it. The decree, under which they purchased, retained the title to the property as security for the payment of the purchase money. The sale was reported and confirmed without objection or exception. The purchasers paid a portion of the purchase money, and being a default for the residue, a rule was made

351 *against them to show cause against a resale of the property to satisfy the unpaid balance of the purchase money. They filed their answer to the rule, objecting to the resale on several grounds, and asking for an abatement of the purchase money unpaid. The circuit court deemed the answer insufficient, and by decree ordered the resale. We are to determine whether there is any error in this decree, from which an appeal has been allowed to the purchasers by one of the judges of this court.

In Virginia, the maxim caveat emptor strictly applies to all judicial sales. The court undertakes to sell only the title, such as it is, of the parties to the suit, and it is the duty of the purchaser to ascertain for himself whether the title of these parties may not be impeached or superseded by some other and paramount title; and if he have just grounds of objection for want or defect of title, he should present them to the court before the confirmation of the report of sale. Ordinarily, objection after confirmation comes too late. Young's adm'r & Bowyer v. McClung & als., 9 Gratt. 336, 358; Threlkeld's v. Campbell, 2 Gratt. 198; Daniel & als. v. Leitch, 13 Gratt. 195, 212, 213; Watson v. Hoy & als., (not yet reported), Virginia Law Journal, August, 1877, p. 473, et seq., 28 Gratt. 698.

These authorities would seem to be a sufficient answer to the pretension set up by the appellants in their answer to the rule for resale, to the effect that at the time they purchased the land and mill property, they believed that the right to the use of the entire road mentioned in the answer was annexed or appurtenant as an easement to the property purchased by them, and that since the purchase they have discovered that a claim has been asserted by a third party, which is probably right, and will de-

352 prive them of the *use of the road, and thus seriously impair the value of the property purchased by them.

This is nothing but an objection for defect of title. The title to the easement is necessarily connected with the title to the land to which it is apurtenant; and whatever the purchasers believed, they must be taken to know that they could acquire by their purchase only the title that the court sold, which was the title, whatever it might be, of the parties to the suit. They purchased at their own risk, and cannot be heard to object for want or defect of title, at least after confirmation of the sale.

What is about to be said in regard to representations alleged to have been made on the day of sale as to the water-power and privileges, will apply also to the representations said to have been made in regard to the road.

The purchasers, in their answer to the rule, further object, that, under their contract, they were entitled to certain valuable water privileges, which they failed to get. This objection is based upon an alleged misunderstanding of the boundaries of the land purchased, and goes rather to the identity of the subject sold than to the title. If they are entitled to any relief on that account, it must be on the ground of fraud or mistake discovered after confirmation of the sale. In such case, the confirmation of the sale would not be an insuperable barrier to relief in the absence of laches, acquiescence, waiver, or other circumstance rendering relief inequitable.

I do not understand the answer as charging or imputing fraud to any one. The respondents do not pretend that the representations made on the day of sale, upon which they relied, as they say, to their prejudice, proceeded from the commissioner who made the sale, or from any party in interest, or indeed from any person having authority to make them. They could not, therefore, have been defrauded by them. I rather take

353 it, that the *defence, in the main, was intended to be based on the ground of mistake. Mutual mistake of material facts by the parties acting, or the mistake of such facts by one of the parties induced by the fraud or culpable negligence of the other, is certainly ground for equitable relief. 1

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Story's Eq. Juris. § 151. The decision in Watson v. Hoy & others, supra, was founded on the doctrine of mutual mistake. But the mistake of one of the parties occasioned by his own culpable negligence does not entitle him to relief as against the other, who is free from negligence. 1 Story's Eq. Juris. § 146.

If there were any mistake in this case, it was not mutual. It was a mistake, if mistake at all, of the purchasers attributable solely to their own negligence. If they chose to rely upon the representations of strangers to the cause, and were thereby misled to their prejudice, they "must lie down under their folly." It was a judicial sale, and the records of the court and the papers in the cause were the only reliable sources of information as to the property to be sold, the title, boundaries, &c. To these the purchasers should have looked. If they had so looked, they could not and would not have been misled. The land which was offered for sale had been once before offered under a decree in the same suit. It had been surveyed and a plat of the survey was on file with the papers in the cause. It is admitted by the respondents in their answer, that there was such a survey, and that it showed the boundaries. They admit that it was filed, but they say they do not know when it was made or filed; that they did not know of its existence until recently. If the survey was filed before the sale, as it no doubt was, ignorance of the fact is no excuse. It was their duty to make inquiry, and inquiry duly pursued would have led to knowledge. It will not do for them to shut their eyes and then
354 say they did not see. Wherever *inquiry is a duty, the party bound to make it is affected with knowledge of all which he would have discovered had he performed the duty. Means of knowledge with the duty of using them are, in equity, equivalent to knowledge itself. Strong, J., in Cordon v. Hood, 17 Wall. U. S. R., 1, 8. See also Burwell's adm'r v. Fauber & als., 21 Gratt. 446, 463, 464. It is moreover to be observed in this case, that the answer to the rule is wholly affirmative in its character, and is not therefore evidence of the facts it avers. No evidence in support of it was produced, none offered to be produced; and non constat, that any ever would or could be produced. No affidavit was filed stating that requisite proof would be furnished, if opportunity were afforded to procure it, and it does not appear that any application was made to the court to give such opportunity. It is further to be observed that the purchasers not only paid the cash instalment of the purchase money without objection, but also the first deferred instalment, which became due twelve months from the day of sale. It is not stated when this deferred instalment was paid, but it is not to be supposed that it was paid before maturity. And yet it is stated in the answer that the respondents did not discover the facts on which they rely for defence until after the payment last referred to was made. It is singular that the alleged discovery was not sooner made, and also worthy of notice that after the discovery no attempt was made by them to obtain relief until they were called upon to answer the rule for resale after nearly two years' default. They might and should have filed their petition in the cause, as soon as they made the discovery, setting out the matters stated in their answer. The inference to be drawn from their delay is not favorable to the equity of their claim.

355 *For the reasons stated I am of opinion that the circuit court did not err in holding that the answer of the appellants to the rule did not show sufficient cause against the resale. But I think the decree was erroneous in ordering a sale without giving the purchasers a day to redeem.

It is the invariable rule to give such day in suits by mortgagee against the mortgagor to foreclose a mortgage, (Clark v. Reyburn, 8 Wall. U. S. R. 322, 323, 324), and also in suits by vendor against vendee to enforce his lien for purchase money, whether such lien be express or implied. Kyles v. Tait's adm'r, 6 Gratt. 44; Yancey v. Mauck & als., 15 Gratt. 300; Adams' Equity, side p. 128. See also the valuable appendix prepared by William Green, Esq., to Wythe's Reports (Minor's Ed.) 404, et seq., and especially p. 420, note 80.

In a suit by vendor against vendee, whether the lien is treated by analogy as a security in the nature of a mortgage, and the suit assimilated to a bill for foreclosure by judicial sale, or the suit be considered, as Judge Allen seemed to think it should be in a case, at least, where the title is retained, (Yancey v. Mauck & als., supra,) as a suit for the specific execution of a contract to which the lien is incident, the rule is the same.

Does the rule apply to proceedings in a pending suit for resale of property theretofore sold under decree in the same suit with retention of lien, or of the title with the lien incident, as security for the payment of the purchase money? I confess I can see no reason why it should not so apply in full force.

In judicial sales the court in some sense is regarded as the vendor, making sale by a commissioner as its agent, and the contract is treated as a contract substantially between the purchaser on one side and the court as vendor on the other. Where the title is retained, the proceeding for resale, whether by bill or in the more
356 *summary way, by rule, is a proceeding substantially by the court, as vendor, to enforce the collection of the purchase money by enforcing the lien incident to the title retained as a security, and must be governed by the same rules and principles which control proceedings of a like nature in a like case by any other vendor. See authorities cited by Judge Daniel in Clarkson v. Read & als., 15 Gratt. 288, 295, and among the rest, the case of Harding v. Harding, 18 Eng. Ch. R. 514, in which Lord Cottenham said, "that there was no reason

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why a person purchasing under a decree of the court should not be held to his contract as much as a person purchasing in the ordinary way; that the court might enforce the vendor's lien against the estate, and that an order to hold the purchaser to his contract and to resell the estate in the meantime, was in strict analogy to the course the court takes against the purchaser in the ordinary way."

This error in the decree, in not giving the appellants a day to redeem, was corrected, it seems, by the circuit court, after the appeal from the decree was allowed and before the same took effect, by the giving of the bond required. As this correction was not to the prejudice of the appellants, but otherwise, they have no cause to complain of it.

As the decree appealed from did not give a day to redeem, of course no amount was fixed to be paid by way of redemption, and this is assigned as additional ground of error; and it is contended that, although the amendatory decree gives a day for redemption, yet it does not ascertain with sufficient certainty the amount to be paid. This amount is described in the amendatory decree as "all the purchase money now due upon their (the appellants') purchase of said property, and all costs at law and in this proceeding."

357 *The receiver had made no report showing how much of the purchase money had been paid, and what balance remained unpaid. It would have been more regular to have required such report before the rule was made, or at least before the resale was ordered; but the appellants, in their answer to the rule, state that they had paid "the hand payment of about $150, and the first deferred payment of about $700, making in all about $850." It appears by the record that the land was sold for cash sufficient to pay the costs of suit and expenses of sale, and for the residue of the purchase money on a credit of one, two, three and four years, equal instalments, secured by the bonds of the purchasers, with title retained as further security. The gross amount of the purchase money was $2,932.63. The answer to the rule shows about the amounts paid. It is not material what were the precise amounts, as they were in full discharge of the cash payment and of the first deferred instalment, thus leaving wholly unpaid the three bonds last falling due with the interest accrued thereon. These bonds, of course, would show accurately the amount of the unpaid balance of purchase money due at the date of the decree and of the resale. They were, under an order of the court, in the hands of the receiver, to whom the appellants were directed to make payment. The decree, therefore, in describing the amount of purchase money to be paid, as "all the purchase money now due upon their (the appellants') purchase of said property," fixes the amount with requisite certainty. And so of the "costs at law and in this proceeding." They were evidenced by the record, and when taxed by the clerk, as the law requires, the amount would be certain. And id certum est quod certum reddi potest.

It is further assigned as error, that the decree complained of orders a sale of
358 the whole of the property, *instead of ordering, as it is contended he should have done, a sale of so much only as might be necessary to discharge the unpaid balance of purchase money.

In ordering a sale of property to satisfy a charge upon it, if partition be practicable and would not be injurious, and a sale of a part will produce means sufficient to satisfy the charge upon the whole, certainly such part only should be sold. But whether it be necessary to sell the whole subject, or a part only, and if a part, whether the cutting off that part will not materially impair the value of what remains, and of the whole, then whether it would be more advantageous to sell it altogether or in parcels, and if in parcels, what number there should be, how they should be laid off and in what order sold, are questions (and there are numerous others of a like character) which must of necessity be left for determination to the sound discretion of the chancellor who orders the sale. This court will supervise the exercise of this discretion by the chancellor, but will, in no case, reverse his actions in the matter, unless plainly erroneous.

There is nothing in the record which shows that the circuit court committed any error in ordering a sale of the entire property. Indeed, the contrary rather appears. The property consists of a parcel of land containing thirteen acres, with the buildings upon it. It was sold entire to the appellants. Three-fourths of the purchase money, with accrued interest, remain unpaid. Prima facie, it will take the whole property to discharge this unpaid balance. It is very improbable that the proceeds of the sale of the land detached from the mill seat and buildings on it would pay this balance. Nor has it been made to appear that it would be advantageous or judicious to sell in parcels. On the contrary, the appellants, in their answer to the rule, assert that the chief value of the property is in the mill seat and buildings, and
359 that *the land attached and sold with it, together with certain privileges, is "necessary for the operation of the mill."

At all events, as the cause must be remanded, if in the further proceedings to be had in the circuit court, it be made to appear that it is necessary to sell only a part of the property, or that it would be more advantageous to sell the property in parcels than in one body, the circuit court can frame its decrees and orders accordingly.

Upon the whole matter, I am of opinion to affirm the decree of the circuit court as amended, and to remand the cause for further proceedings in order to final decree.

The other judges concurred in the opinion of Burks, J.

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The decree was as follows:

This cause, which is pending in this court at its place of session at Staunton, having been fully argued, but not determined, at said place of session, this day came here the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said circuit court committed an error in not ascertaining and fixing by said decree the amount of the purchase money owing by the appellants and remaining unpaid for the land therein ordered to be resold, and a further error in the said decree in not giving to the appellants a reasonable time for the payment of said purchase money before the sale ordered by said decree should be made, and that the said errors are the only errors in said decree; but as it appears from a certified copy of an order of the said circuit court, filed in this cause, that after the appeal aforesaid was allowed, but before it took effect, the said decree was
360 amended by *the said circuit court and the said errors were thereby corrected, the court is further of opinion that the said decree, as thus amended, should be affirmed. It is therefore decreed and ordered that the said decree, as amended as aforesaid, be affirmed, and that the appellants pay to the appellees their costs by them expended in their defence of the appeal aforesaid here; and this cause is remanded to the said circuit court for further proceedings to be had therein, in order to a final decree, in conformity to the opinion and principles herein expressed and declared; which is ordered to be certified to the said circuit court of Rockingham county.

Decree affirmed.

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361 *McLean v. Piedmont & Arlington Life Ins. Co.*

November Term, 1877, Richmond.

Absent, MONCURE, P.

I. The P. & A. Life Ins. Co. of Richmond, Va., have an agency at Newbern, North Carolina, and the agent there issues a policy on the life of H, of that state, which is assigned to D of New York. D pays the premiums to the agent at Newbern for years. He sends the money to pay the premium for July, 1874, to the agent, who receives it, but does not send him a receipt, nor pay it over to the company, and the company enters the policy as forfeited. D having written several times to the agent and getting no response, does not send the money for the premium for October, 1874, or January, 1875. D sent an agent to Richmond, and after some explanations and an agreement, about which the evidence is conflicting, the secretary at Richmond gave to D's agent receipts for the back premiums; said receipts containing conditions as to the health of H. Upon an action on the policy by D against the company—HELD:

1. *Quaere:* Was the policy forfeited by the failure of D to pay the premium due October 1st, 1874?

2. **Life Insurance—Conditions in Policy—Parol Evidence.**—Parol evidence is admissible to prove that the conditions inserted in the receipts was in violation of the agreement between the agent of D and the secretary of the company, and that by that agreement the forfeiture of the policy, if it had been forfeited, was unconditionally waived.

This was an action of covenant in the circuit court of the city of Richmond, brought by Christopher W. McLean for the benefit of Eliza W. Bissell and J. F. Darrow, against the Piedmont and Arlington Life Insurance Company
362 *of Virginia, to recover the sum of five thousand dollars on a policy of insurance issued by said company upon the life of Wiley F. Higgins, of the state of North Carolina. The policy was issued on the 22d of July, 1869, through the agency of D. T. Carraway, the agent of the company at Newbern, North Carolina, in favor of Christopher W. McLean, who, in March, 1870, assigned it to his mother, Mrs. E. W. Bissell; and she, in May, 1872, assigned it to Jay F. Darrow of the city of New York.

The questions in the cause were whether the policy was forfeited in July or October, 1874, by the non-payment of the premiums upon it; and if forfeited, whether the forfeiture had been waived by the company. On this last point the evidence was conflicting. This court does not undertake to decide which is to be credited, but the judge states it sufficiently to show the bearing of the instructions given by the court below.

Upon the trial after the evidence had been introduced, the defendant asked for eleven instructions, and the plaintiff asked for three. But the court refused to give any of them as asked; and of its own motion gave the following:

The jury are instructed that when the letter of the plaintiff of January 30th, 1875, enclosing a remittance of $75, was received by the defendant, the right of the plaintiff under the policy sued upon had been forfeited by reason of default in payment of the premiums due October 22d, 1874, and January 22d, 1875, and that the defendants were under no obligations to reinstate the policy, except upon conditions satisfactory to themselves, and that the retention of the said remittance subject, as he was advised, to the order of the plaintiff and the offer of re-insurance of the policy, subject to his acceptance of conditions tendered by
363 the defendants in their reply of *February 1st, 1875, did not revive the rights of the plaintiff under the policy.

And that when in July, 1875, the plaintiff, through his attorney, negotiated with the defendants through their assistant secretary, the defendants had the right to prescribe conditions upon which the policy should be reinstated.

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*For monographic note on Life and Accident Insurance, see end of case.

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And that the printed receipts for the payment of premiums over due, delivered by the assistant secretary to the plaintiff's attorney in July, 1875, and exhibited by the plaintiff to the jury, are evidence which cannot be contradicted or varied by parol testimony of the contract upon which the defendants agreed to reinstate the policy.

And that under the said contract the defendants are not liable to the plaintiff if, when the remittance of $75 enclosed in plaintiff's letter of January 30th, 1875, was received by the defendant, Wiley F. Higgins was then sick, and his subsequent death resulted from such sickness.

To which action of the court refusing to give the said instruction asked for by it, the defendant excepted; and the plaintiff excepted to the action of the court refusing to give the instructions asked for by him; and both the plaintiff and defendant excepted to the action of the court in giving the instructions to the jury which it gave; and the plaintiff tenders this, his first bill of exceptions, which is signed, sealed and enrolled.

There was a verdict and judgment for the defendants, and a motion by the plaintiff for a new trial, which was overruled; and an exception by the plaintiff; but it is unnecessary to state it. The plaintiff applied to this court for a writ of error; which was awarded.

William L. Royall, for the appellant.

364 *A. M. Keilley, for the appellee.

Anderson, J. In July, 1869, Christopher W. McLean, who is plaintiff in error, and was plaintiff in the court below, and sued for the benefit of Eliza W. Bissell and J. F. Darrow, obtained from the defendant a policy in the amount of five thousand dollars, assuring the life of Wiley F. Higgins, of North Carolina, for considerations and upon conditions therein expressed, for the term of the said Higgins' life. This contract of assurance was made at the defendant's agency, at Newbern, in North Carolina, and was made with its agent there, T. D. Carraway.

On the 22d of March, 1870, McLean assigned the policy to his mother, Mrs. Eliza W. Bissell, all the premiums being then paid up; and on the 27th of May, 1872, Mrs. Bissell assigned it to J. F. Darrow, a resident of the city of New York, all the premiums then being paid up. Both assignments were made with the knowledge and assent of the defendant. All the premiums were paid to the said T. D. Carraway, and the receipts, in which a clause was inserted "not binding until countersigned by D. T. Carraway," were signed by D. J. Hartsook, secretary, and countersigned by D. T. Carraway, agent; which establishes the agency of Carraway. After the assignment to J. F. Darrow he continued the payment of the quarterly premiums to Carraway at Newbern, North Carolina. Carraway would send him a statement of the premium shortly before it was due, and he would immediately enclose him a bank check to pay it, and then Carraway would send him the company's printed receipt for it, signed by the secretary, and countersigned by himself as agent. The last remittance Darrow made him was a bank check to pay the premium for July 22d, 1874. For 365 this remittance Carraway never *sent him a receipt; and although he repeatedly wrote to him, he never heard from him again. In the uncertainty and distrust which this occasioned, he omitted to remit to him the premiums of October, 1874, and of January, 1875; but on the 30th of the last named month, wrote direct to D. J. Hartsook, secretary, at Richmond, and enclosed him a bank check for $75 to pay premiums, and requested him to enclose him the company's receipts.

His letter was answered by J. J. Hopkins, assistant secretary, who informed him that his policy had lapsed and was cancelled because the premiums due July, 1874, had not been paid, "and (he says) must be reinstated before we can receive the premium. We enclose one of our forms of reinstatement, which you can send him (Higgins) and get him to have filled up and return to this office. If approved we will send you the receipts, otherwise return you the money. In the meantime we will place the check to your credit and subject to your order. If the policy is reinstated you can pay in future at the New York agency."

The forms of reinstatement that he speaks of consist of a formal written application, in which the assured solemnly certifies not only as to his own health, that no circumstance has arisen since the issuance of the policy, and none now exists as to his health or habits, to make his risk less acceptable than when first assured, but also as to the health of his family, and that no hereditary taint or disease has exhibited itself in any member of it, besides various concessions as to liabilities and rights are required; which is to be accompanied with a medical certificate of the most searching and stringent character.

Mr. Darrow made no reply to this communication, and did not avail himself of the forms of reinstatement, if they were sent him, but waited in silence until the new quarterly premium would be soon 366 due, and then, July *1st, 1875, enclosed to him a bank check for fifty dollars to pay premiums. The check was returned by Hopkins with a reiteration that the policy was cancelled, and that it may be reinstated by payment of bank premiums and medical examination.

Mr. Darrow then sent his attorney, Mr. VanCott, of New York, to Richmond, to have an explanation, and if he could, an adjustment of the difficulty. Mr. VanCott testifies, that on being introduced to Mr. Hopkins he stated the nature of his business; that he had been sent there to adjust some differences which seemed to exist between Mr. Darrow and the Piedmont and Arlington Company. "The company claimed that Higgins' policy had lapsed in July, 1874, and Darrow claimed that it had not.

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He says I produced a check with the endorsements thereon (which he gives and which are inserted in his deposition,) showing that the July, 1874, premium had been paid, but that Mr. Darrow had no receipt for the payment except the endorsement of Carraway on the check. This (he says) was very satisfactory to Mr. Hopkins, and he said it was all right. After a few minutes he said the policy had lapsed in October, 1874. I told him that Mr. Darrow had made every effort he could to find Carraway, and showed him copies of letters sent, being the same letters that are set out in the testimony of Darrow, and that after Mr. Darrow found that he could not find Carraway, he sent his check for $75 to the company, and they still had the money. He then told Mr. Hill to make up a statement; Hill did so, and we found that Darrow had paid up to July, 1875, and over and above; that there was a balance of three dollars and some cents to Darrow's credit. Mr. Hopkins then said that if the policy had lapsed he was satisfied that it was not the fault of Darrow, and that Darrow had acted in perfect good faith in the matter. And Hopkins then and 367 there agreed with me that *the policy should be reinstated or continued in force the same as if nothing had happened, as he was satisfied of Darrow's good faith in the matter. Nothing was said about Mr. Higgins' health while I was there. * * Hopkins seemed perfectly surprised when I showed him the check that had been paid to Carraway, and which Carraway had failed to pay over to the company, and said that explained the whole matter. He said further that the company had had trouble with Carraway before, and had sued him in another matter, and was going to sue him.

"Mr. Hopkins said he was satisfied the company had made a mistake, and that the policy had not lapsed in July. The company had claimed all along that the policy had lapsed in July (that is the ground assumed by Mr. Hopkins in his letter of February 1st, 1875), and the idea that it had ever lapsed in October was never mentioned until after I had shown Hopkins that it had not lapsed in July. But after the clerk made out a statement showing that Darrow's $75, paid up to July 22d, 1875, and after assuring Mr. Hopkins that Darrow had been acting in the utmost good faith in everything that he had done, without any hesitation he said he would waive their rights, or waive the lapse, and reinstate the policy as it had formerly been, or words to that effect."

Upon the case as now stated two questions arise:

First. Was the policy forfeited under the circumstances by the non-payment of premiums?

Second. If forfeited, has the forfeiture been waived?

Upon the first, has there been default in the non-payment of premiums by Darrow? Where and to whom was he to pay the premiums? The contract was made in Newbern, North Carolina, where the company had an agency. It was a North Carolina contract; and it would seem that the obligation, and consequently the right, was to pay there, as was held in Manhattan 368 Life Ins. Co. v. *Warwick, 20 Gratt. 614, as to contracts made in Virginia, that they were payable in Virginia. And to whom were the premiums payable but to the recognized agent of the company, Carraway, at Newbern. To him, and there, the payments were made by McLean, and by his assignee, Mrs. Bissell, and by her assignee, Mr. Darrow, up to July, 1874, with the approval of the company. To him Mr. Darrow made a remittance of the premium which was due in July, 1874, which he received, but did not pay over to the company. The company up to the 15th of July, 1875, were not aware of that payment, and believing that Darrow had been in default, cancelled the policy on its books; and its organ, the assistant secretary, tells Mr. Darrow as late as February 1st, 1875, that the policy has lapsed because of the non-payment of that premium, and that no premiums can be received on it until it is reinstated. If Darrow was under obligation to pay the premiums to the North Carolina agent, in North Carolina, it was not lawful for him to pay anywhere else without the permission of the company. Both parties seem to have so understood it; for Darrow, wishing to make his future payments at the New York agency, deemed it necessary first to get the permission of the company, and the company gave him permission. Well, if it was the right and the duty of Darrow to pay the premiums to the North Carolina agent, at Newbern, he knew of no other agent there than the one to whom he, and those before him, had paid every premium that had fallen due, with the approval of the company: namely, D. T. Carraway. But after the last payment he had made to him, he had good grounds for distrust whether it would be safe for him, or the company, that he should make further remittances to him until he heard from him and the cause of doubt and distrust had been removed. But he had no knowledge of his removal from his agency. He had no 369 *knowledge of any other agent of the company in North Carolina, where payment had to be made. He had never been notified by the company of the removal of Carraway, and of another agent being substituted in his place, to whom his premium could be paid. He was in another state, at a great distance from the North Caroiina agency, and knew nothing of what was going on there. He still regarded Carraway as the agent of the company to whom his payments had to be made. But as he had not sent him a receipt for the premium of July, and had not sent him a statement, as he was wont, of the next premium that was due in October, although he had written to him for it; and as he could not get a line from him in reply to his repeated and earnest letters, as a prudent man he did not think it proper to make a remittance of money to him; and finally, after the January premium was past due and he had

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heard nothing of Carraway, he determined to communicate direct with the secretary of the company, at its chief office, though in a different state from that where the contract was made and the premiums were payable, and remitted to him a check for $75 to dispose of, so as to satisfy the premiums to the company and to protect him.

But if it should be said he ought to have done it sooner, it is at least doubtful whether the obligation was on him to do it at all; and whether it was not the duty of the company, when they removed their agent, to have notified him of it, and to have informed him to whom he should make payment thereafter. If that had been done, there never would have been any difficulty. For it is perfectly manifest upon the face of the record, that Darrow was always prepared and anxious to pay his premiums according to the requirements of his contract. And if he had ever failed to come up to the exact requirement, it was because he
370 was led into error by the *agent of the company, upon whom he relied for information and direction as to the requirements of the contract.

But there is no question as to the regularity of those payments; they are all admitted; and Darrow was in no default in the payment of the July premium. But the company had determined otherwise, and had cancelled his policy on that account. If he had remitted to J. J. Hopkins at Richmond, he would not have received it. For as late as the 1st of February, 1875, he refused to receive any premium upon the ground that the policy had been cancelled for the non-payment of the July premium. And if he had remitted the January, 1875, premium, it would have been the same. As long then as the company assumed that position, there would have been no use in remitting any of the premiums subsequent to July to the chief office of the company at Richmond. It is true that the company has changed its views. It admits its mistake. It admits that the July premium was paid to their agent, and is lost to the company, unless it can be made out of Carraway. But it did not come to this conclusion until long after the January premium was past due: not in fact until the 15th of July, 1875.

But suppose he had remitted the October and the January premiums to Carraway, of whose removal from the agency he was not informed. His obligation, as we have seen, was to pay to the North Carolina agent, and he was not informed that there was any other. And it just occurs to me that the company itself has shown that it regarded Newbern as the place where, and Carraway the agent to whom, the payments were to be made, by an incident disclosed in the record. A remittance of the premium was made by Darrow, by mistake, to the office at Richmond, and the company there, instead of retaining it and sending him a receipt for it, forwarded it to Newbern,
N. C., and he received a receipt for it
371 *in proper form from Carraway. And supposed he had remitted the premiums of October and January following to Carraway, not knowing that he was not still the agent, it would have been the loss of the company, or his own loss—probably the former, as they have conceded as to the July premium. It would certainly have been no advantage to the company. It was necessary that the company should have had an agent at Newbern authorized to receive the premiums before the assured could be held to a default for their non-payment. And it would seem that their known agent, to whom payment of the premiums had been uniformly made, from the time of the issuance of the policy, having been removed and another substituted in his place, it was the duty of the company to have notified Darrow, who lived in a distant state, and could not be presumed to have known of the change and to whom he should thereafter make payment. Upon a contract to pay on a certain day, upon condition of a forfeiture for default, if the payer is prevented by the act or non-action of the party who is to receive payment from making the payment ad diem, or if the payer incapacitates himself to receive, or the other party to pay, the forfeiture fails.

But whether it was a forfeiture, depended upon the facts; and whether the facts were proved which would establish a forfeiture, was a question for the jury. Without now deciding that question, we are of opinion that it would have been proper for the court to have instructed the jury that if they believed from the evidence that the facts were so and so, it was a forfeiture; and if they believed them to be thus and so, it was not a forfeiture. But to instruct them that upon the facts proved the assured had forfeited his policy, was to decide the facts of the case and to invade the province of the jury. For this reason we are of opinion that the first instruction
372 *given by the court, and all the instructions given, which were consequential upon it, were erroneous and ought not to have been given.

If Darrow had been in such default as would entitle the company to insist on a forfeiture, has it waived that right, and is it estopped now to assert it?

It seems to be well settled that it is a right which the company may waive. The doctrines on this subject are clearly stated in a well considered opinion by Judge Burks in Georgia Home Ins. Co. v. Kinnier's adm'x, recently decided by this court. 28 Gratt. 88. In that case the court held that conditions in a policy, which are for the benefit of the insurer, and the breach of which is visited with forfeiture, may be waived by the insurer or his lawful agent. And numerous authorities are cited in the opinion in support of the decision, which are here referred to. The Chicago Life Ins. Co. v. Anna M. Warner, 70 Illi. R. 410, clearly maintains the same doctrine. The decisions of this court in the more recent case of Southern Mutual Ins. Co. v. Yates, maintains the same principle. 28 Gratt. 585. Judge Staples, who delivered the opinion,

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says (p. 597), "if the defendant, with knowledge of the existence of the incumbrance, knowingly received assessments upon the note involved in the controversy, such conduct would amount to a waiver of the breach of warranty, whether so intended or not." Here it is held that even a breach of warranty may be waived by the acts of the warrantee. The waiver may be made either by the conduct and acts of the party for whose benefit the condition or warranty is made, or by agreement express or implied.

In the case under judgment there is proof tending to show an express agreement by the defendant to waive the right to avoid the policy, because of the non-payment ad diem of the quarterly premiums, due 373 22d of October, *1874, and 22d of January, 1875, and that the policy should continue in force as if nothing had happened. Whether there had been such a waiver was a question of fact for the jury. And the court ought to have instructed the jury that if they believed from the evidence that Darrow had failed to pay the quarterly premiums ad diem on the 22d of October, 1874, and the 22d of January, 1875, when they respectively fell due, and that by reason thereof he had forfeited his right to the policy, but further believed from the evidence that the defendant had waived, or agreed to waive its right to the forfeiture, and received the back premiums from the assured or Darrow, which were paid on the faith of the waiver, they should find for the plaintiff.

But instead of giving such instruction, the court instructed the jury as follows: "That the printed receipts for the payment of premiums over due, delivered by the assistant secretary to the plaintiff's attorney in July, 1875, and exhibited by the plaintiff to the jury, are evidence which cannot be contradicted or varied by parol testimony, of the contract upon which the defendants agreed to reinstate the policy." It is not to be doubted that cotemporaneous parol evidence is inadmissible to vary or contradict the terms, or the legal import of a valid written contract, unless in the case of fraud, accident or mistake. Towner v. Lucas' ex'or, 13 Gratt. 705. But that is not this case. The parol evidence was introduced for no such purpose; but to prove that the defendants' agent had waived any right he had to a forfeiture, not considering that the company was entitled to it when the facts of the case were understood by him, and that it would be unjust to Darrow, who he said was not to blame, but who had acted in good faith, and agreed to receive the money which had been previously remitted to him in payment of the back premiums, 374 and *that the policy should continue in force as if nothing had happened; that he would waive the lapse and reinstate the policy as it had formerly been. In a short time the receipts were prepared and handed by Mr. Hopkins to Mr. Darrow's agent, saying that now everything was all right. They were not read to the agent, and were not read by him. He received them as the company's receipts for the back premiums, and did not know, hadn't a thought that they were anything else but receipts for the money paid, or constituted a contract, or any evidence of a contract, and of a contract by which Mr. Darrow was bound to guarantee the present good health of Higgins in very stringent terms. No such contract had been made between them, nor intimation by Hopkins that such terms would be required. Nothing had been said as to the health of Higgins, but upon being put in possession of the facts of the case, which he had not known before, he thought it would be unjust to Darrow to insist upon a forfeiture, and agreed to waive it. This is substantially the plaintiff's testimony. Mr. Hopkins knew that Darrow was unwilling to make application to have the policy reinstated upon the terms provided by the policy for reinstating lapsed legacies; for he had sent him, before he himself was informed of the facts, the forms for its reinstatement, which Darrow would not have executed, but remitted him money to pay the next premium before it was due; by which he had reason to know that he did not regard his policy as lapsed, and was not willing to have it reinstated on the terms which he, Hopkins, proposed; and after the explanation he received from Mr. Darrow's agent he himself was satisfied, and so expressed himself that the company had made a mistake in cancelling the policy on its books as a lapsed policy for the non-payment of the premium of July, 1874; and upon the whole case, as he then understood it, was sat- 375 isfied that the policy *should continue in force just as if nothing had happened, and so expressed himself to Darrow's agent, without intimating that he would still insist upon a medical examination of Higgins, as he had done before he was informed of the facts; but agreed to receive payment of the premiums, which before this he had refused to do without a medical examination, and directed the receipts to be filled up.

Each of the five receipts contained the clause guaranteeing the health of Higgins—the receipt for the premium due in July, 1874, as well as the others—although he admitted, and now admits, that that premium had been paid in due time, and that there was no default in its payment which should cause a lapse of the policy. If the receipt with the objectional clause was given for that premium for the reason, which he assigns, that he had no printed receipts in hand which did not contain that clause, for the same reason he had to use them in the other cases. The receipts thus handed to Mr. VanCott, he handed in a bundle, which had been unopened and never examined by him, to Mr. Darrow, telling him that the whole matter had been most satisfactorily adjusted, and there were his receipts. And Mr. Darrow testifies that he received them as receipts, and never opened them or examined them until he received a receipt for the next premium, in which he found the objectionable clause. The others were then examined by him and Mr. VanCott, and to

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their great surprise, they found the same objectionable clause in each of them; and Mr. Hopkins was informed that they never made any such contract, and would not be bound by it.

Now, the question is, Did Mr. Darrow ever make such a contract? Do the receipts evidence any contract made by him? He never signed them. The only ground upon which it could be claimed to be his contract, is, that the receipt was delivered to his 376 agent, and his receiving *it would imply that he approved of it. But how could this implication be made, if it was delivered to him merely as a receipt for the money he had paid, and he never read it, nor was it read to him; and he was not told that it contained in addition to the receipt, a clause evidencing a contract, and when he knew he had made no contract and no contract had been proposed; but what had previously passed between him and the company's agent was calculated to impress on his mind that they were merely receipts, and nothing had passed that would suggest to his mind that the papers handed to him as receipts might contain a clause evidencing a contract between the defendant and his principal?

If this evidence is to be believed (there is conflicting evidence, and it was a question for the jury, and the court does not intend to intimate an opinion on that point,) it would be a gross fraud upon Darrow to set up these receipts as evidence of a contract between him and the defendant. And the authorities uniformly hold that parol evidence is not inadmissible to contradict the terms of a written contract, where there is fraud. It is only inadmissible to contradict or vary the terms of a valid contract. But in this case it is not offered to contradict or vary the terms of the written contract of the party who offers it, but to show by independent facts, dehors the instrument, that it is not his contract. Insurance Company v. Mahone, 21 Wall. U. S. R. 152, is a case in point, and fully supports this position. Mr. Justice Strong, speaking for the whole court, says: "The testimony was admitted, not to contradict the written warranty, but to show that it was not the warranty of Dillard, though signed by him." There the instrument was signed by the party; here it was not. This case is stronger than that in favor of the admission of parol testi- 377 mony. Insurance Company v. *Wilkinson, 13 Wall. U. S. R. 222, is also a strong case in point.

Towner v. Lucas' ex'or, supra, does not militate against the admissibility of the parol evidence in this case, but is authority for it. Allen, J., says, p. 715: "I can find no case which determines that oral cotemporaneous evidence is admissible to contradict the terms of a written agreement, or substantially vary the legal import thereof, provided the instrument was a valid instrument and the party designed to execute it in its existing form. The fraud which will let in such proof must be fraud in the procurement of the instrument, which goes to its validity, or some breach of confidence in using a paper delivered for one purpose and fraudulently perverting it to another. In such cases the oral evidence tends to prove independent facts which, if established, avoid the effect of the written agreement by facts dehors the instrument, but do not tend to contradict or vary it." The doctrine thus clearly enunciated by that able jurist, covers this case. It could not be more appropriate if it had been written expressly for it. In The Southern Mutual Ins. Co. v. Yates, supra, there was no fraud, or imputation of fraud, or of any breach of confidence in using a paper delivered for one purpose and fraudulently using it for another.

Upon the whole, the court is of opinion to reverse the judgment of the circuit court, and to remand the cause for further proceedings to be had therein in conformity with this opinion.

Staples, J. I do not concur with Judge Anderson in the opinion that the policy was not forfeited by the failure to pay the premiums. I think the judge of the circuit court did not err in his instruction upon this point. In my opinion there was no 378 sufficient evidence in the case to *justify even the submission of the question to the jury whether the policy was or was not forfeited.

I do concur, however, in that portion of the opinion relating to the waiver of the forfeiture. If the plaintiff's version of the transaction be correct, and there was an unconditional waiver of the forfeiture upon sufficient consideration and under the circumstances described, it was a fraud upon the plaintiff to insert in the receipts a conditional waiver. Upon this point the evidence was very conflicting. The plaintiff had the right to have the whole question submitted to the jury. I think, therefore, the judge of the circuit court erred in not so instructing the jury.

Burks, J., concurred in the results of the opinion of Anderson, J.

Christian, J., dissented.

The judgment was as follows:

The court having maturely considered the record in this cause, is of opinion, for reasons stated in writing and filed with the record, that the circuit court erred in excluding from the jury all parol evidence tending to prove a waiver by the defendant of a forfeiture by Darrow, the assignee, of the policy, and in its instruction to the jury that such testimony was inadmissible. It is therefore ordered that the judgment of the circuit court be reversed and annulled, and that the defendant pay to the plaintiff his costs expended in the prosecution of his appeal here. And the cause is remanded for further proceedings to be had therein in conformity with this order.

Judgment reversed.

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LIFE AND ACCIDENT INSURANCE.

(See *note* on Fire and Marine Insurance, Mutual etc., Co. v. Holt, 29 Gratt. 612.)

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A. THE CONTRACT.

I. Life Insurance.

1. Definition and Nature.—"Insurance upon life is a contract whereby the insurer, in consideration of a certain premium, either in shape of a gross sum or by annual payment, undertakes to pay to the person for whose benefit the insurance is made a certain sum of money or an annuity, on the death of the person whose life is insured. If the insurance be for the whole life, he undertakes to make the payment whenever the death occurs; if otherwise, he undertakes to make it in case the death should happen within a named period, for which period the insurance is said to be made." 3 Min. Inst. (2d Ed.) pt. 2, p. 1189.

The contract of insurance is not a contract of indemnity for a definite period, as a policy against fire, but it is a contract to pay a certain sum of money, for the consideration mentioned, upon the happening of an event, which is inevitable, and only uncertain as to the time it may transpire. Manhattan Life Ins. Co. v. Warwick, 20 Gratt. 614, 3 Am. Rep. 218.

The application for insurance is a mere proposal on the part of the applicant. When the answer signifies the acceptance of it to the proposer, and not before, the minds of the parties meet, and the contract is made. If anything remains to be done, if the agreement is not consummated, if all the terms have not been mutually agreed upon, no contract arises between the parties. McCully v. Ins. Co., 18 W. Va. 782.

2. Insurable Interest.

(1) In General.—In Roller v. Moore, 86 Va. 512, the court, quoting from the opinion of MR. JUSTICE FIELD in Warnock v. Davis, 104 U. S. 779, says: "It is not easy to define with precision what will, in all cases, constitute an insurable interest. It may be stated generally, however, to be such an interest, arising from the relation of the party obtaining the insurance, either as creditor of, or surety for the assured, or from ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation, for a parent has an insurable interest in the life of his child, and a child in the life of his parent; a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful to protect the life of the assured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood, or affinity, to expect some benefit or advantage from the continuance of the life of the assured." See also, Tate v. Building Ass'n, 97 Va. 74, 5 L. R. A. 257; Richards on Insurance, sec. 27; May on Insurance, sec. 102; Conn. Mut. Life Ins. Co. v. Luchs, 108 U. S. 498.

As to the nature of a creditor's policy of life

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insurance and the *quantum* of the insurable interest, see extensive *note*, 5 Va. Law Reg. 801.

(2) Parent in Life of Child.—It is well settled that a father has an insurable interest in the life of his child, and the child in the life of his father. Valley Mut. Life Ins. Co. v. Teewalt, 79 Va. 421.

(3) Building Association in Life of Member.—A building association has no insurable interest in the life of a member who is in no wise indebted to it; and the fact that the member becomes surety for the association does not create an insurable interest. Tate v. Building Ass'n, 97 Va. 74.

(4) Assignee.—An assignee of a policy having no insurable interest in the life of the insured can only retain so much of the proceeds, where the insurance was lawfully effected, as is necessary to reimburse him for the premiums paid, expenses incurred, and interest thereon. Tate v. Building Ass'n, 97 Va. 74; Roller v. Moore, 86 Va. 512; Long v. Meriden, Britannia Co., 94 Va. 594, 3 Va. Law Reg. 287, 832; Beaty v. Downing, 96 Va. 451; New York Life Ins. Co. v. Davis, 96 Va. 737.

In order to constitute a valid assignment of a life policy, the assignee must have an insurable interest in the life of the insured. Roller v. Moore, 86 Va. 512.

(5) Where Not Necessary.—"The necessity of insurable interest in the life of another person to sustain a life policy is held, in Union Fraternal League v. Walton (Ga.), 46 L. R. A. 424, to be inapplicable where a person lawfully procures insurance upon his own life for the benefit of another person, and does so at his own expense." 5 Va. Law Reg. 868. See also, *note*, 25 L. R. A. 627.

(6) When the Insurable Interest Must Exist.—In fire and marine insurance the insurable interest must exist both at the commencement of the risk and when the loss occurs; but in life insurance it may exist when the policy was taken out or at any time thereafter. Hence, a creditor holding a policy taken out by himself on the life of his debtor would be entitled to recover the amount of the policy, even though the debt should be paid in the meanwhile. Any other rule would practically destroy the value of life insurance as security for debts. "This striking difference," says the editor, in 3 Va. Law Reg. 833, "between the interest which is required to support a contract of life insurance and that required in contracts of fire and marine insurance, grows out of the fact that the latter are contracts of indemnity, pure and simple. The loss may happen or it may not. A contract of life insurance on the other hand is not a mere contract of indemnity. In contracts of fire and marine insurance, the insurer does not contemplate that he will be called to pay anything; for a small premium he takes the chances of having to pay a large sum or nothing; and it is only in a comparatively few cases that he makes any return to the insured for the premiums received. On the other hand, in life insurance contracts, the loss in every case is certain; it is contemplated as a certainty at the very inception of the contract, and the only questions are, how long before it will occur, and what amount, paid by the assured annually during the life, will place in the coffers of the insurer an amount sufficient to pay the loss and leave a profit besides. And, as life insurance is conducted as a money-making enterprise, and not from motives of benevolence, it is clear that in the majority of cases the insured really pays in more than he receives. If, therefore, the contract is one of indemnity at all, the indemnity for which the insured contracts is not only in respect of his interest in the life, but in respect of the premiums annually paid. And though the interest in the former may cease, the interest in the latter continues. The subject is learnedly discussed by JUDGE MAY, in his work on Insurance (3d Ed.) secs. 100-117." See Long v. Meriden Britannia Co., 94 Va. 594, 3 Va. Law Reg. 287, and *note*, p. 382; Richards on Insurance, § 30; Conn. Mut. Ins. Co. v. Schaefer, 94 U. S. 443.

3. Application.

(1) Where Made Part of Policy.

a. In General.—Where the application for a life insurance policy is made a part of the policy and its statements are deemed warranties, a false statement therein, whether material or not, will avoid the policy. Metropolitan Life Ins. Co. v. Rutherford, 95 Va. 773, 5 Va. Law Reg. 842, and *note*, p. 846; Home Ins. Co. v. Sibert, 96 Va. 403, 4 Va. Law Reg. 494.

A breach of the warranty contained in the application, that no proposal or application to insure the life of the applicant had ever been made to any company or agent upon which the insured had been rejected, or upon which a policy had not been issued and received by him, avoids the policy. Nat. Life Ass'n v. Hopkins, 97 Va. 167.

If insurance be effected upon the life of a debtor for the benefit of his creditor, and misrepresentations of material facts inducing the contract be made by the debtor, the policy will be vitiated, although the beneficiary was ignorant of such misrepresentations. Burruss v. Ins. Co., 96 Va. 543.

Section 3252 of the Code of Virginia, as to the size of type in which the conditions and restrictive provisions shall be printed, applies alike to the application and the policy, where the application is expressly made a part of the contract of insurance. Burruss v. Ins. Co., 96 Va. 543.

If by the contract and policy the applicant warrants his answers to be true in all respects, then this removes their materiality from the consideration of the jury or of the court; and if the answers are any of them untrue, though they be such as the court or jury might believe could not have prejudiced the defendant or in any degree influenced him in entering into the contract or issuing the policy, yet the insured, or person for whose benefit the policy was taken, cannot recover upon it. Schwarzbach v. Valley Protective Union, 25 W. Va. 622.

b. Under Statutory Enactment.—In Virginia it has been provided by Act of Assembly approved February 26th, 1900, that no answer to any interrogations made by an applicant for a policy of insurance shall bar the right to recover upon any policy issued upon such application, by reason of any warranty in said application or policy contained, unless it be clearly proved that such answer was wilfully false or fraudulently made, or that it was material.

(2) Where Policy Contains Incontestable Clause.—It seems that where the policy contains the incontestable clause, the company cannot set up fraud or false statements in the application, or suicide of the insured. See extensive *note* on the Incontestable Clause, 42 L. R. A. 247.

"A provision that a life insurance policy shall be incontestable after one year, is held, in Clement v. New York Life Ins. Co. (Tenn.), 42 L. R. A. 247, to be neither unreasonable nor contrary to public policy, but while it is held applicable to fraud in procuring the policy, it is held inapplicable to the defense that the plaintiffs had procured the issue of the policy and its transfer to them as a speculation, and

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that it was therefore a gambling or wagering contract." 4 Va. Law Reg. 777.

4. Payment of Premium.

(1) In General.—Payment of the premium is of the essence of the contract of insurance. Punctuality in such payment is essential. A failure to pay within the specified time will avoid the policy, unless the company has waived such payment or the delay is due to some omission on its part. Richards on Insurance (2d Ed) p. 205; So. Mut. Ins. Co. v. Taylor, 33 Gratt. 743; Easley v. Ins. Co., 91 Va. 161. The payment of the first premium is a condition precedent to the liability of an insurance company upon a policy. Oliver v. Ins. Co., 97 Va. 134, 5 L. R. A. 260.

A provision avoiding a policy unless the premium is actually paid is waived by the delivery of the policy without requiring prepayment of the premium. Eagan v. Ins. Co., 10 W. Va. 583. Where the company charges the premium personally to the agent, who gives credit to the insured, it amounts to a payment of the premium. Wytheville Ins. Co. v. Teiger, 90 Va. 277. In Croft v. Ins. Co., 40 W. Va. 508, 21 S. E. Rep. 854, where credit had been given in an oral contract for insurance, the court says: "Insurance can be sold on credit as well as anything else. The agent can give credit. Eagan v. Ins. Co., 10 W. Va. 583, 588; Wood on Insurance, sec. 28; May on Insurance, sec. 360 d; Ins. Co. v. Colt, 20 Wall. 560; Long v. Ins. Co., 137 Pa. St. 335, 21 Am. St. Rep. 883, *note*. Prepayment is not necessary to the conclusion of an oral contract. Wood on Insurance, secs. 22 a, 43 b."

Where a policy provides that if a note given for the premium be not paid at maturity, such nonpayment shall terminate the insurance and the note shall be considered the premium for the risk thus terminated the policy is forfeited for nonpayment of the note when due. Muhleman v. Ins. Co., 6 W. Va. 508.

The assistant secretary of a life insurance company has authority to waive the forfeiture of a policy for the failure to pay the premium on the day it was due, and to reinstate the policy. Piedmont, etc., Life Ins. Co. v. McLean, 31 Gratt. 517.

(2) Payment Prevented by Insurer.—Where the insurance company wrongfully determines the contract of insurance by refusing to receive a premium when it is due, and lapses the policy issued, the insured has a right to treat the policy as at an end and recover all the premiums he has paid under it. McCall v. Ins. Co., 9 W. Va. 237.

(3) Payment Prevented by War.—Where the performance of the condition in a policy as to the payment of premiums is prevented by the existence of war, the contract of insurance is suspended, not abrogated thereby, and such nonpayment, where the insured was ready and willing to pay, does not relieve the company from liability under the policy. Manhattan Life Ins. Co. v. Warwick, 20 Gratt. 614, 3 Am. Rep. 218; Mutual Benefit Life Ins. Co. v. Atwood, 24 Gratt. 497, 18 Am. Rep. 652; New York Life Ins. Co. v. Hendren, 24 Gratt. 536; Conn. Mut. Life Ins. Co. v. Duerson, 28 Gratt. 630; Clemmitt v. Ins. Co., 77 Va. 366, 76 Va. 355; Abell v. Ins. Co., 18 W. Va. 400.

Where the insured is prevented from paying the premiums on a life policy by reason of the existence of war, and the company annuls the contract on account of such nonpayment, the insured is entitled to have refunded the premiums paid, less enough to compensate the company for the actual cost of such insurance. Abell v. Ins. Co., 18 W. Va. 400.

(4) Extension of Time.—A letter from an insurance company, in reply to a request from the assured, agreeing to grant an extension of time of payment of the premium on a policy upon the execution and return, before the policy lapsed, of an extension note enclosed in the letter, is not of itself a completed contract binding the company to grant the extension without the execution and return of the note. Ætna Life Ins. Co. v. Ragsdale, 95 Va. 579.

(5) Evidence of Payment.—The possession of a policy of insurance is sufficient evidence of the payment of the premium thereon, on a demurrer to the evidence by the insurance company. Fidelity, etc., Co. v. Chambers, 93 Va. 138.

5. Beneficiary.—Where the insured took out a policy "for the benefit of his wife and their children" and had one child by his first wife and five children by his last wife, the child by the first, as well as the children by the last wife, is entitled to share the proceeds of the policy. Stigler v. Stigler, 77 Va. 163.

Where the insured took out a policy for his wife, and in case she died before him, then to her children, and his wife did die before him, the child's rights in the policy, being derived from the company under the policy and not through her mother, vested immediately upon the death of her mother. Clemmitt v. Ins. Co., 76 Va. 355.

6. Assignment.—The insured, intending to assign a policy on his life to a third party as a gift, executed an assignment thereof in duplicate and delivered one copy to the insurance company for its protection, and not as agent of the assignee. He failed, however, either to deliver the policy or the other copy of the assignment to the assignee. *Held*, that the assignment was incomplete and could not be enforced in law or equity. Spooner v. Hilbish, 92 Va. 333.

An endorsement on a life insurance policy by the beneficiary therein which is testamentary in its character, but which has not been, and cannot be, admitted to probate, is not admissible in evidence to show title in the legatee named in said endorsement, and a payment of the policy by the insurer to such beneficiary is wrongful. Nor, in an action on the policy, is evidence relevant which merely tends to show that the endorsement was made in the presence of witnesses, at the special instance and request of the beneficiary, and that she made her mark as a signature thereto. A will must be proved before a probate court in a proceeding for that purpose. Grand Fountain U. O. T. R. v. Wilson, 96 Va. 594, 4 L. R. A. 839.

7. Voluntary Conveyance of Policy.—Where one takes out a policy payable to his wife and children, and thus, to the extent of the premiums paid, decreases his own estate, his then existing creditors have a right to subject the proceeds of the policy upon his death to the extent of such premiums paid, regardless of whether the premiums paid were fraudulent or not, because it was a voluntary conveyance and void under Va. Code 1873, ch. 114, § 2. But it seems that only the premiums for five years can be reached under the statute. Stigler v. Stigler, 77 Va. 163.

8. Suicide.—Where a policy of life insurance contains no clause prohibiting suicide, the suicide of the insured when insane, is no breach of the implied condition upon which the policy is issued. But if the insured, under such a policy, deliberately takes his own life, when sane, such act is a breach of implied conditions, and exonerates the insurer from liability. If, under such policy, the death is caused by the vol-

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untary act of the assured, knowing and intending that his death shall be the result of his act, and when he is in possession of his ordinary reasoning faculties, such suicide will prevent a recovery, unless he is impelled thereto by an insane impulse which he has not power to resist. A contract by the insurer to pay the amount of the policy to the estate of the insured in case of his deliberate suicide when sane, is contrary to public policy and void. Ritter v. Mutual Life Ins. Co., 169 U. S. 139, 3 Va. Law Reg. 776.

9. Proof of Loss.—When the general agent refuses to recognize any claim, such refusal waives compliance with the conditions as to preliminary notice and proof, and authorizes immediate suit. Traveler's Ins. Co. v. Harvey, 82 Va. 949. As to waiver of technical requirement, see Richards on Ins. § 80.

10. Agents.—An agent, who writes policies, settles the terms of insurance, investigates losses and recommends payment or nonpayment, must be deemed a general agent, without regard to extent of territory or scope of powers; and such agent has the power to waive the conditions of a policy as to the preliminary proof of loss. Traveler's Ins. Co. v. Harvey, 82 Va. 949.

A life insurance company is chargeable with knowledge of all the facts stated by the applicant for insurance to the agent as to the time of his birth; and he, having truly stated to the agent the time of his birth, cannot be held to have made a misstatement towards the insurer, although the written application, as drawn up by the agent, does not correspond with the verbal statement made by the assured to the agent. McCall v. Ins. Co., 9 W. Va. 237.

A contract procured by the false representation of an agent is not voidable at the option of the party deceived, where it appears that the representation was the mere expression of an opinion, and did not amount to an engagement or undertaking that the fact was as represented. In the case at bar, the plaintiff in error was induced to take out further insurance in a company on the representation of an agent of the company that the company would pay him the cash surrender value of a policy which he already held in the company. This representation was the expression of an opinion, and not the statement of a fact. Garber v. Bresee & Sons, 96 Va. 644, 4 L. R. A. 765.

Where the company ratifies an agent's unauthorized acts, it cannot afterwards object to his want of authority. New York Life Ins. Co. v. Taliaferro, 95 Va. 522.

11. Construction.—The same rules of interpretation applicable to other instruments are applicable to policies of insurance, which are to be interpreted according to their sense and meaning. Where the insured has violated the plain terms of the contract he cannot recover. Universal Life Ins. Co. v. Devore, 88 Va. 778.

Where a policy contains contradictory provisions or is so formed as to render it doubtful whether the parties intended that the exact truth of the applicant's statement should be considered a condition precedent to any binding contract, the construction which imposes on the insured the obligations of a warranty should not be favored. Schwartzbach v. Valley Protective Union, 25 W. Va. 622.

If a plain, unambiguous policy of insurance stipulates that, in consideration of a stated bimonthly premium, there shall be paid to the beneficiary a given sum upon the death of the insured less any "indebtedness due to the company" issuing the policy, such "indebtedness" cannot refer to unearned or unaccrued premiums, but must refer to a real or actual indebtedness that the insured or beneficiary is liable to the company when the policy matures. Nat. Life Ins. Ass'n v. Berkeley, 97 Va. 571, 5 Va. Law Reg. 703.

A mutual benefit society provided in its charter that on the death of a member "the fund to which his family is entitled shall be paid as designated in the application for membership, and this being changed by death or otherwise, it shall go—first, to the widow and infant children," and then to others in order named. The insured, in his application, directed that the fund should be paid as specified in his will. He died without a will, leaving a widow but no infant child. *Held,* that the widow was entitled to the fund. Whitehurst v. Whitehurst, 83 Va. 153.

Section 3252 of the Code of Virginia, requiring that conditions and restrictive provisions of insurance policies must be written or printed in type of a prescribed size, should be liberally construed. The whole provision relied on must be in writing or printed in type of the prescribed size, or else it is not available as a defense to an action on the policy. Nat. Life Ass'n v. Berkeley, 97 Va. 571.

Only such assessment companies as raise money to pay a loss by a member's death, by assessment made upon those who survive him, are entitled, under act of May 18, 1882, to be licensed without making the deposit of bonds under Code 1887, § 1271. In the act of May 18, 1887, the words "surviving members" designate such as are "not deceased," and not those whose policies are "not lapsed." Mutual Benefit Life Ins. Co. v. Marye, 85 Va. 643.

12. Evidence.

(1) Fraud.—Fraud may be established by circumstantial evidence as well as by direct testimony, but, in either case, it must be clearly and satisfactorily proved. It will not be presumed from doubtful evidence, or circumstances of suspicion. The law never presumes fraud, but the presumption is always in favor of innocence and honesty. New York Life Ins. Co. v. Davis, 96 Va. 737.

An averment in an answer that a policy of insurance was procured by the suppression of material facts, and that the assured and another conspired to thus obtain the policy, is a sufficient charge of fraud to admit evidence to prove the facts. Nat. Life Ass'n v. Hopkins, 97 Va. 167.

In an action on a life policy, where defense is made on the ground that the assured had falsely and fraudulently misrepresented his age, his declarations as to his age in a former application to another company for a policy for the benefit of another person cannot be received in evidence against the beneficiary in the policy in suit to prove the facts stated therein, but after proof tending to show that his age is different from what he represented it to be, it may be received to show that he had knowledge of his age, and falsely and fraudulently misrepresented it. Union Central Life Ins. Co. v. Pollard, 94 Va. 146.

Statements of the insured sometime before his application are not admissible evidence to disprove representations of his age contained in said application; nor are statements admissible which were made by insured to company's agent several months after the policy was issued, nor is it proper to allow a witness to give in evidence his opinion of insured's age from

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the latter's appearance. Valley Mut. Life Ass'n v. Teewalt, 79 Va. 421.

(2) Assessments.—Where the by-laws of a mutual life insurance company provide that "no question shall be raised as to the right to make, or necessity of, any mortality assessment made under any certificate of membership, except in the lifetime of the member, and within six months from the time the same was made," it is not competent for the plaintiff, after the death of the member, to offer evidence for the purpose of raising such question. Easley v. Ins. Co., 91 Va. 161.

(3) Parol Evidence.—Parol evidence is admissible to prove that the conditions inserted in the receipts were in violation of the agreement of the assignee of the insured and the secretary of the company, and that by that agreement the forfeiture of the policy, if it had been forfeited, was unconditionally waived. McLean v. Ins. Co., 29 Gratt. 361.

13. Foreign Insurance Companies.

(1) Attachment.

a. In General.—An insurance company, incorporated by the laws of New York, having its principal place of business in that state, which has complied with the laws of Virginia in relation to foreign insurance companies doing business in the state, by making the deposit, and appointing a citizen of Virginia an agent, by power of attorney, etc., as required by statute, is not a resident of this state, within the meaning of the foreign attachment laws of Virginia, and the property of said insurance company is liable to such attachment as a nonresident. Whilst a corporation may, by its agents, transact business anywhere, unless prohibited by its charter or prevented by local laws, it can have no residence or citizenship except where it is located by or under the authority of its charter. Cowardin v. Ins. Co., 32 Gratt. 445, distinguishing Continental Ins. Co. v. Kasey, 25 Gratt. 268, and Conn. Mut. Life Ins. Co. v. Duerson, 28 Gratt. 630.

b. Measure of Recovery.—Each policy holder is entitled to a sum of money which, on the day of the company's insolvency, would purchase from a solvent company a policy of the same kind, for the same amount and for the same rate of premium. This sum is ascertained by treating the difference between the premiums paid the defendant company and the premiums to be paid the new insuring company as an annuity for the assured's expectation of life, and calculating its cash value. Universal Life Ins. Co. v. Binford, 76 Va. 103.

(2) Garnishment.—The treasurer of the state, who holds bonds of a foreign insurance company, doing business in the state, under the act of February 3, 1866, as amended by the act of March 3, 1871, is not liable to be summoned as garnishee by a foreign creditor of the insurance company. Rollo v. Ins. Co., 23 Gratt. 509, 14 Am. Rep. 147.

(3) License Tax.—The city of Norfolk has authority under its charter, to impose a license tax upon foreign insurance companies having an agency in the city; and such companies are not exempted from this tax by the act of 1871-72, ch. 385, § 57, p. 484. Humphreys v. City of Norfolk, 25 Gratt. 97.

(4) Conflict of Laws.—The validity, nature, interpretation and effect of a contract of insurance is determined by the law of the place with reference to which it is made, and an express stipulation of the parties that it is to be held and construed as made with reference to a certain jurisdiction shows by what law they intended the transaction to be governed. Union Central Life Ins. Co. v. Pollard, 94 Va. 146.

II. Accident Insurance.

1. Definition.—"Accident insurance is an insurance against personal injury, or loss of life, by accident, and, though applied to a particular class of risks, depends upon essentially the same principles as other kinds of insurance. The value of the interest insured is not capable of exact determination after loss, as in the case of fire and marine insurance, but it may be fixed by the parties within such limits as will not make it a wager policy." 1 Am. & Eng. Enc. Law (2d Ed.) 285; May on Insurance (3d Ed.) §§ 7, 535, 3 Min. Inst. (2d Ed.) pt. 2, 1197.

2. Voluntary Exposure.—The words "voluntary exposure" in an accident insurance policy, imply *conscious, intentional* exposure something which one is willing to take the risk of. The exposure must be to what reasonable and ordinary prudence would pronounce dangerous, and the accident complained of must have been in consequence thereof. Whether, in a given case, the conduct of the insured has been such as to preclude a recovery is for the jury, under all the circumstances of the case, to determine, or, upon a demurrer to the evidence, for the trial judge. Contributory negligence on the part of the insured will not prevent a recovery. Fidelity, etc., Co. v. Chambers, 93 Va. 138.

3. Bodily Infirmity.—Deafness will not avoid a policy of insurance "against injuries received in a consequence of bodily infirmity," in the absence of evidence that such deafness in any way contributed to the injury. Fidelity, etc., Co. v. Chambers, 93 Va. 138.

4. Asphyxiation—Instructions.—An accident policy contained a provision that no recovery could be had, unless it was proved that the death of the insured was "caused by external, violent, and accidental means," or where "caused by taking poison, or by contact with poisonous substances." The insured was found dead in bed from inhaling coal gas. The testimony was conflicting as to whether coal gas was "poison or poisonous substance." *Held*, that it was not error for the court to refuse to instruct the jury that inhaling coal gas was a taking of poison, if they believed coal gas to be a poisonous substance, which, when inhaled, destroyed life. U. S. Mut. Accident Ass'n v. Newman, 84 Va. 52.

Where the policy contained a clause that "the benefits shall not extend to any bodily injury of which there shall be no external and visible signs upon the body of the insured;" and the evidence showed that, when found, the body had bloody froth at the mouth, spots of blood on face and breast and red spots on body: *Held*, that it was not error for the court to refuse to instruct the jury that if there were no visible signs of injury upon body of insured, except the froth and red spots, that did not constitute visible and external signs of injury, as it was a fact properly determinable by the jury. U. S. Mut. Accident Ass'n v. Newman, 84 Va. 52.

5. Injuries Received in the Discharge of Duty.—A corporation organized to afford relief to employees of certain railroad companies, in one article of its constitution provides relief to those injured "by accidents while in the discharge of duty, and in the service of the Baltimore & Ohio Railroad Company, or of any other railroad company whose employees shall be admitted to the privileges of membership;" and in another article, "while in the discharge

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of duty in the service of either of the companies aforesaid." An employee, who from 4 to 15 minutes before had quit work for the day, while going home from work, in crossing the railroad tracks, was killed by cars. *Held*, that he is entitled, as a member of the association, to relief from it. Kinney v. Baltimore, etc., Relief Ass'n, 35 W. Va. 385, 14 S. E. Rep. 8.

6. Rules of Construction.

(1) In General.—The same rules of construction apply to this as to other instruments. Its language is to receive a reasonable construction, and its intent and substance should be regarded. When two constructions can be given it, that most favorable to the insured must be given. Where there is doubt as to the meaning of terms employed by the company to exempt it from liability, they are to be construed most strongly against the insurer. U. S. Mut. Accident Ass'n v. Newman, 84 Va. 52; Fidelity, etc., Co. v. Chambers, 93 Va. 142.

(2) Insufficient Statement Not Demurrable.—The object of sec. 3249 of the Code, which authorizes the court to require a plaintiff or defendant to state the particulars of his claim or defense is to give the opposing party more definite information of the character of such claim or defense than is generally disclosed by the declaration, notice, or plea, and to prevent surprise. But such statement does not constitute the issue to be tried, and need not be as formal or precise as a declaration or plea. It is not the subject of a demurrer. If the statement is not sufficient, the trial court should require a sufficient statement, and, if not furnished, exclude evidence of any matter not described in the notice, declaration, or other pleading, so plainly as to give the adverse party notice of its character. If the statement fails to disclose a legal claim, or to constitute a defence at law, motion should be made, if the issue is tried by a jury, to exclude any evidence offered in respect to the matter contained in the statement, or if the evidence has been admitted, to strike it out, or to correct its effect by appropriate instructions. Columbia Accident Ass'n v. Rockey, 93 Va. 678.

(3) Equitable Set-Off.—The provisions of sec. 3299 of the Code as originally enacted in 1831, allowing a special plea of equitable set-off, were intended to enlarge the right of defense theretofore existing at common law, and not to impair any previous right, or to take away defenses previously allowed by law. The common-law right of recoupment was not impaired, but, in addition thereto, the statute permitted the defendant to recover any damages he could prove in excess of the damages claimed by the plaintiff, and in an action upon a sealed contract to prove a failure of consideration, or fraud in its procurement, or breach of warranty of the title or soundness of personal property, for the price or value whereof he had entered into the contract. Columbia Accident Ass'n v. Rockey, 93 Va. 678.

B. PLEADING AND PRACTICE.

I. Suits in Equity.

1. Clearness.—It is an elementary rule that the bill should state the right, title or claim of the plaintiff with accuracy and clearness, and that it should in like manner state the injury or grievance of which he complains and the relief which he asks of the court. Universal Life Ins. Co. v. Devore, 83 Va. 267.

2. Multifariousness.—A bill which sets forth two distinct and inconsistent causes of action, upon two different policies of insurance, one actually issued, upon which the premiums were not paid, the nonpayment being excused by the alleged insolvency of the company, the other, which ought to have been issued, because the first had been surrendered and receipted in full to the company, is bad on demurrer. Universal Life Ins. Co. v. Devore, 83 Va. 267.

3. Right to Trial by Jury.—If an insurance company is properly before the court in a chancery suit where its policy is the subject of litigation, any issue or issues raised by the pleadings as to its liability on the policy must be tried according to the rules and principles governing courts of equity in such cases. It is not entitled to a jury trial as a matter of right, but only in the event that the case made shows that a jury trial is proper. New York Life Ins. Co. v. Davis, 94 Va. 427.

4. Dismissal of Suit.—Where a creditor files a bill alleging the insolvency of an insurance company and asking that the creditors be convened, that the amount of the company's debts and assets be taken and that a receiver be appointed, the creditors described are not parties thereto in any sense; nor do they become so unless and until further action be had in the cause. Until such action, the suit is the suit of the plaintiff on the record, he is the sole *dominus litis*, and therefore may dismiss it at his will and pleasure. Piedmont and Arlington Life Ins. Co. v. Maury, 75 Va. 508.

5. Bill of Review.—Where a complainant in her original bill admits that one of the defendants had an insurable interest in the life of her husband, and seeks a recovery on the ground that, having a double security for his debt, he had collected both, she cannot, in her bill of review, deny the insurable interest, and seek relief on other grounds. Beatty v. Barley, 97 Va. 11.

II. Actions on Policy.

1. Who May Sue.—Where C takes out a policy of insurance on his life for the benefit of his wife, and the insurance company fails during his lifetime, he may sue in his own name to recover the premiums he has paid. Universal Life Ins. Co. v. Cogbill, 30 Gratt. 72.

Where the insured took out a policy for his wife, and in case she died before him, then for the children, and his wife did die before him, the child's interest in the policy vested immediately upon her death, and suit should be brought by the child and not by the personal representative of the wife. Clemmitt v. Ins. Co., 76 Va. 355.

2. Where Action Brought.—In Virginia an action at law or suit in equity may be brought to recover under a life policy in any county or corporation wherein the person whose life was insured resided at the date of the policy. Va. Code 1887, § 3214. See also, Lile's Notes to 1 Min. Inst. p. 314.

Where the purpose of the action is to subject the deposit required by law to be made by foreign insurance companies with the state of Virginia for the protection of the insured, the policy holder may sue in the circuit court of the city of Richmond. Universal Life Ins. Co. v. Cogbill, 30 Gratt. 72.

3. Service of Process.

(1) Domestic Companies.—The same rules which govern the service of process on other corporations apply to insurance companies. For service of process on corporation, see Va. Code 1887, sec. 3225; Lile's Notes to 1 Min. Inst. 318 *et seq.* It is to be noted, however, that the provisions of section 3214 that an action to recover a loss under a policy of in-

surance may be brought in any county or corporation wherein the property was situated, or the person whose life was insured resided, at the date of the policy, are not embraced in section 3215. Hence, these provisions are not governed by the inhibitions of section 3220, and process may, therefore, issue to some other county or corporation than that in which the action was brought, and, where there is no agent residing in the county, the process may be by publication. See 2 Bart. Law Pr. (2d Ed.) 1298. In Wytheville Ins. Co. v. Stultz, 87 Va. 629, where there was no agent in the county in which the action was brought, it was held that service by publication was proper, although the company was doing business both in banking and insurance, and another kind of service is provided for in an action against banks.

(2) Foreign Companies.—In Virginia it is provided by statute that every foreign insurance company doing business in the state shall appoint an agent in the city of Richmond upon whom process may be served, and that in case of his death or inability to act, process may be served upon the Auditor of Public Accounts. V. C. §§ 1266, 1267, as amended by Acts 1889-'90, p. 9; Continental Ins. Co. v. Kasey, 27 Gratt. 216.

In West Virginia there is a similar statute providing for an agent upon whom process may be served. Code W. Va., chap. 124, § 9.

Where a company withdrew from a state and revoked its appointment of an agent, but afterwards re-entered the state and appointed another agent under a new law, it was held that the new law referred to past as well as to future contracts, and service on the new agent in an action on a contract made when the company was previously doing business in the state was sustained. Conn. Mut Life Ins. Co. v. Duerson, 28 Gratt. 630.

4. Declaration.

(1) Statutory Form.—In Virginia it has been provided by statute that if the plaintiff file the policy, or a sworn copy thereof, with his declaration, it shall not be necessary, in respect to the conditions and provisos of such policy, to set forth in the declaration every such condition and proviso, nor to allege observance thereof or compliance therewith in particulars; but, it shall be sufficient to refer to the policy or copy and allege, in general terms, the performance of all its conditions and the violation of none of its prohibitions. V. C. 1887, sec. 3251. By Acts 1895-'96, p. 707, the pleadings are to be filed and the proceedings matured as in ordinary actions.

A declaration, from which it is evident that the pleader intended to proceed under this statute, is good, although it largely follows the form of an ordinary declaration in debt. Va. F. & M. Ins. Co. v. Saunders, 84 Va. 210; Travis v. Peabody Ins. Co., 28 W. Va. 583. For form of declaration, see 1 Bart. Law Pr. (2d Ed.) 408; 4 Min. Inst., pt. 2 (3d Ed.) 1684.

In West Virginia a brief form for actions on insurance policies is provided by statute. Code W. Va., chap. 125, sec. 61.

Where the declaration is drawn under such statute and additional statements are ordered by the court, such statements are to be regarded as informal pleadings. Rheims v. Ins. Co., 39 W. Va. 672, 20 S. E. Rep. 670.

In *assumpsit* the common courts, or other courts proper in that action, may be joined with a court in the statutory form. Bentley v. Ins. Co., 40 W. Va. 729, 23 S. E. Rep. 584.

(2) What Must Be Averred.—In an action on an insurance policy, where the money is only payable on the performance of certain acts and the existence of certain facts, the declaration must aver the performance of those acts and the existence of those facts. There can be no recovery upon such policy upon a declaration which contains only the common counts. If the common counts were sufficient, then the act for simplifying declarations on insurance policies (V. C. 1887, sec. 3251) was wholly unnecessary. Metropolitan Life Ins. Co. v. Rutherford, 95 Va. 773.

An averment that an insurance company has made and is making illegal assessments on its policy holders, including the plaintiff, is not sufficient to show that the company has repudiated the contract so as to entitle the plaintiff to sue at once and recover its value. The policy holder is only bound to pay lawful assessments, and then only upon proper notice. Refusal to pay illegal assessments is no reason for avoiding the policy, and the policy holder is not entitled to maintain an action against the company before the policy has been declared void. Lee v. Mutual, &c., Life Ass'n, 97 Va. 160.

(3) Demurrer.—Misjoinder of parties is not a good ground of demurrer, under Acts 1895-'96, p. 453. Lee v. Mutual, &c., Life Ass'n, 97 Va. 160.

In West Virginia the plaintiff may be required to file, in addition to his declaration, a sworn statement of the facts which he expects to prove, and, in an insurance case, the legal sufficiency of the facts thus presented was held to be properly raised by a demurrer. Deitz v. Ins. Co., 31 W. Va. 851, 8 S. E. Rep. 616.

(4) Amendment.—The court may allow the plaintiff to amend his declaration, where it omits one of the conditions endorsed upon the policy. New York Life Ins. Co. v. Hendren, 24 Gratt. 536.

5. Recovery by Motion.—A motion may be maintained under sec. 3251 of the Code of Virginia, as amended by Acts 1895-'6, p. 707, for a judgment on an insurance policy, and the notice takes the place of both writ and declaration. Grubbs v. Ins. Co., 94 Va. 589; Morotock Ins. Co. v. Pankey, 91 Va. 259, 1 Va. Law Reg. 128; Union Central Life Ins. Co. v. Pollard, 94 Va. 146.

The statutory complaint on an insurance policy (Va. Code § 3251, as amended by Acts 1895-'6, p. 707) can only be filed where the loss or death insured against occurred before the institution of the suit. It cannot be filed upon an averment that the company has wholly repudiated and abandoned the contract. Lee v. Mutual, &c., Life Ass'n, 97 Va. 160.

6. Foreign Companies.

(1) Removal of Cause.—In an action upon a policy of insurance by a citizen of the state of Virginia against a foreign corporation doing business in this state, the foreign corporation is *quoad hoc* domiciled in the state by virtue of the statutes authorizing the company to do business here, and is not entitled to have the cause removed to the United States court on the ground that the corporation is a resident of another state. Continental Ins. Co. v. Kasey, 27 Gratt. 216, distinguished in Cowardin v. Ins. Co., 32 Gratt. 445.

(2) Writ of Error.—Under article IV, § 1, of the constitution of the United States, and the act of Congress of May 26, 1790, a writ of error, not operating as a *supersedeas*, from the supreme appellate court of Texas to a judgment of a district court of that state, will be regarded as having the same effect in Virginia as in Texas.

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In such a case, an action may be maintained upon the judgment in Virginia, notwithstanding the pendency of appellate proceedings in Texas, but the Virginia court may order that no execution shall be issued on a judgment obtained in such action, provided the defendant give bond and security conditioned to satisfy the judgment and pay all damages, costs and fees, etc., in case the writ of error pending in Texas should be determined adversely to the defendant.

The laws of Texas are not pleaded nor in evidence in the cause, but in the absence of proof of a difference between the law of that state and this, it will be taken that the law of that state, as it affects the question of the effect of a writ of error without a *supersedeas*, is the same as in this state. Piedmont and Arlington Life Insurance Company v. Ray, 75 Va. 821.

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379 *Johnston, Trustee, &c. v. Wilson's Adm'r & als.

November Term, 1877, Richmond.

1. **Judicial Notice—Military Orders.**—The court cannot take judicial notice of the military orders extending the time for a stay of execution on judgments.
2. **Military Orders—Statute of Limitations.***—The object of the said orders was to extend only those provisions of the law which related to the stay of executions and the forced sales of property; and therefore, if they had any validity, they did not operate to suspend the running of the statute of limitations.
3. **Statute of Limitations—Debts of Decedents.**—The statute of limitations, Code of 1849, ch. 149, § 9, is a legislative declaration that all the provisions of that chapter in regard to the limitation of actions shall apply in favor of the testator's debts, although there is a devise of real estate for their payment, unless it plainly appears that the testator otherwise intended. The devise is not of itself sufficient evidence of the intent. It must appear from some provision or phrase independent of the devise, which indicates the purpose of the testator.
4. **Same—Same—Devise of Real Estate.**—A devise of real estate for the payment of debts will not affect the operation of the statute of limitation upon such debts, whether they be barred at the testator's death or not, unless the contrary intention on his part plainly appears.
5. War interest improperly abated in this case.

This was a creditor's bill in the circuit court of the town of Danville, filed in August, 1873, by John P. Johnston, trustee of James C. Voss and his creditors, against the administrator de bonis non of George T. Wilson, deceased, and R. M. Lowrey and Sarah Josephine, his wife, to subject the interest of said George T. Wilson in certain real estate in and near Danville to
380 the payment *of his debts. The plaintiff states that as trustee under the deed of Voss he held two notes of Wilson and also an account; that Wilson died in the latter part of 1861, and by his will subjected all his estate, real and personal, to the payment of his debts, and subject to this charge gave it all to his widow, who he appointed executrix, and directed that she should not be required to give security; that the will was admitted to probate in January, 1862, and Mrs. Wilson qualified in November of the same year; that she afterwards married R. M. Lowry, and they had wasted the whole estate except the interest of said George T. Wilson in a parcel of real estate in and near Danville; that he derived this interest under the will of his father, Nathaniel Wilson, who gave it to his widow for her life, and directed that at her death his estate should be equally divided among all his children; that since the death of Mrs. Wilson, the division of the estate of Nathaniel Wilson had been the subject of a protracted controversy in the circuit court and court of appeals, under the style Puryear v. Baptist & others, which had not yet been concluded, and until this was done, the interest of George T. Wilson could not be ascertained or subjected to the payment of his debts; that for this cause plaintiff had delayed for several years to bring this suit, hoping it would not be necessary, but he was then advised not to wait longer. He says that the widow of George T. Wilson having married, his estate was committed in June, 1867, to the sheriff, but he had never received any assets of the estate.

The bill was taken for confessed as to all the parties, and in November, 1873, a decree was made directing a commissioner to take an account of the debts of George T. Wilson, showing their priorities with several other accounts, which it is unnecessary to state.

381 *In November, 1875, the commissioner returned his report, which was excepted to by the plaintiff on the ground that the commissioner had reported two of the debts claimed by him as barred by the statute, and the account as not proved. Of the debts excluded by the commissioner one was evidenced by a negotiable note for $531.14, which bore date on the 24th of July, 1859, and was payable four months after date; and the plaintiff relied on the facts stated in his bill as excusing his delay in bringing his suit, even if the time of limitation had expired; which he insisted had not. The other was the account which ended December 13th, 1860; and the plaintiff insisted that the bill having stated the claim on the account, and having been taken for confessed, no proof of the open account was necessary, and the statute of limitations did not bar it. The will of George T. Wilson was filed with the bill, and is as there stated.

On the 1st of December, 1875, Lowry and wife filed their answer in the case, in which they called for proof of the plaintiff's debts, of which they averred they knew nothing, and they claimed the protection of the statute of limitations. The plaintiffs excepted to the answer and to the filing of it, because it was not fully responsive to the

*Statute of Limitations—Suspension.—In Coles v. Ballard, 78 Va. 139, the principal case is cited for the proposition that the statute of limitations was suspended April 17, 1861 to January 1, 1869. See also, Norvell v. Little, 79 Va. 141; 3 Min. Inst. (2d Ed.) 156.

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bill as to the action of Mrs. Lowry as executrix, and because it was not verified by the oath of each of the parties.

The cause came on to be heard on the 4th of December, when the court held that the period of time during which the statute of limitations was suspended extended only from the 17th of April, 1861, to the 1st of January, 1869, and made a decree overruling the plaintiff's exceptions to the commissioner's report, and as to these items confirmed it, and held that the said two debts of the plaintiff were barred by the statute of limitations. And the decree provided for the payment of the debts reported 382 *as due by the commissioner in the order of their priority, abating interest during the war under the statute; and sustaining the first exception to the answer, ordered Lowrey and wife to answer more fuly. And thereupon Johnson applied to a judge of this court for an appeal; which was allowed.

H. Robertson, for the appellant.

H. R. Barksdale, for the appellees.

Staples, J. The first question to be considered is whether the debts in controversy are barred by the statute of limitations. It is conceded by the counsel for the appellants that the act of March 3d, 1866, known as the stay law, expired on the 1st of January, 1869; but he insists that the several orders issued by the military authorities having control of the state of Virginia in the years 1868 and 1869, extended the operation of that act until the 26th of January, 1870, and that these orders have all the force and effect of legislative enactments.

It might be a sufficient answer to this argument to say that the military orders to which the learned counsel refers, are not in this record, and do not appear to have been relied on in the court below.

They are not acts or proceedings of which this court will take judicial notice, but ought to have been proved as other facts in the cause. Burke v. Miltenberger, 19 Wall. U. S. R. 519. It is not necessary, however, to rest our decision upon this ground. The orders in question clearly have no such effect as is claimed for them in this case, as will be apparent from a moment's consideration. The first military order relating to executions was issued on the 22d December, 1868. It simply provides that the stay of executions against personal prop- 383 erty, *which, by the provisions of "the stay law," would expire on the 1st of January, 1869, shall be extended till the 1st of July, 1869; and if on or before the last named day the debtor shall have paid all the interest then due, execution should be further stayed until other orders from headquarters. All the subsequent orders were to the same effect, simply continuing the stay of execution. All of them were subject to certain conditions with respect to the payment of interest, and unless these conditions were strictly complied with, the debtor was not entitled to the stay of execution.

The military authorities in issuing these orders did not undertake or profess to extend all the provisions of the stay law; but only so much of it as related to executions and the forced sales of property.

This court, in all the cases before it involving the construction of that act, has decided that the statute of limitations was suspended unil the 1st of January, 1869; not, however, because the creditor was prevented from suing out execution, but because the seventh section of the act had provided that "the period during which the act should remain in force shall be excluded from the computation of the time within which, by the operation of any statute or rule of law, it might be necessary to commence any proceeding to preserve or prevent the loss of any right or remedy." If the legislature had re-enacted and extended every provision of the stay law omitting this section, it cannot be questioned that the result would have been the complete restoration of the statute of limitations on the 1st of January, 1869. The military orders do not profess to continue the seventh section. They make no sort of reference to it. Their whole object was to prevent forced sales of property after the stay law had expired by its own limitation until relief could be afforded by the legislature. It is not 384 to be supposed *that the military officers then commanding in Virginia designed to do more than provide for an emergency, an extraordinary condition of affairs, which demanded immediate action; and this construction can be placed upon their conduct without doing violence to their language. It is unnecessary therefore to decide a question, sometimes suggested, whether the courts would now recognize as valid the order of any military commander suspending the statute of limitations for a longer period than that prescribed by the legislature. No such question arises here, and it need not be considered.

My opinion is, as stated in previous cases, that the 1st of January, 1869, is to be regarded as the period at which the stay law ceased to operate and the statute of limitations again commenced to operate in Virginia.

The main question in this case is, whether the provision in the will of the testator charging his real estate with the payment of his debts prevented the running of the statute of limitations as to the debts in controversy? Prior to the act hereafter mentioned, it was settled that a devise of real estate for the payment of debts, or a charge upon it, which was in effect the same thing, created a trust as to the proceeds of such real estate for the payment of all those debts which were not barred at the time of the testator's death; and after that event the statute did not so run as to affect the claims of such creditors upon the proceeds. Chandler's ex'x v. Neal's ex'or, 2 Hen. & Mun. 124. In some of the earlier cases it was held that a devise for the payment of

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debts had the effect of reviving debts already barred by limitation; but this doctrine has long since exploded, and it is now held that such a devise does not take a debt out of the operation of the statute. Burcke v. Jones, 2 Ves. & Beam. 275; 7 John. Ch. R. 293; Tazewell v. Whittle's
385 *adm'r, 13 Gratt. 329; Baylor's lessee v. Dejarnette, 13 Gratt. 152; 1 Rob. Prac. 346.

In this state of the law the legislature passed the act of March 17th 1842 (Acts of 1841 and '42, page 55), the first section of which provides that where any person shall die seized of any real estate which he shall not by his will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in courts of equity ratably for the payment of all the just debts of such person, as well debts due on simple contract as on specialty, subject, however, to a proviso that no debt should be charged on the reality which was not evidenced by writing signed by the debtor or his agent.

The second section provided that no testamentary provision charging the debts of the testator generally upon his real estate shall be held to prevent the operation of the statute of limitations against such debts, unless it shall plainly appear to be the intent of such provision that the said statute shall be no bar to their recovery.

What is the meaning of this latter section? Does it apply to all the debts of the testator charged upon his real estate, or is it to be confined to such debts as are barred by the limitation at the time of his death? Prior to the enactment of the first section, which must be considered along with the second, the real estate of a person dying intestate was liable only for debts of record and debts evidenced by bond in which the heir was bound. The statute just cited abolishes this rule of the common law. It gives effect to a devise for the payment of debts; but when there is no such devise the real estate is to be applied pro rata to all the just debts of the decedent, provided they are evidenced by writing. Subject to this single qualification the act makes the real estate liable to the debts of the decedent in the same manner and to the
386 *same extent as under a devise for the payment of debts generally. In the one case to be administered, perhaps, as legal, and in the other as equitable assets.

The legislature having thus placed upon the same footing, so far as the real estate was concerned, debts provided for by the testator and debts provided for by the statute, by the second section of the act already cited applied to both the same limitation, unless the testator plainly indicated a different intention. The testator, in making his real estate assets for the payment of his debts generally, was doing no more than the statute effected without the devise; it was proper, therefore, to apply to those debts the same rule as to all other debts in the administration of the real assets. And this was by way of analogy to the principle governing a bequest of the personal estate for the payment of debts; which was never regarded as creating a trust, or as preventing the running of the statute of limitations. The reason is that such a bequest does no more than the law declares, and that is, that the personal estate shall be assets for the payment of debts. It is very true that the act of 1842 excludes debts due by account, whereas a devise for the payment of debts generally would embrace them; but this was only an additional reason for applying the statute of limitations. If we turn to the revisal of 1849, we shall find abundant confirmation of this view. The phraseology of the second section of the act of 1842 is materially changed, and is incorporated in the chapter on limitations. It is as follows: "No provision in the will of any testator devising his real estate or any part thereof subject to the payment of his debts, shall prevent this chapter from operating against such debts, unless it plainly appear to be the testator's intention that it shall so operate." Code of 1849, ch. 149, § 9.

387 *This is in effect a legislative declaration that all the provisions of that chapter in regard to the limitation of actions shall apply in favor of the testator's debts, although there is a devise of real estate for their payment, unless it plainly appear that the testator otherwise intended. The devise is not of itself sufficient evidence of the intent. It must appear from some provision or phrase independent of the devise, which indicates the purpose of the testator.

When the testator specifies the particular debts he means to be paid out of his realty, but little difficulty can arise with respect to his intention. It may be safely presumed these debts have not been paid, and that it was his purpose they should be paid, at all events, without regard to the limitation. But when the charge is for the payment of debts generally, the testator has no reference to any particular debt. It is not to be presumed his intention was to provide for an indefinite extension of time in favor of all who might assert claims against his estate.

The legislature, at the revisal of 1849, changed also the first section of the act of 1842. It abolished the distinction between debts evidenced by writing, and debts not in writing. It made the real estate assets for the payment of all the debts of the decedent, whether due by bond, note, or open account: so that if we hold that the statute has no application to debts which were not barred at the period of the testator's death, we establish a rule which protracts indefinitely the settlement of estates in favor of all classes of creditors. I think the legislature in declaring that a devise for the payment of debts shall not prevent the statutes of limitation from operating against such debts, has plainly manifested the intention to apply the rule to all debts of the testator, whether barred or not at the time of his death.

388 *The statutes of limitation in former times were no great favorites with

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the courts. But the spirit of modern opinion and modern legislation is to regard them as statutes of repose. Their tendency is to afford protection against stale demands, by requiring the early settlement of claims when the true state of the transaction is known and capable of explanation. In Head v. Manner's adm'rs, 5 J. J. Marshall, 255, the supreme court of Kentucky says: "It was better that an indulgent or negligent creditor shall be subjected to the hazard of losing a just demand as the penalty of delay, than that the crafty and dishonest should be encouraged to sue for claims that had been satisfied, but the extinguishment of which could not be expected to be proved satisfactorily after the lapse of several years; and that it was essential to the just and wholesome administration of the law in its remedial action on private rights, that some period shall be fixed beyond which the citizen may not be harassed, but may feel secure and enjoy repose." Joynes on Limitation, 117; Sutton v. Burras, 9 Leigh, 385; Bell v. Morrison, 1 Peter's R. 361. These observations apply with great force to the estates of dead men. Such estates are peculiarly liable to unjust claims from the loss of papers, the removal and death of witnesses, and above all, the death of the only person in general capable of explaining the real nature of the transaction.

The whole spirit of our legislation is to require speedy settlements of such estates, not merely that the demands of creditors may be adjusted, but that persons interested as legatees and devisees or distributees may understand the extent of their liabilities and the nature and value of their interests.

But if a testator inclined to be just as well as generous, puts into his will a charge upon his real estate for the payment of his debts, thereby suspends the operation
389 of *the statutes of limitation as to all persons who may assert claims against his estate, it is manifest that there is no security against unjust demands or vexatious and expensive litigation.

I think a liberal interpretation should be given to the statute, an interpretation in harmony with the spirit of our legislation. My opinion is that under the present law, a devise of real estate for the payment of debts does not suspend the operation of the statute of limitations as to such debts, whether they are barred or not at the death of the testator, unless it plainly appears that such was his intention.

Applying these rules of construction to the debts in controversy, it appears that the note of $531.14 executed by George T. Wilson, and the account for $155.40, due the appellant as trustee, and also the account for $372.89, due J. T. Gerst, are within the operation of the statute, and are barred by the limitation. The note for $192.15, due the appellant as trustee, is not barred, and constitutes a valid obligation.

The decree of the circuit court is therefore substantially correct on the merits. There is, however, a difficulty in the case growing out of an irregularity in the proceedings in the court below. The commissioner to whom the accounts were referred for settlement, made a statement of the debts which in his opinion are barred by limitation. This part of the report was excepted to by the plaintiff, who insisted that the debts were not barred, as reported by the commissioner. At the December term, 1875, after the commissioner's report was completed and returned, the defendants filed their answer, and in it relied upon the statute of limitations. This answer was excepted to as not being responsive to the bill in one particular not connected with the question of limitation. The exception was
390 sustained, the answer *rejected as insufficient, and the defendants directed to answer more fully. The court thereupon, without waiting for the answer, at the same term proceeded to decide the cause upon its merits, entered a decree as though an answer was in the cause and the plea of the statutes of limitation pleaded. It is very clear that the court having directed the defendant to file a better answer, ought to have waited until such answer was filed, or afforded the defendant an opportunity of doing it before rendering a decree on the merits.

The question now arises what course is to be pursued here? If the cause is sent back there is no doubt the defendant will rely upon the statute of limitations. There is no reason to believe that the aspect of the case will be varied by any further proceedings. The court is as fully possessed of every fact as it will be upon any further inquiry. If it be that the defendants cannot claim the benefit of the statute of limitations without relying upon it in the court below, it is apparent they did rely upon it before the commissioner and in their answer, and they ought not to be deprived of its benefit here because the court rejected the answer as insufficient upon other grounds.

The decree of the circuit court is, however, erroneous in abating the interest accrued during the war upon the debts reported by the commissioner. One of these only is due the appellant, that is to say the note of $192.15; the others are due to creditors not appealing in this case. All the debts are secured by judgment, bond or note obtained or executed before the war. No ground is suggested for abating the interest except the existence of war. According to numerous decisions of this court this constitutes no sufficient reason for the abatement of interest where the creditor and debtor are citizens and subjects of the same government.

391 *My opinion, therefore, is to amend the decree of the circuit court in this particular, and as amended to affirm it.

The other judges concurred in the opinion of Staples, J.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record,

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there is no error in the decree of the circuit court, except in abating the interest which accrued during the war upon the debts set out in Commissioner Atkins' report, which interest ought to have been allowed on said debts by said circuit court. It is therefore adjudged, ordered and decreed that the said decree of the circuit court be amended in this respect; and as amended stand affirmed.

Decree amended and affirmed.

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392 *Dillard v. Thornton.

November Term, 1877, Richmond.

Absent, MONCURE, P.

On September 30, 1867, a summons in debt on a single bill was sued out, returnable to the succeeding October rules, to which rules it was returned executed on the 3d of October; and the plaintiff filed his declaration, and the defendant not appearing, a conditional judgment was entered against him, which was confirmed at the succeeding rules held October 28, 1867; and final judgment was entered against the defendant on the last day of the succeeding term of the circuit court, which was October 31, 1867, which was less than one month after the service of process on the defendant—HELD:

1. **Practice—Service of Process—Final Judgment within One Month.**—The entry of final judgment against the defendant within one month after he was served with process was erroneous. Code 1873, ch. 166, § 6.
2. **Same—Same—Same.***—According to the true construction of our statutes, where less than one month has elapsed between the service of process and the end of the succeeding term, the conditional judgment will become final at the term next succeeding the expiration of one month after the service of process.
3. **Same—Setting Aside Judgment—Reinstating Cause.**—The aforesaid judgment of October 31, 1867, having been set aside in the court below on the motion of the defendant, the court should have reinstated the cause upon the docket, with liberty to the defendant to plead, and to set aside the office judgment upon the usual terms, the said judgment to become final in case of his failure to set it aside.
4. **Same—Issuance of Fi. Fa.—Quashing Proceedings.**—Where under such a judgment a *fi. fa.* is issued, and there is a proceeding by
393 suggestion against persons indebted *to the defendant, such defendant may, upon proper notice, appear in such proceeding and have the judgment vacated, and all proceedings thereunder quashed.
5. **Quashing an Execution—Notice.**—A notice to reverse or correct a judgment by default, or to quash an execution, need not be in writing. All that is requisite is, that there should be reasonable notice.
6. **Same—Same—Time to Object.***—It is too late to make the objection in the appellate court that the notice was insufficient, when the parties appeared and made no such objection in the court below.
7. **Jurisdiction of Courts.**—The court below having vacated the judgment of October 31, 1867, upon a motion of the defendant, where all parties appeared by their counsel, it had no jurisdiction to correct its action in that regard under § 5, ch. 177 of Code of 1873; but the proper remedy was by appeal.

This was an appeal by W. H. Dillard from a judgment of the circuit court of Sussex, in a case in which he was plaintiff and R. E. Thornton was defendant. The case is fully stated by Judge Burks in his opinion.

Jones & Bouldin, for the appellant.

No counsel for the appellee.

Burks, J. On the 30th day of September, 1867, W. H. Dillard sued out of the clerk's office of the circuit court of Sussex county a summons in debt on a single bill against R. E. Thornton, returnable to the next succeeding rules the first Monday in October. The summons was duly executed on the 3d of October and returned, and the plaintiff filed his declaration at the return day. The defendant not appearing, a conditional judgment was entered against him, which was confirmed at the succeeding rules held on the last Monday in October, because the next term of the circuit court of Sussex commenced on the 29th day of October, which was the Tuesday preceding the
394 first Monday in November, *and final judgment was entered against the defendant as of the 31st day of October, which, it is supposed, was the last day of the term of said circuit court, although it is not so stated in the record.

On this judgment a writ of fieri facias was issued on the 4th day of November, 1867, under which there was a levy by the sheriff and the judgment partly satisfied. Several other executions were afterwards issued from time to time, which proved fruitless. The last was issued on the 12th day of October, 1871, and at the same time, upon a suggestion by the plaintiff, that by reason of the lien of his execution, there was a liability on certain parties named, a summons was issued against them to answer the suggestion at the next term of the court. The summons was returned duly executed, and at the then next term, to-wit: on the 25th day of October, 1871, on the motion of Thornton, the court annulled the judgment of the 31st of October, 1867, and quashed the executions and all the proceedings had under the said judgment.

At the term of the court held in April,

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*Statute—Month.—In Turnbull v. Thompson, 27 Gratt. 306, it was held that where a summons of debt was served on defendant on February 3, the judgment by default might become final on March 3, as under the statute, the day of service of the process may be counted. See also, Barton's Law Pr. (2nd Ed.) 334, 557, 574; 4 Min. Inst. (3d Ed.) 721, 723; Dick v. Robinson, 19 W. Va. 165.

*Appellate Court—Objections There—Review.—In Railroad Co. v. Miller, 80 Va. 821, the principal case was cited for the proposition that defects in notice, or in service of notice, by sub-contractor under the mechanics' lien law, cannot be objected to for the first time in the appellate court. See Barton's Law Pr. (2d Ed.) 1331.

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1872, Dillard, on proof of notice duly given, made a motion to correct the judgment rendered on the 25th of October, 1871, which motion was overruled, and he excepted.

A writ of error from this court was allowed Dillard to the judgment of the 25th of October, 1871,

The court is of opinion that the judgment aforesaid rendered as of the 31st day of October, 1867, is erroneous.

Among the provisions of chapter 167, Code of 1873, are the following:

"§ 45. Every judgment entered in the office in a case wherein there is no order for an inquiry of damages, and every non-suit or dismission entered thereon, shall, if not previously set aside, become a final
395 judgment, if *the case be in the circuit court, of the last day of the next term, or the fifteenth day thereof (whichever shall happen first), and if it be in a county or corporation court, of the last day of the next term designated for the trial of civil cases in which juries are required, and have the same effect by way of lien or otherwise as a judgment rendered in the court at such term. * * * * *

"§ 46. If a defendant, against whom judgment is entered in the office, shall, before it becomes finel, appear and plead to issue, it shall be set aside, unless an order for inquiry of damages has been executed, in which case it shall not be set aside without good cause. * * * *."

Under and by virtue of these two sections taken alone, the judgment entered in the office on the last Monday in October, 1867, would have become a final judgment as of the last day of the next term of the court, to-wit: the 31st day of October, 1867. The summons was in legal form, duly executed and properly returned. The orders entered at rules and all the proceedings in the office were regular, and had terminated in the confirmation of the conditional judgment before the commencement of the term. It was the duty of the clerk to put the cause on the court docket for the said term. Code of 1873, ch. 173, § 1.

But it is further provided by the Code, ch. 166, § 6, last clause, that "no judgment by default, on a scire facias or summons, shall be valid, if it become final within one month after the service of such process." The preceding clause of the section provides that a summons or scire facias may be served as a notice is served, that is by delivery of a copy to the party in person, or if he be absent from his usual place of abode by delivery of copy and giving information of purport to certain other persons at such place, or in the absence of the party and such persons by putting a copy at the
396 front door of said *place. Previous to the revision of the law in 1849, personal actions were commenced by writ of capias ad respondendum, which was executed by arrest of the defendant, where bail was demanded as matter of right, and by personal notice where no bail was demanded. Bail of right being abolished, the summons was substituted for the capias as the process for the commencement of a suit, (ch. 166, § 5), and as actual personal service was dispensed with under certain circumstances, and thus judgments, by default, might be recovered upon constructive notice merely, which might take parties by surprise and work injustice, it was, for these reasons, probably deemed wise by the revisors to fix a period within which no final judgment by default should be recovered.

The judgment annulled by the circuit court was a judgment by default, and purports to be a final judgment within one month from the date of the service of the summons. Under the section, therefore, last cited, (§ 6, ch. 166,) the judgment cannot be valid, although, according to the letter of the section cited from chapter 167, it must have become final within one month from the service of the summons.

It is a settled rule of construction that all statutes in pari materia should be read and construed together, as if they formed parts of the same statute and were enacted at the same time, and where there is a discrepancy or disagreement among them, such interpretation should be given as that all may, if possible, stand together. Potter's Dwarr. Stat. and Con. 144, 145.

The rule applies with peculiar force in the construction of a statutory code to the several parts thereof which relate to the same subject matter, were conceived by the same minds, prepared by the same hands, and were adopted at the same time by the same legislative body.

397 *These sections of the Code, in the points of apparent disagreement, are now substantially as they came from the hands of the revisors, and the only way to give effect to section 6 of chapter 166, is to construe it as in the nature of a proviso to section 45 of chapter 167. The latter section gives the general rule, the former the limitation or exception. Thus construed, all judgments in the office become final at the next term of the court, except those in which the process commencing the suit has not been served at least one month before the end of such term. These last cannot become final at such term, notwithstanding the language of section 45, chapter 167, because section 6, chapter 166, expressly declares that if they become final they "shall not be valid," which is in effect to provide that they shall not then be final. It must have been intended, therefore, that they should become final at the first term after the expiration of "the month from the service of the process." Under this construction, which we deem the correct one, the judgment, which was entered in the office on the last Monday in October, 1867, did not become final on the 31st day of October, 1867, and it was error so to enter it. The cause should have been replaced on the docket at the next succeeding term of the court, when the office judgment, if not set aside as allowed by the statute, would have become a final judgment as of that term.

The court is further of opinion that there

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is no error in the judgment of the said circuit court rendered on the 25th day of October, 1871, in so far as it annuls the judgment aforesaid of the 31st of October, 1867, and vacates all the proceedings thereunder; but it is erroneous in not reinstating the cause on the docket, with liberty to the defendant to plead and to set aside the office judgment on the usual terms, the
398 judgment to become final *in case of his failure to set it aside. Green v. Skipwith, 1 Rand. 460.

It is assigned as error that the judgment complained of was rendered in a collateral proceeding between the creditor and the garnishees. There is nothing in this objection. The judgment debtor had a direct interest in that proceeding, and had the right to appear and defend it, and if the judgment on which the proceeding was based was invalid, he had the further right, on his own motion, to have it vacated, and the summons of garnishment quashed.

But it is further objected that the motion was without notice. The notice to reverse or correct a judgment by default, or to quash an execution, is not required to be in writing. All that is required is, that it must be a "reasonable notice." Code of 1873, ch. 177, § 5; ch. 183, § 40. What is a reasonable notice depends on circumstnces. In this case it appears by the record that the parties to the motion "appeared by their attorneys," and "the said motion being maturely considered by the court," it was ordered "that the execution aforesaid, together with the judgment and all the proceedings thereunder, be quashed." It does not appear that any objection was made or exception taken because the notice was not sufficient, or not reasonable. It is too late to make the objection here, when none was made in the court below. Ballard & als. v. Whitlock, 18 Gratt. 235.

The court is further of opinion that there was no error in the judgment of the said circuit court rendered on the —— day of April, 1872, overruling the motion of the plaintiff in error to correct the judgment of the 25th of October, 1871. The court had no jurisdiction to set aside said judgment or to correct it. The motion was based upon the idea, we suppose, that the
399 last named *judgment was a judgment by default, and if erroneous, that it might be corrected under § 5, ch. 177 of the Code. But, as already stated, it was not a judgment by default. The parties "appeared by their attorney."

The court is of opinion, for the reasons stated, that the said judgment of the 25th day of October, 1871, so far as the same is hereinbefore declared to be erroneous, should be reversed and the residue thereof affirmed; and that the cause should be remanded to the circuit court of Sussex county, with directions that it be reinstated on the docket of said court, and for further proceedings to be had therein according to law and in conformity to this opinion.

The other judges concurred in the opinion of Burks, J.

The judgment was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in said judgment in so far as it vacates and annuls the judgment of the said circuit court of the 31st day of October, 1867, and quashes the executions issued thereon and all the proceedings had under said judgment; but the court is further of opinion that the said judgment is erroneous in not reinstating the cause upon the docket of the said circuit court with liberty to the defendant to plead to issue and set aside the office judgment entered in the cause, if so advised, the said office judgment to become final in case of his failure to set it aside. It is therefore considered that so much of the said judgment of the 25th day of October, 1871, as is
400 herein before declared to be *erroneous, be reversed and annulled, and the residue thereof be affirmed; and that the defendant in error pay to the plaintiff in error, as the party substantially prevailing here, his costs by him expended in the prosecution of his writ of error aforesaid here. And this cause is remanded to the said circuit court, with directions that the same be reinstated on the docket of said court, and otherwise proceeded in according to law and in conformity to the opinion and principles hereinbefore declared; which is ordered to be certified to the said circuit court of Sussex county.

Judgment reversed.

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401 *Raglaḿd v. Broadnax & als.

November Term, 1877, Richmond.

Absent, MONCURE, P., and ANDERSON, J.

I. Jurisdiction of Courts.*—The circuit court of the city of Richmond has no equity jurisdiction except in certain cases specified in the statute, in which the state is interested or some of the officers and boards representing the state are necessary or proper parties; and in such cases its jurisdiction is exclusive. Sess. Acts, 1869-'70, pp. 42, 43.

II. Same—Statute—Parties.†—Upon the facts of this case, held that the Board of Public Works of the state was a necessary party to a suit brought

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***Jurisdiction of Courts.**—In Blanton v. Fertilizing Co., 77 Va. 335, it was held, citing the principal case, that the commissioner of agriculture not being one of the enumerated officers who, being necessary parties defendant, give the circuit court of Richmond, chancery jurisdiction according to the statute, that court has no jurisdiction in such a case. See also, Taylor v. Williams, 78 Va. 422; 4 Min. Inst. (3d Ed.) 637.

†**Corporations—Preferred Stockholders.**—In Gordon v. Railroad Co., 78 Va. 501, the principal case is cited for the proposition that guaranteed stock issued by a corporation under certain statutes is guaranteed or preferred capital in the strictest sense; that the dividends are payable out of the gross earn-

by parties claiming to be stockholders in the Petersburg Railroad Company, against the Company, the city of Petersburg, Ragland and others, to set aside certain acts of the railroad company done in favor of Ragland as the holder of a large amount of the stock of the company which he purchased from the city of Petersburg. This stock had been pledged by the city to the state as collateral security for the guaranty by the state of a debt of the city.

III. The state having returned the stock to the city of Petersburg, and it being held by the city as collateral security for the debt Ragland owed for the stock, and his note having fallen due, the city sued him upon it, and advertised the stock for sale. Ragland then filed his cross-bill in the first suit to enjoin the suit and sale until the questions in the first suit as to the character of the stock which the state had held, whether preferred or common, should be settled. All the parties to the original bill were made defendants to the cross-bill. The causes were heard together, and the original bill dismissed —HELD:

1. **Practice—Cross-Bills.**‡—The second bill asking for relief against the City of Petersburg, which could not be given on the pleadings and proceedings in the original bill, but which
402 was based *upon grounds involved in that case, it was the proper subject of a cross-bill; but the relief sought by it being outside of the original bill, the dismissal of the original bill did not involve the dismissal of the cross-bill.

2. **Same—Same.**—If the cross-bill is to be treated as an original bill in the nature of a cross-bill, all the parties being before the court, and the case having been matured, it was proper to proceed to decide it upon the merits. And certainly Ragland is not to be heard to question the jurisdiction of the court after having had the determination of the question brought by him into the case.

In July, 1873, A. J. Broadnax, W. E. Broadnax and E. W. Wilkins instituted a suit in the circuit court of the city of Richmond, against the Petersburg Railroad Company, Reuben Ragland, the Board of Public Works, and several other persons; and the City of Petersburg afterwards became a party defendant in the cause. The plaintiffs, in their bill, say they are the owners of four hundred and forty shares of the captial stock of the Petersburg Railroad Company, and they file the bill not only for themselves, but for all other stockholders of the company, and such holders of the mortgage debt of the company as may become parties to the suit and contribute to the cost of its prosecution. They set out the action of the stockholders of the company by which they directed to be issued to Reuben Ragland and other persons named 4,852 shares of preferred stock, and that the board of directors and treasurer of said company pay to the holders of said stocks three per centum per annum thereon out of the gross receipts of the company, in addition to their dividends out of the net profits of said company; and that they should pay to Reuben Ragland two hundred and forty-nine thousand three hundred and fifty dollars, in satisfaction of all arrears claimed by him to be due upon 4,490 shares of the so-called preferred stock held by him, and that in addition thereto that the said
403 Ragland, *as president of the company, be paid the sum of $12,000 per annum in monthly instalments. They deny that the stock was preferred stock entitled to the payment of three per cent. out of the gross earnings of the company; or that this stock was, in addition to this three per cent. out of the gross earnings, to be paid equally with the other stock of the company dividends out of the net earnings; or that Ragland was entitled to receive these dividends if they were properly payable, which fell due before he purchased the stock. They charge that Ragland having purchased a majority of the stock of the company, he controlled the action of the stockholders when this action was taken. And they refer to the acts of assembly upon which the claim of Ragland was founded, and the action of the common hall of the city of Petersburg, by which the stock was sold to Ragland. These are given in the opinion of the court delivered by Christian, J. And they ask f r the appointment of a receiver for the road.

Ragland answered the bill. He charged that the plaintiffs were not the owners of any stock in the Petersburg railroad company; that though they had at one time owned the shares they claimed, they had disposed of them, and that the suit was in fact carried on in their names by John M. Robinson, a citizen of Baltimore, who was president of the Seaboard and Roanoke railroad company and several other companies he named, and that the object was to defeat the efforts the defendant was making to attract freight to his road, which would interfere with the interests of the companies managed by said Robinson. He denies that the meeting of the stockholders was packed, and says one of the plaintiffs was present at the meeting, acting for himself and as proxy for one other of the plaintiffs, and voted for everything that was done. And he insists that the action
404 of the *stockholders was proper; that the stock was preferred stock, and that the holders thereof were entitled to three per cent. per annum out of the gross earnings of the company, and an equal dividend out of the net earnings; and that these net earnings, unpaid when he purchased the stock, passed with the stock to him.

In September, 1875, Reuben Ragland filed what is called a cross-bill in the cause. He

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ings and that in a division of the assets, these guaranteed stockholders must be paid if need be, to the exclusion of the common stock; but that as to any excess of the dividends guaranteed them they stand upon the same footing as common stockholders.

‡**Cross-Bills.**—In Fishburne v. Ferguson, 85 Va. 326, the principal case is cited for the proposition that a cross-bill is proper whenever the defendants have equities arising out of the subject-matter of the original suit, which entitle them to affirmative relief which they cannot obtain in that suit. See 4 Min. Inst. (3d Ed.) 1381.

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made the City of Petersburg, the Seaboard and Roanoke Railroad Company, the Petersburg Railroad Company, the Board of Public Works of Virginia, the plaintiffs in the first bill, and the other defendants thereto, defendants. The object of this bill is to enjoin the city of Petersburg from proceeding in an action which had been commenced by said city of Petersburg against himself and others upon a note for $249,982, with interest, which had been given by them for 3,500 shares of the stock of the Petersburg railroad company, and to enjoin the sale of said stock by the city of Petersburg for the payment of said debt, the said stock having been left with the city of Petersburg as collateral security for the payment of said debt. After setting out the nature of the stock, 3,235 shares of which he claims to be preferred stock, and its purchase by Ragland, and the circumstances of that purchase, and the objections made in the original suit to Ragland's claims, he states the points he asks to have settled:

First. Are the 3,235 shares of stock, common stock, or preferred and guaranteed stock, in the hands of the present owners thereof?

Second. If the said 3,235 shares be preferred and guaranteed stock, what is the measure of the preference and guaranty? Is it, first, a preferred and guaranteed dividend of one and a half per centum for every six months, out of the gross receipts of the road, without participation in the full amount of dividends declared out of
405 net *profits, or is it a preferred and guaranteed dividend out of gross receipts as aforesaid, with participation in the full amount of dividends declared out of net profits in addition thereto?

The City of Petersburg answered the bill contesting the claims of the plaintiff as to the character of the stocks and the dividends to be paid upon it, and insisting that there was nothing in their agreement with Ragland, as he had insisted in his bill, which forbade the city to sue upon the note and to sell the stock.

The two causes came on to be heard on the 19th of April, 1876, when the court being of opinion that the plaintiffs in the first suit had so disposed of their stock that they had no appreciable interest in the subject in controversy, dismissed their bill with costs. In the second case the judge—Wellford—delivered the following opinion:

The dismissal of the original bill does not, however, relieve the court from the duty of passing upon some of the matters set out therein, for they are necessarily involved in the action which must be had upon the cross-bill. That bill must be regarded in many respects as an original bill, and the court having assumed jurisdiction and awarded an injunction to the complainant therein, cannot content itself with a simple dissolution of the injunction and dismissal of the bill.

It appears from the cross-bill that a considerable portion of the purchase money of the stock of the Petersburg railroad company sold to Ragland by the city of Petersburg, is unpaid, and that as a security therefor the city of Petersburg holds the note of Ragland and other parties for the sum of $249,982, due upon its face August 1st 1875, with the pledge of 3,500 shares of the stock now in the possession of the city as collateral security; that suit has been instituted by the city on the note, and
406 *that a sale of the stock has been ordered by the city. The prosecution of the suit and the sale of the stock has been enjoined by the court, not upon any hearing of the parties or any judicial determination of the matters at issue, but upon the ex parte application of the complainant. I am of opinion now, as I was when the preliminary injunction was issued, that it was providently awarded. The bill presents grave questions, and opportunity was afforded the city of Petersburg to be heard as to the propriety of considering application for the preliminary injunction in advance of a determination of those questions upon full presentation thereof, by counsel, for all the parties in interest. That presentation was then promised and expected at a very early date, and the determination thereof by the court has been delayed without its default. It is claimed by the complainant, Ragland, that the city of Petersburg, by an ordinance of the council, passed March 5th, 1872, in accepting the note of Ragland and his associates, bound itself not to demand or require payment of the principal of the debt for which said note was given, so long as the stock, or the greater part thereof, should continue to be held by the said Ragland and his then partners, or either of them, or by any other bona fide citizen or citizens of Petersburg. The ordinance is very awkwardly expressed, but this construction imputes to the common council which enacted it such a gratuitous extension of credit to the obligors that it cannot be accepted if the bungling phraseology of the ordinance admits of any other interpretation. I think that it does, and that read in the light of surrounding circumstances and the contemporaneous acts of all parties, its meaning and intent is very clear.

It will be observed that the obligation of Ragland, &c., bound them to pay on the 1st day of August, 1875, if not paid sooner. When the obligation was executed
407 *the stock was held by the state of Virginia as security for a debt due by the city of Petersburg, and could not then be delivered; but in contemplation of its release by the state and surrender to the city prior to the maturity of the obligation, the obligors bound themselves, upon the tender of the stock and demand of payment by the city, to anticipate the maturity of the obligation and make payment in full after four months' notice. The provision of the ordinance for a waiver of right to demand payment was very clearly intended to be limited to this contemplated anticipation of the agreed pay day, and to relieve the obligors from any apprehension that they would be required to pay before August 1st, 1875, so long as

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they or any citizens of Petersburg as assignees continued to hold the stock.

But even conceding the construction claimed by Ragland, his purchase since the passage of the ordinance of the entire interest of his then partners and his own removal from the city of Petersburg has absolved the city from the obligation of its waiver; for it cannot be pretended that the stock is now under the control of "any party or parties bona fide holding the same as a citizen or citizens of the city of Petersburg," and in such contingency the city reserved in the ordinance the right to enforce payment of the debt.

It appears that Ragland purchased from the city of Petersburg 4,755 shares of stock of the Petersburg railroad company; that 1,255 shares were transferred and delivered to him, and that the remaining 3,500 shares are now in the possession of the city of Petersburg, hypothecated as security for the unpaid purchase money. Of these 3,500 shares, 3,235 were derived by the city of Petersburg from the state of Virginia, and have been heretofore known and recognized as preferred stock.

408 *While this stock was held by the state and by the city, the only preference claimed was the right to annual dividends of three per cent., whether any dividend was or was not declared upon the other stock, and to no more unless a dividend of more than three per cent. was declared upon the other stock, and in such event only to an equal dividend with the other stock. When the stock was purchased by Ragland he was advised by learned counsel that this stock was much more valuable, that it was entitled not merely to the dividend of three per cent. in any contingency, but to share equally in any and all dividends declared upon the other stock.

This construction of the law not merely made this stock much more valuable, that in futuro the holders should receive these dividends, but imposed upon the company a heavy liability for arrearages due to the stock for unpaid dividends of thirty previous years. Furthermore it appears that under authority of an act of assembly, passed in 1861, the company increased its capital stock to the extent of fifty per cent., and it was also claimed by Ragland under the like advice that the fifty per cent. additional stock accruing to the holders of this preferred stock, partook of its character, and was entitled to the full extent with the original stock to the benefit of these peculiar privileges.

The stockholders of the company in general meeting, in 1872, recognized these claims to their full extent, and ordered the board of directors to pay to Reuben Ragland the arrearages claimed, and to issue to all the holders of the original preferred stock, or any dividend stock thereof, certificates for all their original and new stock, expressing on the face of the certificates that the stock was "preferred;" and the board have, it appears, made payment to Ragland and issued some of these certificates.

409 *The original bill in this case complained of all this action of the company and the board of directors, and denied the validity of the claim asserted on behalf, not merely of this new stock, but also of the original stock, and as to the original stock not only denied the new claims asserted by Ragland, but insisted that it was entitled to no preference whatever over the other stock of the company. The views put forth in that bill were sanctioned and endorsed by counsel of ability and commanding professional influence. If sound, they impaired immensely the value of 3,235 shares of the stock held by the city of Petersburg as security for Ragland's note, and whether sound or not, pending the determination of that question in the courts, no sale could be made of the stock without the hazard of great detriment to all the parties in interest. The sale has been arrested by the order of this court. The city of Petersburg is entitled to have the sale made, and to realize, so far as it will be available, the full amount of her debt. But the sale can not be made without a determination by this court of the character and status of the stock, whether preferred or not preferred; and if preferred, a determination of the extent of its privileges.

What, then, is the status of this stock?

It appears that in 1843 the state of Virginia held $160,000 of common stock in this Petersburg railroad company, and was a creditor of the company for $150,000 of principal money loaned, and $13,500 of interest in arrear. In view of this fact, an act was passed by the general assembly (Sess. Acts 184-3, p. 71-2) increasing the capital stock of the company to the extent of its debt to the state, and authorizing the board of public works to subscribe the amount of the debt to the stock of the company upon certain conditions.

410 *The conditions so far as action was required were complied with, and the subscription made. Those conditions required a mortgage to be executed creating the first lien on the entire property of the company and all its net income, conditional to pay the amount of the then debt of the state in full, whenever the company should fail to pay dividends of three per cent. per annum on all the stock of the state in the company. The act further required the officers of the company to set apart out of its gross receipts the amount of this three per cent. dividend, and to pay the same into the treasury, reserved to the state the right in the event of default for thirty days to obtain judgment therefor against the company on thirty days' notice, and furthermore made the president, directors, and treasurer of the company liable for such default to a penalty of $1,000 each, recoverable by the board of public works on ten days' notice.

Was the stock in the hands of the state of Virginia preferred stock? It was more; it was guaranteed stock. It was $323,500 of stock, entitled in any and every contin-

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gency of the future fortunes of the company to a dividend of three per cent. per annum, the punctuality of the payment of which was insured, as far as legislative sagacity could insure anything, as long as the company could maintain its corporate life; and in the event of overwhelming disaster to the company, to the extent of $163,500, more than fifty per cent. of its par value, the principal of the stock was secured by a first lien upon all it corporate property.

The stock was valuable property to the State, and made annual returns into her treasury so long as she held it. But in 1869 the state transferred this stock to the city of Petersburg. The transfer was made with the avowed object of facilitating the construction of the Southside railroad, but it was not made without consideration
411 *on the part of the city of Petersburg. The act of assembly (Sess. Acts, 1848-9, p. 107) indicates no contemplation of any benefaction designed to or any consideration moving from the Petersburg railroad company.

It was the act of a proprietor transferring for value his interest in the stock of a railroad corporation. I know of no principle of law or of construction of statutes which would justify me in attributing to the state any purpose to withhold as assignor any valuable incident to this property which was susceptible of transfer either in law or equity to the assignee. The act contemplated an absolute transfer, and carried with it necessarily, I think, all that made the property valuable in the hands of the assignor. It may be very well conceded that at the time the right was acquired by the state, it was not in the contemplation of either party that the state would ever transfer it. The same thing may be said by every improvement company to which the state in her former days subscribed her three-fifths of stock. It may be conceded further that there is difficulty and some apparent discord in enforcing for an assignee the securities reserved by the state. I think the difficulties suggested in argument are more apparent than real. But conceding that they are quite as formidable as suggested, I cannot see that the misfortune of the assignee in losing the benefit of one security which the state only could make available should be made the basis of an argument to deprive him of the benefit of other securities which are just as available to him as they could have been to the state.

It is then a grave matter of inquiry to all the stockholders of this company to what extent are the privileges of this stock to be conceded.

The privilege attached to the stock was the creature of positive law, reserved to the state, and we may well presume
412 *that the board of public works was fully cognizant of the views of the general assembly in its enactment. Their contemporaneous construction of the law and their unchallenged action under it, for the several years in which they as the representatives of the state were charged with the duty of enforcing it, would have militated very much against any assertion of a contrary construction by the city of Petersburg when she first became a party in interest. But the city of Petersburg concurred, and for thirty years no question was suggested. I incline very much to think that this action of the holders of this stock, even if we could reduce it to the low grade of mere acquiescence, would estop any claimants under them from preferring a broader claim. But I do not rest my opinion upon this; with the utmost respect for the learning and ability of the counsel under whose advice the action of the Petersburg company was had in recognizing the novel and startling claims of Mr. Ragland, I am of opinion that the language of the statute (Acts 1842-3, p. 72), clearly condemn them. I see no necessity for any refinement of verbal criticism in seeking the intent of the law-maker; distinctly and clearly dividends to the amount of 3 per centum per annum, payable half-yearly—i. e., 1½ per cent. semi-annually—are reserved; then we have the proviso "nothing herein contained shall deprive the state of the full amount of any half-yearly dividend exceeding 1½ per cent., which may be declared by the company on the whole amount of its capital stock." The insertion here of the words "exceeding 1½ per cent.," the exact amount reserved to the state in any contingency, seems to me utterly unintelligible, except upon the idea that the state proposed as soon as the interstate upon her then debt which was commuted into stock should be realized, out of the dividend reserved as chargeable on the gross earnings of the company, to
413 *place herself upon an equal footing with all other stockholders in the company.

I am of opinion that this stock in the hands of the present holders or their assignees, as it was in the hands of the state, is entitled to a dividend of 1½ per cent. semi-annually per share, to be paid out of any earnings of the company, and that in the event of any dividends being declared upon the common stock exceeding 1½ per cent. semi-annually, it is entitled, in addition, to the 1½ per cent. chargeable upon the gross earnings, to receive out of the net earnings a sufficient sum to make its aggregate dividend equal to that of the other stock, and that in the event of the default of the company, the board of public works may be required to forclose the mortgage and to realize by sale of the corporate property the sum of $163,000, to be divided ratably among the 3,235 shares of stock.

The injunction, so far as it restrains the city of Petersburg from prosecuting her suit upon the note of Reuben Ragland and others, must be dissolved.

I do not think it would be proper to dissolve the injunction restraining the sale of the stock; but the city of Petersburg is entitled to have it sold, and a sale will be ordered by the court and commissioners appointed for that purpose, and the cause retained upon the docket with a view to the

entry of any orders which may be necessary after the sale, to secure the purchaser or purchasers proper transfers and certificates of stock, with full recognition by the company of the peculiar priviliges incident thereto.

The decree dissolved the injunction so far as it prohibited the city of Petersburg from prosecuting their suit at law upon the note; but continued it as to the sale of the stock held as collateral security, and appointed commissioners to sell the same in the
414 mode and upon terms *stated in the decree. And thereupon Ragland applied to this court for an appeal; which was allowed.

The case was argued by John Lyon and William Green, for Ragland; by Judge Crump and Drewry A. Hinton, for the City of Petersburg; and by W. W. Gordon, for the Petersburg Railroad Company.

Christian, J. The first question we have to determine in this case is a question of jurisdiction.

Did the circuit court of the city of Richmond have the jurisdiction to hear and determine the matters set forth in the original bill?

The circuit court of the city of Richmond is different from the other circuit courts of the state—a court of limited jurisdiction.

It has no chancery jurisdiction, (there being created by statute a separate chancery court for the city of Richmond), except "in suits in which it may be necessary or proper to make any of the following public officers a party defendant as representing the commonwealth, to-wit: the governor, attorney-general, treasurer, register of the land office, or either auditor; or in which it may be necessary or proper to make any of the following public corporations parties defendant, to-wit: the board of the literary fund, board of education, board of public works, or any other public corporation composed of officers of government, of the funds and property of which the commonwealth is sole owner, or in which it shall be attemped to enjoin or otherwise suspend or affect any judgment or decree in behalf of the commonwealth, or any execution issued on such judgment or decree." Sess. Acts 1869-70, pp. 42, 43.

By this provision of the statute it is plain, that while the circuit court of the city
415 of Richmond has no chancery *jurisdiction outside of the specific powers indicated therein, yet, within these limits thus defined by the statute law, it has the same and equal powers with those of the other circuit courts of this state in respect to the jurisdiction of chancery causes; and it is equally plain that with respect to the before-mentioned classes of cases and persons the said circuit court of the city of Richmond has exclusive jurisdiction, even in a chancery cause, which is withheld from all the other courts of the commonwealth. In other words, by fair interpretation of the statute law, whenever one of the persons or classes named in the statute shall be a necessary or proper party, the circuit court of the city of Richmond has, whether it be in a common law or chancery cause, not only original but exclusive jurisdiction.

In order, therefore, to determine whether the circuit court of the city of Richmond had jurisdiction to entertain the original bill of the plaintiffs in this cause, it is only necessary to inquire whether the board of public works was a necessary or proper party to that suit.

It appears from an examination of this record and the acts of assembly, that in the year 1843 the state held $160,000 of common stock in the Petersburg railroad company, and was a creditor of the company for $156,000 of principal money loaned, and $13,500 interest in arrear.

On the 25th March, 1843, an act was passed by the general assembly increasing the capital stock of the company to the extent of its debt to the state, and authorizing the board of public works to subscribe the amount of this debt to the stock of the company upon certain conditions. These conditions required a mortgage to be executed creating the first lien on the entire property of the company and all its net income, conditioned to pay the amount of the then debt of the state in full whenever
416 the *company should fail to pay dividends of three per cent. per annum on all the stock of the state in the company. The act further required the officers of the company to set apart out of its gross receipts the amount of this three per cent. dividend, and to pay the same into the treasury of the state to the credit of the board of public works. On default of such payment there is reserved, by the terms of the act, the right to the state to obtain judgment, on thirty days' notice, for the same; and furthermore, the president, directors and treasurer of the company are made liable for such default in the penalty of $1,000 each, recoverable by the board of public works on ten days' notice. See Sess. Acts 1842-43, pp. 71, 72.

On the 26th of January, 1850, an act was passed authorizing the state to guarantee the payment of certain bonds of the city of Petersburg to the amount of $323,500 (see Sess. Acts, 1849-50, p. 57); and as indemnity against any loss which might result to the state in consequence of such guaranty, the said city of Petersburg pledged and mortgaged to the board of public works 3,235 shares of the capital stock of the Petersburg railroad company (No. 743, and dated 7th May, 1849).

It appears from the record that of the shares of stock in the Petersburg railroad company owned by the city of Petersburg and sold by said city to the appellant, Reuben Ragland, 3,235 shares had been pledged or mortgaged to the board of public works to indemnify the state for any loss it might sustain in consequence of its guaranty of the bonds of the city of Petersburg. The state was, therefore, doubly interested in any suit affecting the disposition of the stock or franchises of the company. First. Because by the act of 25th March,

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1843, it retained a lien upon the entire property of the company and its net earnings, conditioned to pay its then debt whenever there was a failure to pay a dividend of three per cent. per annum on
417 *all the stock the state held, which was to be paid semi-annually out of the gross receipts; and second, because the larger part of the stock sold to Ragland by the city of Petersburg was pledged to indemnify the state against any loss it might sustain in consequence of the guaranty by the state of the bonds of said city. In both cases the board of public works, standing towards the state and the railroad company and the city of Petersburg in the position of mortgagee, was a necessary and proper party.

As to the character of this stock, as well as to its disposition and sale, the state had a certain and valuable interest, and the board of public works, as the representative of the state, charged with certain duties and responsibilities prescribed by the statutes referred to, was a necessary and proper party.

The court is therefore of opinion that the original bill in this suit was properly filed in the circuit court of the city of Richmond, and that there was no error in the refusal of said circuit court to dismiss the same for want of jurisdiction.

This disposes of the question of jurisdiction.

The circuit court, however, after asserting, as we think, properly, its jurisdiction to entertain the plaintiff's bill, dismissed the bill upon certain grounds not necessary to be considered by this court, because from that order there is no appeal, and of that action of the circuit court there is no complaint here.

But it is insisted by the learned counsel for the appellants here, that the dismissal by the circuit court of the original bill necessarily carried with it a dismissal also of the cross-bill (so-called) filed by the appellant, Reuben Ragland; and it is insisted that it was error in said circuit court in not dismissing both bills, instead of making a decree upon the issues made by the cross-bill.

The bill filed by Ragland (called in the
418 proceedings a *cross-bill), was filed for a twofold purpose; first, to restrain and enjoin the city of Petersburg from instituting suit upon a certain promissory note for the sum of $249,982, executed by him, with others, as his sureties, for 3,500 shares of stock in the Petersburg railroad company, sold to him by said city, upon the alleged ground that by express covenant of said city with him, said city had agreed not to demand or require payment of the principal of said debt so long as said stock, or the greater part thereof, should continue to be held by him; and second, to enjoin and restrain the said city of Petersburg from selling said stock which had been hypothecated as collateral security for the payment of said note, until it should be determined what was the character and nature of the 3,235 shares of stock sold and now held by said city as collateral (above referred to), whether the same was common stock or guaranteed and preferred stock.

The formal prayer of the bill (after convening all the parties interested) was to enjoin and restrain the city of Petersburg both from instituting suit on said note and from selling said stock; and the court was asked to enter its decree "determining and establishing the true character and status of the aforesaid 3,235 shares of stock, and what are the rights and privileges, preferences and advantages appertaining and belonging thereto, and what are the rights and duties of the holders and owners of said 3,235 shares of stock, and of the Petersburg railroad company and its officers and agents in respect to the same."

An injunction was awarded in accordance with the prayer of this bill filed by Ragland, and after protracted proceedings and most voluminous depositions, the circuit court determined and adjudicated the very points submitted to it by said bill and proceedings under it.

419 *It is now insisted by Ragland, who filed this bill asking for an adjudication of these questions, and who, of all the parties, is the only appellant, that the circuit court erred in not dismissing his bill at the same time the original bill was dismissed. In other words, after invoking and receiving the extraordinary jurisdiction in his behalf of said circuit court by way of injunction, and asking the adjudication of the court upon the questions he submitted to it in his bill, he now insists the court had no jurisdiction to pass upon the questions submitted alone by him, and that the dismissal of the original bill carried with it the dismissal of his cross-bill also.

The court is of opinion, that the dismissal of the original bill in this case did not carry with it necessarily a dismissal also of the cross-bill. Indeed it would have been error to have dismissed the latter bill without adjudicating the questions therein submitted to the court.

Whether the bill filed by Ragland be regarded simply as a cross-bill, or as a cross-bill in the nature of an original bill, the circuit court had jurisdiction to pass upon and adjudicate the questions submitted to it in that bill, and to retain it for that purpose after the dismissal of the original bill; and such dismissal did not oust said court of its jurisdiction. A cross-bill is generally brought for one of two purposes, either to obtain a necessary discovery of facts in aid of the defense to the original bill, or to obtain full relief to all parties touching the matters of the original bill. A cross-bill is also necessary to enable a defendant to have a decree against a co-defendant. Story's Eq. Pl. §§ 389, 392. In 2 Barb. Ch. Pract., p. 129, it is said: "The connection of the matter of a cross-bill, be it per se legal or equitable, with the subject matter of the original bill, gives the court jurisdiction of the cross-bill,
420 *of which it cannot be ousted by a dismission of the original bill."

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A cross-bill is proper whenever the defendants, or any or either of them, have equities arising out of the subject matter of the original suit which entitle them to affirmative relief which they cannot obtain in that suit. See Jones v. Smith, 14 Illi. R. 229; Clay v. Wickliffe, 1 Dana R. 589. A cross-bill is always necessary when the defendant is entitled to some positive relief beyond what the scope of the complainant's suit will afford him. 2 Barb. Ch. Pr. 129; Brown v. Story, 2 Paige R. 594. The affirmative relief sought by Ragland, one of the defendants in the original bill and the sole plaintiff in cross-bill, was to enjoin the sale of the stock which he had hypothecated as collateral security with the city of Petersburg, at least, until the character of that stock as "preferred" or "common" stock could be determined by adjudication of the court. This was so connected with the matter of the original bill as to be a proper subject of a cross-bill, but at the same time a matter of which the jurisdiction of the court could not be ousted by a dismission of the original bill.

It is insisted, however, by one of the learned counsel for the appellees, that the city of Petersburg, whom the plaintiff in the cross-bill seeks to enjoin, was not a party to the original bill, and that indeed the so-called cross-bill must be treated as an original bill, and has none of the features of a cross-bill, because it makes new parties and introduces new and independent matter. It is true that in the original bill the city of Petersburg is not formally made a party defendant and called upon to answer; but the city of Petersburg does come in and answer the bill. Whether it filed a formal petition, as it might have done, and asked to be made a party to a suit in which its interest were so vitally affected, the 421 record does not disclose; *but the record does show that an answer to the original bill was filed by the city of Petersburg, and that the case was brought on to be heard, among other papers in the cause, upon the answer of the city of Petersburg, and throughout the case was treated as a party to the suit. But conceding that Ragland's bill must be held to be an original bill, and not a cross-bill; still, in the view we take of the case, the circuit court of the city of Richmond had jurisdiction of the cause.

The argument is that if the bill be treated as an original bill at the time it was filed, the state of Virginia had parted with her interest in the stock in question, having released it in favor of the city of Petersburg, and that therefore the board of public works was not a proper or necessary party; and that there was nothing left to which the jurisdiction could attach.

It is true that the state had in October, 1873, released its mortgage on the stock which was pledged by the City of Petersburg on the 27th of May, 1850, to indemnify the state against any loss it might sustain in consequence of its guarantee of the bonds of said city; but it is also true that the state held a mortgage "on the whole property, real and personal, of which the Petersburg railroad company were the owners," authorized and required to be taken by the board of public works under the act of March 25th, 1843. At the time of the filing of Ragland's bill, whether there was a subsisting mortgage in favor of the state or not, the state being the mortgagee in a mortgage executed as directed by the board of public works, and whether it had been released or not, it was still a question in which the state was interested, and the board of public works was therefore a "necessary and proper party."

The court is therefore of opinion that the circuit court of the city of Richmond 422 had jurisdiction to determine *and adjudicate the questions raised in the cross-bill filed by Reuben Ragland, and that the dismission of the original bill by the court did not oust the jurisdiction of the court as to the matters presented by the cross-bill.

It is a noteworthy fact, and one to us incomprehensible, that of all the parties to the original and cross-bills, the only one who now questions the jurisdiction of the circuit court is the party who came into that court invoking its jurisdiction for relief, and asking its protection by way of injunction, and a determination of the character of the stock before it should be sold to prevent a sacrifice, now when the injunction has been awarded, and the very question submitted by his bill has been adjudicated, objects that the court was without jurisdiction, and that it was error in the court below not to have dismissed his own bill.

We think the circuit court was right in retaining the cross-bill and adjudicating the questions raised by it. All the parties interested were before the court. It had jurisdiction of the subject matter and the parties. It ought not, after protracted and costly litigation, to have dismissed the cross-bill and turned the parties over to another tribunal to litigate the same questions. In furtherance of a favorite maxim of courts of equity, it ought to have put an end to the litigation between the parties, having all the parties before it and doing justice to all. See Rhea v. Jordan, 28 Gratt. 678; Mettart v. Hagan, 18 Gratt. 231; Clarke v. Long, 4 Rand. 452.

The court is further of opinion that there is no error in the decree of the circuit court in dissolving so much of the injunction order as enjoins and restricts the city of Petersburg from further prosecution of the action of debt brought by said city of Petersburg as plaintiff, and now pending in the hustings court of the city of Petersburg against Reuben Ragland, Lancaster, 423 Brown & Co., *T. T. Broocks, S. A. Plummer and William R. Mallory, defendants, and also from instituting or prosecuting any other action or suit whatever upon the promissory note for two hundred and forty-nine thousand nine hundred and eighty-two dollars, executed by Reuben Ragland and others, as his sureties, to the

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city of Petersburg, in part payment for the thirty-five hundred shares of the stock of the Petersburg railroad company held by said city as collateral security for said note. And this court concurs with the circuit court of the city of Richmond in the opinion that the thirty-two hundred and thirty-five shares of the capital stock of the Petersburg railroad company, in the bill and proceedings mentioned and embraced in certificate number seven hundred and forty-three, issued by said company, and now held by said city as collateral security for the note of said Ragland and others, and which was derived originally from the state of Virginia, is entitled to a dividend of one and one-half per cent. per share semi-annually, to be paid out of any earnings of the said company, and that in the event of any semi-annual dividends being declared upon the common stock of said company exceeding said one and one-half per cent., the said stock is entitled, in addition to said one and one-half per cent. chargeable upon the gross earnings of said company, to receive out of the net earnings of said company a sum sufficient to make its aggregate dividend equal to that received by other stockholders, and that in case of default of the company to pay said one and one-half per cent. semi-annually, the board of public works may be required to foreclose the mortgage made to secure said payment and to realize by a sale of the corporate property in said mortgage mentioned the sum of one hundred and sixty-three thousand five hundred dollars, to be divided ratably among the holders of the said
424 *thirty-two hundred and thirty-five shares of the said stock.

This court, adopting the views of the said circuit court expressed in the clear and able opinion filed with the record in this cause, is of opinion that there is no error in the decree of the said circuit court, and that the same be affirmed.

Staples and Burks, J's, concurred in the opinion of Christian, J.

Decree affirmed.

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425 *Coleman's Adm'x v. Anderson.

November Term, 1877, Richmond.

Absent, MONCURE, P.

Equitable Relief.*—*Quaere:* If a party against whom a judgment has been rendered in a court of law, may come into equity to set up payments he has made to the attorney of the plaintiff in the action at law, where it is insisted by the plaintiff at law that the debtor was forbid to pay to the attorney, and the attorney was so informed by the plaintiff.

This was an appeal from the decree of the circuit court of Caroline county affirming a decree of the county court. It was a bill by Benjamin Anderson to enjoin a judgment for $300 with interest from the 6th of March, 1860, and costs, which Coleman's administratrix recovered in the circuit court of Caroline county in May, 1866, against said Anderson and Henry McCalley. The grounds on which the plaintiff sought to enjoin the judgment, was, that John J. Chew was the counsel for the plaintiff in the action in which the judgment was recovered, and that he had paid to Chew in September, 1867, one year's interest on the judgment; that he paid to Chew in April, 1868, $100, and in November, 1868, $100, and in January, 1870, $75; that in May, 1870, he made an agreement with Solon T. Coleman, who he believed to be the agent of Coleman's administratrix, by which said Coleman agreed to take in full of said judgment $110, and that he sent to Coleman a check for the money, which he kept until the 10th
426 of April, 1871, *and then sent it back to the plaintiff; and plaintiff enclosed it in an envelope directed to Coleman directed to his postoffice; and that the money was still in bank, as he believes; that notwithstanding all this, Coleman's administratrix had sued out an execution upon the judgment without any endorsement of credits upon it, which was then in the hands of the sheriff. The injunction was granted.

Coleman's administratrix answered the bill. She denied that Chew was authorized to collect any money on the judgment except the $18. That in March, 1868, Anderson had come to see her and told her that Chew proposed to compromise and settle the debt by the payment of $100 a year, provided respondent would agree to it, and that she did then and there, in the presence of several persons, distinctly inform said Anderson that she would not assent to it; and moreover stated to Anderson that he was not to pay to the said J. J. Chew any money on the said judgment, but that he was to settle with her; that she afterwards informed Chew what she had said to complainant, and told him to collect no money from him. She avers she has never received one cent from said Chew on account of this debt of Anderson, nor did he ever inform her that he received any part of it.

As to what is said in the bill in respect to Solon T. Coleman, she only knows that some time in 1870 he told respondent that he had a conversation with Anderson or his attorney, and he had sent him a check or draft in full of the said debt; that he had taken it with the understanding that if it was all right and approved by this respondent, then it would be a bargain. She at once refused and rejected it; and she understands and believes the draft was in a short time returned, or tendered by said Solon T. Coleman to the complainant
427 or his friend *or attorney; that Solon T. Coleman or no one else is or was her attorney or agent to compromise the debts due the estate of the testator; that Solon T. Coleman was not informed at the time he brought her the draft as to the true condition of the judgment and amount due,

*Equitable Relief.—The principal case is cited in Va. ining Co. v. Wilkinson, 92 Va. 100, for the maxim that equity will not grant relief where there is a plain and adequate remedy at law. See also, Miller v. Miller, 25 W. Va. 503.

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and had he been her agent and entered into such a contract as it is alleged he did, it would not have been binding upon him or her, because it was through mistake on his part.

A number of witnesses were examined in the case, and the cause coming on to be heard on the 19th of September, 1871, the court perpetuated the injunction with costs; and on appeal to the circuit court, that court affirmed the decree. Coleman's administratrix thereupon applied to this court for an appeal; which was allowed.

Welch, for the appellant.

John Meredith, for the appellees.

Anderson, J. The court is of opinion that the plaintiff below had, and still has, upon the case made by his bill, a plain and adequate remedy at law, by motion, on reasonable notice, to quash the execution in the circuit court which rendered the judgment, or before the judge thereof in vacation. (Code of 1873, p. 1178, § 40.) And nothing appearing on the face of his bill, or in the pleadings or evidence, from which it could be inferred that his remedy at law would be unavailing or inadequate, and that there was a necessity for invoking the aid of a court of equity, upon the authority of Morrison v. Speer, 10 Gratt. 228, and Beckley v. Palmer, 11 Gratt. 625, the court of chancery had no jurisdiction to hear and determine his case. In the former case Judge Daniel, who delivered the opinion concurred in by the other judges, 428 *says: "I can see nothing in this case on which to ground the jurisdiction of a court of chancery. The original bill sets out a single execution, and payments made to the sheriff in satisfaction of it, which had not been fully credited. No reason is alleged why the appellee had not applied, or might not still apply to a court of law from which the execution issued to remedy the injustice of which he complained; and there is an entire absence from the case of those peculiar features which induced this court, in the case of Crawford v. Thurmond, 3 Leigh 85, to sanction the interference of the chancellor." Every word of the foregoing remarks might be spoken with equal appropriateness to this case as to that, except that the payments are alleged in this case to have been made to the judgment plaintiff's attorney instead of to the sheriff, as in that—an immaterial difference.

In the other case the opinion was delivered by Judge Lee, in which Moncure and Samuels J's, concurred—a majority of the whole court. Neither of the other judges dissented. Allen, J., concurred in affirming the decree, upon another ground stated in the opinion, but expressed no dissent to the opinion on this ground. Daniel concurred in affirming, but does not say on what grounds. In the opinion, Judge Lee says: "I apprehend a party to be entertained in a court of equity upon a case of this character ought to allege some reason why its aid is invoked, instead of seeking his remedy in the court of law. It should appear that the latter could afford him no remedy, or an inadequate one, or that he had been deprived of the opportunity of seeking it without any default on his part, or some circumstance should be shown furnishing a reason for withdrawing the matter from the cognizance of the appropriate tribunal, and carrying it into the court of chancery." And as the judge said in that case, it may be said in this: 429 "nothing *of the kind is shown here; but for aught that appears, the matter might have been as well tried (in this case, we think, better tried), and as full redress afforded in the court of law as in the court of chancery."

Judge Lee then says the case of Crawford v. Thurmond, supra, is not in conflict with the foregoing views. "That case," he says, "involved several complicated questions of law and fact stated in the opinion of Judge Carr, and which he thought could be better tried in the court of chancery than the law court, and there was an equitable right involved more appropriate for the jurisdiction of the former tribunal than the latter." This is an authoritative judicial interpretation of that case. There are no such reasons for entertaining chancery jurisdiction in this. There is no equitable right involved here more appropriate for the jurisdiction of a court of chancery than a court of law, and there are no complicated questions of law and fact which could better tried in the former court than in the latter. On the contrary, the questions of fact are not complicated, but their solution depends on testimony which is very conflicting, and the court of law may better evolve the truth by having the witnesses before it, observing their manner of giving their testimony, their intelligence, their bearing and moral tone, the agreement of the testimony with the probabilities of the case, and from these circumstances, and their general standing in the community, may be better qualified to decide what weight should be given to their testimony respectively.

In this there was no demurrer to the bill for want of jurisdiction or plea to the jurisdiction. But the bill does not show on its face proper matter for the jurisdiction of a court of chancery. Section 20 of chap. 167, p. 1092, Code of 1873, which allows no exception for want of jurisdiction, unless it be taken by plea in abatement, is applicable only when the bill shows on its face 430 proper *matter for the jurisdiction of the court. When the bill or the whole record does not make a case which gives the court jurisdiction, it is bound to notice it, whether it be the court of trial or the appellate court, although no exception has been taken to its jurisdiction. No court can hear and determine a cause of which it has no jurisdiction. Hence objection may be made for the first time to the jurisdiction in the appellate court where the want of jurisdiction appears on the face of the bill and proceedings. It is the policy of our law that the two jurisdictions should be

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kept separate, and it is important that the decisions drawing the line of separation between them should be uniform and stable. If it be understood that in such cases the party aggrieved will be confined to his remedy by motion to quash in the court of law, unless by the averments of his bill it appears that it would afford him inadequate relief, or for other reasons was not his appropriate remedy, it would be a saving of great expense to the litigants, and could work no injustice. The court is of opinion, therefore, to reverse the decree of the circuit court, to dissolve the injunction, and to dismiss the plaintiff's bill with costs, without prejudice, however to the right of the plaintiff to prosecute his remedy at law.

Burks, J., concurred in the opinion of Anderson, J.

Staples, J., did not concur in the opinion of Anderson, J.; but as, if he dissented, the decree of the court below would be affirmed, by reason of the court being equally divided, which result he thought would be worse than that which would follow from the effect of Judge Anderson's opinion, he therefore concurred in the results of that opinion.

Christian, J., dissented. He thought the decree below should be affirmed.

Decree reversed.

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431 *Balt. & Ohio R. R. Co. v. Wightman's Adm'r.

November Term, 1877, Richmond.

1. **Foreign Corporations—Removal of Causes.***—Where a railroad company which was incorporated in another state, leases a railroad lying in this state, and operates the same as owner thereof, and an injury occurs on said railroad, the person having the right of action for such injury may sue the railroad company in the courts of this state, and such company has no right to remove the suit to the federal court.
2. **Statute—Averments.**†—In an action under ch. 145, §§ 7-9, Code of 1873, it is not necessary to aver in the declaration for whose benefit the suit is prosecuted.
3. **Death by Wrongful Act—Elements of Damage.**—In such an action against a railroad corporation for the killing of a person evidence is admissible to show the condition and circumstances of the family of the deceased, his business qualifications, the condition of his health, the amount he was realizing annually from his employments, the value of his services to his family, and the damage suffered by them in the loss of his care, nurture and instruction.
4. **Same—Assessment of Damages.**—In such an action where the deceased has left a wife and children the jury, in ascertaining the damages, may properly assess the same with reference to the pecuniary loss sustained by the wife and children—first, by fixing the same at such sum as would be equal to the probable earnings of the deceased during the probable period of his life, if he had not been killed, taking into consideration his age, business capacity, experience, habits, health, energy and perseverance; and, second, by adding thereto the value of his services in the attention to and superintendence and care of his family, and in the education of his children, whereof they are deprived by his death.
5. **Same—Solatium for Wounded Feelings.**—*Quaere:* Whether in such an action the jury, in ascertaining the damages, are limited to the pecuniary loss sustained by the family of the deceased, or whether they may consider the *physical pain of the deceased, or the mental suffering of the surviving family, or the loss to them of the parent's moral and intellectual training.

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6. **Same—Evidence—Policies of Insurance.**—In such an action it is not competent for the defendant to show that the deceased held policies of insurance on his life for the benefit of his wife and children, and that since his death the amounts called for by such policies have been paid over to his widow and children.
7. **Carriers of Passengers — Negligence—Presumptions.**—When injury or damage happens to a passenger by the breaking down or overturning of a railroad train, or the breaking down of a bridge, or wheel, or axle, or by any other accident occurring on the road, the presumption, *prima facie*, is, that it occurred by the negligence of the railroad company, and the burden of proof is on the company to establish that there has been no negligence whatsoever, and that the damage has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent.
8. **Same—Same—Degree of Care.**—The law in tenderness to human life and limbs holds railroad companies liable for the slightest negligence, and compels them to repel, by satisfactory proofs, every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in

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***Removal of Causes—Principal Case Reversed.**—In so far as the principal case and Balt. & O. R. R. Co. v. Noell, 32 Gratt. 394, hold that a corporation of one state by carrying on business in another state, *e. g.* by leasing the property and franchise of a corporation of that other state, thereby becomes a citizen of that other state and loses the right of removal of the cause to the federal courts when sued in the latter state, they are reversed by the supreme court of the United States in 14 Otto 5, reported in 4 Am. & Eng. R. R. Cas. 105.

†**Statute—Averments.**—In Mathhews v. Warner, 29 Gratt. 570, the principal case is affirmed as to the rule laid down by it that in an action under ch. 145, §§ 7-9, Code of 1873, it is not necessary to aver in the declaration for whose benefit the action is brought. See also, Balt. & O. R. R. Co. v. Noell, 32 Gratt. 394; Barton's Ch. Pr. (2d Ed.) 417; Mahany v. Kephart, 15 W. Va. 622, 624; Madden v. Ry. Co., 28 W. Va. 613; Searles v. Kanawha & Co., 32 W. Va. 375, 9 S. E. Rep. 250; Fisher v. W. Va. & P. R. Co., 39 W. Va. 366, 19 S. E. Rep. 578; Couch v. C. & O. R. Co., 45 W. Va. 55, 30 S. E. Rep. 149.

Questions Discussed.—In the case of B. & O. R. R. Co. v. Noell, 32 Gratt. 394, many of the questions involved in the present case are discussed. See that case, and *note* on the questions decided in the second, fifth and seventh headnote, of the principal case.

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such case will make such carriers liable in damages under the statute.

9. **Same—Same—Same.**—The Baltimore and Ohio Railroad Company, as a common carrier of passengers, was bound to exercise the utmost degree of diligence and care in safely transporting William A. Wightman, the deceased in this case, on his journey.

10. **Same—Same—Same.**—The slightest neglect, against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, renders such company liable in damages for such death.

11. **Same—Same—Repairs to Track.**—The said railroad company is held by the law to the utmost care, not only in the management of its trains and cars, but also in the structure, repair and care of the track and bridges, and all other arrangements necessary to the safety of passengers.

12. **Continuance—Absence of Material Witness.***—In order to entitle a party to a continuance on the ground of the absence of a material witness, it is necessary for him to *show that he has used due diligence to procure the attendance or deposition of such witness, and upon such a matter the appellate court will not disturb the action of the court below, unless such action was plainly erroneous.

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This was an action on the case brought in the circuit court of Shenandoah county, under ch. 145, §§ 7-9, Code of 1873, by George W. Koontz, administrator of William A. Wightman, against the Baltimore and Ohio Railroad Company, to recover damages for the death of his decedent, who died from injuries received at the well-known Narrow Passage accident, which occurred on the Valley railroad, which was then leased and operated by the Baltimore and Ohio Railroad Company. The jury rendered a verdict in favor of the plaintiff for $5,000, with interest from March 6th, 1876, for which sum the court gave judgment. To this judgment the defendant obtained a writ of error and supersedeas from one of the judges of this court.

There was a demurrer to the declaration, which was overruled, and the defendants took eight bills of exceptions to the rulings of the court. The ground of the demurrer was that the declaration did not state for whose benefit the action was prosecuted. The first bill of exception was to the refusal of the court to transfer the cause to the United States court. This was on the ground that the plaintiff was a citizen of Virginia and that the defendant was a foreign corporation chartered by the state of Maryland and was a citizen of Maryland. But it was in proof that the defendant was, at the time of the institution of this suit and still was lessee of the Valley railroad from the town of Strasburg, in Shenandoah county, to Harrisonburg, in Rockingham county.

The 2d, 3d, 4th and 5th exceptions were taken to rulings of the court admitting evidence as to who constituted the family of Wightman; as to his marriage with Mrs. *Wightman; as to his relations with his family, how he provided for them, his capacity to instruct and prepare his children for education, and the annual value of his services in his employments, and also in managing and superintending the business of his family. The 6th exception was to the refusal of the court to permit the defendant to prove that Wightman held policies of insurance on his life for at least $5,000 for the benefit of his wife and children, and that since his death the amount called for by said policies had been paid over to his wife and children.

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The 7th exception was to the instructions given to the jury on the motion of the plaintiff. These instructions are set out in the opinion of Judge Staples. And the 8th was to the refusal of the court to continue the cause. The facts are sufficiently stated in the opinion.

Williams & Brother, for the appellants.

M. Walton, for the appellee.

Staples, J., delivered the opinion of the court.

A preliminary question in this case to be settled, is, whether the circuit court erred in refusing to remove the case to the circuit court of the United States for the western district of Virginia. The defendant, the Baltimore and Ohio Railroad Company, is a corporation chartered by the state of Maryland. It is also, and was when this suit was brought, the lessee of a railroad from Strasburg to Harrisonburg, in this state, belonging to the Virginia Midland railroad company, a Virginia corporation, and was controlling and operating said railroad under said lease, as owner and proprietor, at the time of the injuries committed, as set forth in the declaration. *The defendant has not produced the lease nor given evidence of its contents. We are, therefore, not informed as to the precise terms and conditions upon which the lease was granted. All that we know is, that the defendant is operating the road as owner and exercising the powers and privileges granted its lessee by the charter of incorporation. What, then, is the status in Virginia of the defendant, a Maryland corporation, with reference to this road?

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The cases generally agree that a corporation created by the laws of one state can have no legal existence outside of the limits of that state. It may, however, make contracts, transact business, and even exercise corporate functions in another state with the consent of the latter, express or

*Continuance—Absence of Material Witness.—In Matthews v. Warner, 29 Gratt. 570, it is held in accordance with the principal case that in order to entitle a party to a continuance on the ground of the absence of material witness it is necessary that he should have used due diligence to ascertain the materiality, and to procure the attendance of the witness, see further, Dimmey v. R. Co., 27 W. Va. 51; Norfolk, etc., Ry. Co. v. Stevens, 97 Va. 635; Carrico v. W. Va. Cent. R. Co., 35 W. Va. 404, 14 S. E. Rep. 15; Carrico v. W. Va. Cent. Ry. Co., 39 W. Va. 95, 19 S. E. Rep. 375.

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implied. In the Baltimore and Ohio R. R. Co. v. Gallahue's adm'r, 12 Gratt. 655, this court decided that under the statutes authorizing that company to construct its road across the territory of Virginia, the Baltimore and Ohio Railroad Company, as to such road, was to be regarded as a Virginia corporation.

In Railroad Company v. Harris, 12 Wall. U. S. R. 65, the supreme court of the United States decided that the Baltimore and Ohio Railroad Company having under an act of Congress constructed a lateral branch of its road in the District of Columbia, was by reason thereof liable to suit in that district as if it had been an independent corporation of that locality.

The court did not rest its decision upon the ground, however, that the act of congress had made the Baltimore and Ohio Railroad Company a corporation of the district, but upon the ground that the act operated as a license to the company to construct its road there; and having accepted the license, the company had placed itself in the position of a domestic corporation for all the purposes at least of being sued 436 in that locality. The *court say they could see no reason why one state may not make a corporation of another state, as there organized and conducted, a corporation of its own, quo ad hoc any property within its territorial limits.

See also Maryland v. Northern Central R. R. Co., 18 Mary. R. 193; Sprague v. Hartford, Prov. & Fishk. R. R. Co., 5 R. I. 233; Goshen v. Supervisors, 1 West Va. 308; The Penn. R. R. Co. v. Sly, 65 Penn. St. R. 205; Pomeroy v. New York & New Haven R. R. Co., 4 Blatchf. R. 122. The Baltimore and Ohio Railroad Company, as a corporation of Maryland, can of course, have no legal existence outside of that state, but as the lessee of a Virginia railroad company, exercising all the functions and powers of the latter, it may be subject to all its duties and obligations. This must necessarily be so, upon the authority of the cases cited, if that company is acting under any license granted by the state of Virginia. Under such circumstances, so acting, it must be treated as a Virginia corporation quo ad hoc the line of railroad under its control, so far at least as its liability to our own citizens is concerned. It can only escape these consequences by showing that it is exercising corporate powers here without permission of the state, and consequently that it is a tort feasor or trespasser. Whether the company obtained the lease under any statute or provision in the charter of Virginia roads does not appear—none was shown to the court and none was claimed in the argument. It may be a very grave question whether a corporation of this state can be permited to convey its franchises to a foreign corporation, so as to enable the latter to exercise corporate rights and powers here without some such authority. The purposes of this case do not require a decision of this question.

If the Baltimore and Ohio Railroad Company is controlling and operating the 437 Valley road without permission *of the state, it certainly cannot therefore claim exemptions and immunities to which it could not be entitled if it had obtained such permission. The company derives all its powers and privileges from the charter of the company which owns the road; it must be subject to all the duties imposed on that company, and among these is the obligation to answer in our own courts to our own citizens for any damage resulting from its conduct.

If under authority of law or on principles of comity a foreign corporation is allowed to hold property and exercise corporate functions in this state, it must also submit to the jurisdiction of our courts in controversies with our citizens. If it claims the privileges and immunities of a domestic corporation, it must also perform the duties and answer to all the liabilities of a Virginia corporation.

It is estopped by its conduct—by its exercise of corporate functions here under a Virginia charter—to deny that it is a Virginia corporation for all the purposes of Virginia jurisdiction.

The learned counsel for the defendant referred to the case of Baltimore & Ohio R. R. Co. v. Casey, decided by the supreme court of Ohio, 28 Ohio Stat. R. 218, in which a somewhat different view is taken from that which is here presented. It will be seen that the decision in that case is, in a great measure, based upon the statute of Ohio, not in force here. The court was not unanimous, and we think the dissenting opinion contains the more satisfactory doctrine upon this question. We are, therefore, of opinion that the circuit court did not err in refusing to remove the case to the circuit court of the United States.

The next error assigned is in the action of the court overruling the demurrer to the declaration.

438 *It is contended that in an action under our statute, by the personal representative of the person killed, it is necessary to aver in the declaration for whose benefit the suit is prosecuted—whether the family of the deceased or for his creditors—that otherwise it will be impossible for the defendant to come prepared to meet all the issues arising on the trial. The first, second and third sections of the act of 1872, incorporated in the Revised Code of 1873, ch. 145, p. 996, comprise all the enactments in our laws upon this subject. We think it is very clear that the framers of these enactments had before them at the time, the English and New York statutes on the same subject, from which the statutes of the different states, of a similar character, are generally taken. It will be perceived that our legislature has omitted some of the provision of those statutes and materially changed the phraseology of others. Thus the English statute requires the plaintiff to file with his declaration a full

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particular of the person or persons in whose behalf the action is brought. Our statutes contain no such provision, and the very fact that it is omitted, while other provisions of the English statutes are adopted, would seem to indicate a deliberate purpose on the part of the legislature to dispense with any such statement.

The first section of our statute and the first section of the English and New York statutes, respectively, are almost identically the same. All of them declare that when the death is caused by the wrongful act or neglect of any person or corporation, and the wrongful act or neglect be such, if death had not ensued, as would entitle the party injured to recover damages, then the person or corporation shall be liable in an action for damages, notwithstanding the death of the person injured, to be brought by and in the name of the personal representative. The New York statutes pro-
439 vide that the action shall be for *the exclusive benefit of the widow and next of kin of the deceased. The Virginia statutes does not declare for whose benefit the action is brought, or that it is for the benefit of any one. It authorizes the jury to award such damages as to it may seem fair and just, and to direct in what proportions they shall be distributed to the wife, husband, parent or child—the amount recovered to be paid to the parties just named, as the case may be, in such proportions as the jury shall have directed, or if they have not directed, according to the statute of distributions; but if there be no husband or wife, parent or child, the amount recovered shall be assets in the hands of the personal representative to be disposed of according to law.

In the cases under the New York statutes and in the cases under the statutes of Indiana, Missouri and Illinois, which are taken from those of New York, it has been held that the declaration must aver there is a widow and next of kin. But these decisions are uniformily placed upon the ground that the damages are not assets of the estate, but belong exclusively to the widow and next of kin. As the action cannot be entertained unless there be a widow and next of kin, their existence must be averred in the declaration and proved on the trial. Safford v. Drew, 3 Duer. R. 627; Chicago and Rock Isl. R. R. Co. v. Morris, 26 Illi. R. 400; Woodward v. The Chic. and Mich. West. R. R. Co., 23 Wisc. R. 400; The Ind. and Pittsbg. and Chic. R. R. Co. v. Keely, adm'r, 23 Ind. R. 133.

These cases proceed upon the obvious ground that whenever damages are limited to a class, the declaration must show there is such a class, otherwise the foundation of the action fails.

Under the Virginia statute the damages, it is true, are given first to the husband or wife, parent or child, but if
440 *neither of these is alive, the action then may be maintained and the damages will be assets to be disposed of according to law. In this respect the Virginia statute differs from that of all the other states. As with us the damages are not for the exclusive benefit of the family of the deceased, it would seem not to be essential that the declaration shall allege that there is a family or that the action is prosecuted for their benefit. It is very true the fact that the deceased left a widow and children dependent upon him for support, will, as a general rule, very materially affect the amount of the recovery. There is, however, no rule of law which compels a party to state in his declaration every matter which may enhance the damages. In an action of trespass for breaking and entering the plaintiff's house, he may give in evidence without specially stating it, under the general allegation of alia enormia, the debauching of his daughter, or the battery of his servants, and with us it is not even necessary to make the allegation of alia enormia. Code of 1860, § 12, ch. 171.

If the declaration ought to state that the deceased left a family for whose benefit the suit is prosecuted, it should go further and state the condition and circumstances of the individual members of the family. And if there is no family, it should state whether there are other relatives of the deceased, their circumstances and condition; also the number and claims of creditors, the age, the mental and physical powers and capacity of the deceased, his avocation and value to his family. All these bear directly upon the question of damages, and all may be the subject of investigation by the jury. Can any good reason be given for not stating them in the declaration, if it be necessary to apprise the defendant of any matter which may materially affect the amount of recovery?

441 *The statute was designed to give to the personal representative a right of action wherever the deceased would have had it had he lived. The declaration must, therefore, always state such facts as will show a good cause of action on the part of the deceased himself. And this would seem to be the only test prescribed by the statute. The defendant knows that the damages are primarily for the benefit of the family, for so the law declares, and he can very rarely be surprised by the evidence upon this point. The manner in which the damages are to be distributed is no concern of the defendant, and not under the control of the plaintiff. It is a question for the jury exclusively, not involved in the issue. It is very probable that no serious inconvenience would result from requiring the plaintiff to state for whose benefit the action is brought, but such an averment is not essential to the action. If we require it to be made merely because it has a natural bearing upon the question of damages, it will be difficult to assign a limit to allegations of that character. In simplifying all the proceedings and pleadings, we best promote the object of the statute. We are, therefore, of opinion that the demurrer to the declaration was properly overruled.

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The defendant's second and third bills of exception were taken to the ruling of the court in admitting certain testimony introduced by the plaintiff. The defendant's objection to this testimony is based upon the ground, that as the declaration did not aver that the suit is for the benefit of the family of the deceased, the plaintiff ought not to be permitted to prove any fact relating to their condition or circumstances by way of affecting the amount of damages to be recovered. This objection was considered and disposed of in discussing the demurrer to the declaration. As it is unnecessary to aver that the action is for the benefit
442 of the family, the testimony is *admissible without such averment. If the declaration did not give the defendant sufficient information upon this point it might have been obtained by calling on the plaintiff to file with his declaration the bill of particulars provided for in our statute.

The defendant's fourth and fifth bills of exception set out the evidence offered by plaintiff, to show the business qualifications of the deceased, the value of his services to his family, the condition of his health, and the amount he was realizing annually from the employment in which he was engaged, as also the value of his services in attending to the business of his family.

As all the questions arising upon the admission of this evidence are also fully presented by the instructions given by the court to the jury, it will save time and induce to a clear understanding of the subject to consider the instructions in connection with the evidence. Before doing so it may be proper to advert very briefly to some well established principles of law governing in this class of cases.

Under the English and American statutes the courts have generally held that the damages must be assessed with reference to the pecuniary loss resulting from the death of the person injured, and that neither the physical pain of the deceased, nor the mental sufferings of the surviving family can be taken into the estimate. Shearman & Red on Neg., sec. 610; Field on the Law of Damages, and cases cited, sec. 630. Whether the same construction must be given to our statute may not be so clear. The question does not arise in this case, and no opinion is given or even formed on the subject. The plaintiff's instructions concede that the damages are to be fixed with respect to the pecuniary loss sustained by the family of the deceased. The defendant certainly cannot complain of this form of stating
443 the proposition. All *the cases agree that where the deceased has left a widow and children it is proper for the jury, in assessing the damages, to estimate the value of the support and maintenance properly derived from the deceased, the amount realized by him from his usual occupation, as also the loss of his care, nurture and instruction.

Some of the cases have gone much farther in holding that the jury may take into the estimate the loss of the family in reference to the parent's moral and intellectual training, upon the ground that such training, if judicially administered, would operate favorably upon the pecuniary interests of the children. Tilley v. Hudson River R. R. Co., 29 N. York R. 252. The instructions given by the court in this case carefully avoid all controverted points of this character. The propositions they affirm are such as have received the sanction of nearly all the courts. They inform the jury that in ascertaining the damages they shall assess the same with reference to the pecuniary loss sustained by the wife and children of the deceased:

First. By fixing the same at such sum as would be equal to the probable earnings of the deceased, taking into consideration the age, business capacity, experience and habits, health, energy, and perseverance of the deceased during what would probably have been his lifetime if he had not been killed.

Second. By adding these to the value of his services in the superintendence, attention to and care of his family and the education of his children, of which they have been deprived by his death. As was very properly said in Tilley v. Hudson River R. R. Co., 29 New York R. 252: "All these are elements of pecuniary success—component parts of that pecuniary capital, of the continued exercise and employ-
444 ment of which the children *were entitled to the benefits, and of which the wrongful act of the defendants deprived them."

The statute is regarded by the courts as remedial in its character—as affording compensation for injuries unknown to the common law—and is to be liberally construed to promote the objects the legislature manifestly had in view. And, therefore it is, the courts look to the relationship and dependent condition of the parties, the capacity and ability of the deceased, mental and physical, and, indeed, all the surrounding circumstances and situation of the family to enable the jury properly to estimate the loss sustained and to fix the measure of the damages. The evidence offered by the plaintiff in this connection, and upon which the instructions were based, was properly received; and the instructions correctly stated the law for the guidance of the jury. The cases bearing upon this subject may be found in Shearman & Red on Negligence, sec. 606 to 613; Redf. on Carriers and Bailees, 295 to 304; and in Field on the Law of Damages, page 490, chap. 21, where the statutes of the different states on this subject are given.

The court, at the request of the plaintiff, also gave the jury five other instructions, to which the defendant excepted. They are as follows:

I. When injury or damage happens to a passenger by the breaking down or overturning of a railroad train, or the breaking down of a bridge, or wheel, or axle, or by any other accident occurring on the road, the presumption, prima facie, is, that it

occurred by the negligence of the railroad company, and the burden of proof is on the company to establish that there has been no negligence whatsoever, and that the damage has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent.

445 *II. The law, in tenderness to human life and limbs, holds railroad companies liable for the slightest negligence, and compels them to repel, by satisfactory proofs, every imputation of such negligence.

When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such case will make such carriers liable in damages under the statute.

III. The Baltimore and Ohio Railroad Company, as a common carrier of passengers, was bound to exercise the utmost degree of diligence and care in safely transporting William A. Wightman upon his journey.

IV. The slightest neglect against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, renders such company liable in damages for such death.

V. Said railroad company is held by the law to the utmost care, not only in the management of its trains and cars, but also in the structure, repair and care of the track and bridges, and all other arrangements necessary to the safety of passengers.

We do not deem it necessary to enter into any discussion of the proposition of law involved in these instructions. It is sufficient to say that they are fully sustained by the elementary writers and by the opinions of the most respectable courts in this country. The decisions on this subject are given in Wharton on Negligence, § 627 to 661, inclusive; also, § 422 and the notes to these sections; Redfield on Carriers and Bailees, § 346, Farish & Co. v. Reigle, 11 Gratt. 697.

The defendant's sixth bill of exceptions is to the refusal of the court to receive the evidence offered by the defendant to show that the deceased, at the time of

446 *his death, held policies of insurance on his life to the amount of $5,000 for the benefit of his wife and children, and that since his death the amount called for by said policies had been collected and paid over to the widow and children. We think the court did not err in refusing to admit this evidence. It was clearly calculated to mislead the jury as to the issues they were to try. The mere fact that the family of the deceased received money from some other source would not justly influence the measure of compensation to be made by the defendant for injuries attributable to the misconduct of its employees and agents. The party effecting the insurance paid the full value for it, and there is no equity in the claim of the defendant to the benefit of a contract for which it gave no consideration.

It is said that Lord Campbell, the author of the English act, was of opinion that the money received on a policy of insurance by the family of the deceased, might be taken into account in assessing the damages. In this country the courts have uniformily held the contrary; and this view is the more just and reasonable. Althorpe v. Wolfe, 22 New York R. 355; Harding v. Town of Townshend, 43 Verm. R. 536; Pittsburg and Cin. R. R. Co. v. Thompson, 56 Illi. R. 138. See also the English case of Bradburn v. Great W. R. R. Co., L. R. 10 Exch. R. 1; Yates v. Whyte, 4 Bing. N. C. 272, 5 Scott 644.

The only remaining point to be considered was the refusal of the court to continue the case for the defendant. This point ought more properly to have been considered in the beginning, but it is taken in the order in which it is presented by the record, as set forth in the eighth bill of exceptions. The application for a continuance was upon the ground of the absence of a material witness. This witness, although in the service of the defendant, was a resident

447 of the state of Maryland. No *effort was ever made to take his deposition, although the case was pending on the docket for a considerable time. The witness was never summoned, the defendant relying upon his promise to attend the trial. He left the service of the company, and ceased to be subject to its orders, nearly ten days before the commencement of the trial. This fact alone ought to have satisfied the defendant not to rely upon the promise of the witness, but to take the necessary steps to procure his attendance or his deposition. There was an additional reason for the exercise of diligence. This case, with others against the same defendant, had been arranged as early as February, 1877, for trial in April following, and the judge of an adjoining circuit requested to preside. Under all these circumstances, we think the court very properly overruled the motion for a continuance. A motion of this kind is addressed to the sound discretion of the court under all the circumstances of the case, and this court will not reverse the action of the court below in such case, unless such action was plainly erroneous. Hewitt's case, 17 Gratt. 627.

Upon the whole, we are of opinion the judgment of the circuit court should be affirmed.

Judgment affirmed.

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448 *Taylor v. Cleary & als.

November Term, 1877, Richmond.

Absent, ANDERSON, J.

By a deed made on the 28th of July, 1821, certain land in said deed described, was granted by D to his grandson R, his executors, administrators and assigns, from and after the grantor's death, for and during his life only; and after his death the said piece of land to go to such person or persons as

See Camp v. Cleary, 76 Va. 140, for the sequel of the principal case.

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shall at that time answer the description of heir or heirs at law of the said R, and such person or persons shall take the said land under that description as purchasers under and by virtue of this deed, and not by inheritance as heirs of the said R—HELD:

1. **Real Estate—Construction of Deed—Purchasers.***—R took but a life estate in the land; and the persons who at the time of R's death answered the description of his heirs at law took as purchasers under the deed.
2. **Same—Rule in Shelley's Case.**—By the act of 1785 dispensing with the word "heirs" in the grant of an estate in fee simple, the grant to the remaindermen is a fee; but that act does not therefore extend the rule in *Shelley's* case to the estate given to R so as to enlarge it into a fee.

This was an action of ejectment in the corporation court of Norfolk, brought in December, 1870, by Nicholas F. Cleary, Margaret Cleary and Reuben St. John Cleary, the persons who, at the death of Thomas J. D. Reilly, answered the description of his heirs at law, against Babel Taylor, to recover a lot of land in said city. The case was submitted to the judge, who having heard the evidence, ren-
449 dered a judgment for the plaintiffs; *and the defendant excepted and spread the facts upon the record.

By a deed made on the 28th July, 1821, and admitted to record in the clerk's office of Norfolk borough on the same day, John Donaghee, of that borough, "for and in consideration of the natural love and affection which" he bore to his "grandson, Thomas John D. Reilly, of the same place, and for the sum of five dollars to" him, John Donaghee, "in hand paid by his father, Thomas Reilly," granted unto him, said Thomas John D. Reilly, his heirs and assigns, two pieces or parcels of land in said borough, to have and to hold as follows:

"Unto him, the said Thomas John D. Reilly, his heirs and assigns, from and after the death of the said John Donaghee, forever and in absolute fee simple; but I do hereby reserve and retain to myself a life estate in the said land, and mean that this conveyance to my said grandson shall take effect only at the time of my death; but without any other power over the said land in myself than the right to use and enjoy the benefits and profits thereof during my natural life."

And by the same deed the grantor also gives and grants unto his grandson the intermediate space or piece of land, situate between the other two, to have and to hold this last piece of land as follows:

"Unto him the said Thomas J. D. Reilly, his executors, administrators and assigns from and after my death, for and during his life only, and upon the conditions and subject to the restrictions hereinafter mentioned; and after his death the said piece of land to go to such person or persons as shall at that time answer the description of heir or heirs at law of the said Thomas J. D. Reilly, and such person or persons shall take the said land under that description as purchasers under and by virtue of this deed, and not by inheritance as heirs of
450 *the said Thomas J. D. Reilly, upon the terms and conditions before referred to. For that whereas I have erected upon the said piece of land a very expensive monument or mausoleum which I regard with great veneration, and would therefore wish it to be forever consecrated for the pious use for which it has been designed by me; now I do hereby solemnly enjoin and restrict my grandson from selling, alienating, mortgaging or disposing of the same in any manner whatever; and I do hereby give and grant to him the said land and mausoleum upon the condition that if he shall ever sell, give, lease, mortgage or in any way whatsoever alienate or dispose of the said land, or any part thereof, or should even attempt to make a deed of conveyance of the same to any person or persons whomsoever, then, and immediately thereupon, this deed shall cease and be void, and the said last-mentioned piece of land, together with the other two lots conveyed to him in fee, shall revert to and vest in his sister, Elizabeth M. D. Reilly and her heirs forever."

The defendant claimed under a deed dated July 23, 1867, from Thomas J. D. Reilly and wife to himself, conveying the piece of land between the two pieces conveyed to Thomas J. D. Reilly by the deed of John Donaghee, except the land on which the mausoleum stands. And the only question in the case is as to the estate which Thomas J. D. Reilly took in the said intermediate space or piece of land situate between the other two. On the application of Babel Taylor a writ of error and supersedeas was awarded by a judge of this court.

The case was argued by William Green, Scarbrough & Duffield, for the appellant, and by C. Robinson, Leigh Robinson, W. M. Chaplin and N. F. Cleary, for the appellees.

451 *Moncure, P., delivered the opinion of the court.

This case has been argued with a great deal of learning, research and ability by the counsel on both sides; who have cited a great many authorities in support of their respective views. But, in the view we take of the case, it depends upon a few plain principles which admit of no contradiction,

*__Real Estate—Construction of Will—Purchasers.__—In Robinson v. Robinson, 89 Va. 916, a testator left at his death a widow and two infant sons. By a clause in his will he said: 'I give to my children by her, and their descendants at their death, the remainder of my property." It was held that the words of the devise were not words of limitation, vesting the inheritance in the sons, in whom they create an estate for life only, but words of purchase, conferring a contingent remainder in their children, citing the principal case, and Moon v. Stone, 19 Gratt. 130; Smith v. Chapman, 1 H. & M. 240; Foxwell v. Craddock, 1 P. & H. 250; 2 Min. Inst. 351, 83, 404, 411, 412. See also, Walker v. Lewis, 90 Va. 578, citing the principal case, and Milhollen v. Rice, 13 W. Va. 536.

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and which require no citation of authority to sustain them.

Certainly a person can, lawfully, give an estate to another person for his life, and at his death to the person or persons who may then answer the description of heir or heirs at law of such other person, to be taken by him or them by purchase, and not by descent.

However the law may have favored, and may even yet favor, the application of the rule in Shelley's case, where it can be properly applied, its application may certainly be avoided by the donor of the estate, if he choses to do so and expresses his intention to that effect in plain and unmistakable language in the deed by which the estate is conveyed.

Whether he has done so in any given case, depends therefore upon his intention to do so, and his plainly expressing that intention in such case.

Of course he cannot abrogate a rule of law, or prevent its application to a proper case, however plainly he may express his intention to do so. The rule in Shelley's case is a rule of law, which in its application is generally, if not necessarily, contrary to the apparent intention of the author of the estate. It therefore overrules, or is paramount to such apparent intention.

The rule, as it seems to be correctly laid down in 2 Jarm. on Wills, 241, simply is, "that where an estate of freehold is limited to a person, and the same instrument contains a limitation, either mediate or
452 immediate, to his *heirs or the heirs of his body, the word heirs is a word of limitation—i. e., the ancestor takes the whole estate comprised in this term. Thus, if the limitation be to the heirs of his body, he takes a fee-tail; if to his heirs general, a fee simple."

Now the gift of an estate for life to the first taker, however plainly and expressly given, is not at all in conflict with the application of the rule. On the contrary, it is one of the two conditions which the rule contemplates and requires; and it exists in almost every case to which the rule applies. It cannot, therefore, be properly said that an intention in the author of the instrument to give a life estate to the first taker is at all in conflict with the rule. The other of the two conditions is, that at the termination of the freehold or life estate given to the first taker, the estate is limited by the same instrument to go to his heirs or the heirs of his body—the word "heirs" being used in its technical sense, to comprehend all his heirs forever. In such case the rule applies, and is paramount to the intention of the testator, either in regard to the latter or the former condition of the rule. But the question in such cases is, whether the limitation was intended to be "to his heirs or the heirs of his body" forever—that is, to the whole line of heirs of the first taker, or only to certain persons intended to be described by the use of those terms.

Sometimes, we know, that the word "heirs" is used in an instrument, and especially a will, to describe "children" or "issue," or some particular class of heirs; and sometimes the word "children," or some other word, is used to describe "heirs." This is a question of intention, depending on the terms of the instrument, construed altogether and in connection with the surrounding circumstances, or such of them as may be admissible evidence upon such a question. In deciding the
453 question *great weight must be given to the technical meaning of the word "heirs," which must be presumed to have been intended to be used in such technical sense in the absence of evidence of a plain intention to the contrary.

If the word "heirs" was intended to be used in its technical sense, then the rule applies, and there is an end of the question in the case. But if the word was intended to be used as a description or designation of particular persons who were to take by purchase, in contradistinction to those who would take by inheritance, as "heirs forever," then clearly the rule in Shelley's case does not apply; and the persons thus described as remaindermen are entitled to take by purchase.

The foregoing are the rules, which, in our opinion, apply to this case, and govern and conclude it, and according to them, the court is of opinion, that the donor, John Donaghee, intended to give the land in controversy in this case to his grandson, Thomas J. D. Reilly, for and during his life only; and after his death, to such person or persons as should, at that time, answer the description of heir or heirs at law of the said Thomas J. D. Reilly; such person or persons to take the said land under that description as purchasers under and by virtue of the deed by which the gift was made, to-wit: the deed of the 28th day of July, 1821, in the proceedings mentioned, and not by inheritance as heirs of the said Thomas J. D. Reilly, upon the terms and conditions referred to in said deed; and that such intention is plainly expressed in said deed.

The court is therefore of opinion that as the defendants in error, at the time of the death of the said Thomas J. D. Reilly, answered the description of his "heirs at law," they were entitled to take the said land as purchasers under and by virtue of the said deed, and not by inheritance as heirs of the said Thomas J. D. Reilly,
454 and were *entitled to recover the same in the action of ejectment brought by them therefor against the plaintiff in error, and there is no error in the judgment of the court below in the said action.

Therefore, (without expressing any opinion in regard to the condition in restraint of alienation mentioned in the said deed, and the effect of the supposed breach thereof, it being unnecessary, in the opinion of the court, to decide in this case any question concerning the same), it is considered that the said judgment be affirmed, and that the defendants in error recover against the

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plaintiff in error thirty dollars damages, and their costs by them about their defence in this behalf expended; which is ordered to be certified to the corporation court of the city of Norfolk.

After the decision of the court, the appellant asked for a rehearing of the cause.

Moncure, P., delivered the opinion of the court.

The learned counsel for the plaintiff in error seems to concede that the decision of the court in this case would have been perfectly right but for the act of 1785, which declared that "every estate in lands which shall hereafter be granted, conveyed or devised to one, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law." This has in substance been the law of the state ever since its first enactment, in 1785. In 1 R. C. 1819, p. 369, ch. 99, § 27, the same language is used as in the original act of 1785.

In the Code of 1873, p. 889, ch. 112, § 8, the *language is: "When any real estate is conveyed, devised or granted to any person without any words of limitation, such devise, conveyance or grant shall be construed to pass the fee simple or other the whole estate or interest which the testator or grantor had power to dispose of in such real estate, unless a contrary intention shall appear by the will, conveyance or grant."

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In his printed argument in support of his motion for a rehearing in this case (p. 5), the learned counsel uses this language: "Accepting, then, the principles which to me while hearing its opinion read, the court appeared to lay down, and which I clearly conceived to be the true principle, I thought my client (until at last I heard the decision announced against him) sure of gaining his cause, although upon the same principles he would have been sure to lose it had it depended upon English law, or upon Virginia law prior to the statute of 1785, dispensing with words of inheritance (in deeds and wills) to pass a fee simple." And on page 6 he uses this language: "Consequently had the deed here in question been made in England, concerning lands there, or made in Virginia while our law was in this regard the law of England unchanged, concerning the very land in question, the rule in Shelley's case would have had no manner of application; because then the person or persons answering to the description given in the deed of intended remaindermen, would have taken an estate for life, and no longer, and so the ilmitation in remainder would not have been to the whole line of heirs of the first taker."

The question, therefore, upon the motion for rehearing, has come down to the single inquiry, whether the effect of the act of 1785, was to create a new instance for the application of the rule in Shelley's case, which did not exist before the passage of that act. In other words, *whether, when the reason for that rule had long since ceased to exist, and it was about to be abolished by the state legislatures of some of the United States, as has been done, nearly if not entirely in this state, it was extended in its operation, without, however, intending or contemplating such extension, by the act of 1785? So far from having that effect and thus defeating the intention both of the legislature and the donor of the estate, the act of 1785 would, if necessary to prevent that effect, be regarded as an implied modification of the rule, so as to make it inapplicable to such a case. But no such necessity exists.

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The court is of opinion that such was not the effect of the act, and such was not the intention or contemplation of the legislature in its enactment.

"If the word heirs," said the court in its decision of this case, "was intended to be used in its technical sense, then the rule applies and there is an end of the question in the case; but if the word was intended to be used as a description or designation of particular persons who were to take by purchase, in contradistinction to those who would take by inheritance as 'heirs forever,' then, clearly, the rule in Shelley's case does not apply, and the persons thus described as remaindermen are entitled to take by purchase." And the court was of opinion "that the donor, John Donaghee, intended to give the land in controversy in this case to his grandson, Thomas J. D. Reilly, for and during his life only, and after his death to such person or persons as should at that time answer the description of heir or heirs at law of the said Thomas J. D. Reilly, such person or persons to take the said land under that description as purchasers under and by virtue of the deed by which the gift was made, and not by inheritance as heirs of the said Thomas J. D. Reilly, *upon the terms and conditions referred to in said deed, and that such intention is plainly expressed in said deed."

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The word "heirs" may be used as designatio personarum with the same effect as any other word. And if it be ascertained by a proper construction of the instrument, who are the persons intended to be designated by that word in the particular instance, the instrument has precisely the same effect as if the persons thus intended to be designated had been described by their christian and surnames in the instrument. Id certum est, quod certum potest reddi. Suppose they had been so described in the instrument? The act of 1785 would have assured to them an estate in fee simple, although other words theretofore necessary to transfer an estate of inheritance might not have been added to their names in the instrument. Would that have prevented them from taking by purchase, as at common law, and caused them to take by descent under the operation of the act? How would such a case differ in effect from any other

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case of a gift to persons by name without the addition of words of inheritance to their names? In every such case the donee takes by purchase; the only difference being that at common law he would take a life estate, whereas under the act he would take a fee simple estate by purchase. The rule in Shelley's case does not affect the question. That rule, when it applies, gives to the first taker an estate in fee, though performan doni an estate for life only is given to him. But the effect of the act is to give to the persons designated by the word heirs an estate in fee simple, instead of an estate for life, to which they would have been entitled at common law under a gift in the same form. The question under the rule in Shelley's case is, what is the meaning of the word "heirs" used in the instrument? Does it mean the whole line of heirs in succession forever; or does it mean only a particular
458 *class of those heirs, or such persons as may happen to answer the description of heirs at a particular time, as at the death of a particular person, as in this case? If it means the former, then the rule in Shelley's case applies, and the first taker is entitled to the whole estate, though a life estate only is nominally given to him by the instrument. But if it means the latter, then the rule in Shelley's case does not apply, and the persons who happen to answer the description of such heirs at the particular time designated in the instrument are entitled to the estate as purchasers, and the act in question enlarges that which would have been a mere life estate at common law into an estate in fee simple. Of this effect of the act, the heirs at law of the donor might, possibly, have some cause to complain, as they would have been entitled to the estate after the expiration of the life estate of the remaindermen if they had been entitled to a life estate only as at common law; but the heirs at law of the first taker would have had no such cause to complain, as nothing is taken from them by enlarging the common law life estate of the remaindermen into an estate in fee simple under the act. The question as to the application of the rule in Shelley's case, depends entirely upon whether the word heirs in the instrument is to be construed in its technical sense to embrace all the heirs forever of the first taker, or as a mere designation of particular persons. If the former, then the rule in Shelley's case applies. If the latter, then it does not apply.

The question is, What did the donor mean by the use of the word "heirs" in the limitation over after the death of the first taker? Did he mean to use it in its technical sense as a word of inheritance, or as a mere designation of certain persons who might answer the description at the death of the first taker?

459 *The presumption, in the absence of a plain indication of an intention to the contrary, is that he meant to use it in its technical sense; but that presumption may be repelled by such an indication. In this case there is a very plain indication of an intention to use the word, not in its technical sense, but as a mere designatio personarum as aforesaid.

If the word had been used in the former sense, the rule in Shelley's case would have applied. But as the word was used, not in the former but in the latter sense, the rule in that case does not apply, and the persons answering the description of heirs of the first taker at the time of his death are entitled as purchasers from the donor of the estate, and not as heirs at law of the first taker.

Whether the persons thus taking as purchasers are entitled to a life estate merely, or to a fee simple estate, is wholly immaterial so far as concerns the application of the rule in Shelley's case. They may be entitled to either, in perfect consistence with that rule. Whether they are entitled to the one or the other, is a question which does not arise until after the determination of the question whether the word "heirs" in the gift is to be construed in its technical sense as a word of inheritance, or as a mere designation of persons to take by purchase, and not then unless it be determined that the word was intended to be used in the latter sense.

If the word is to be construed in its technical sense, then it refers to the first taker, who is entitled to a fee simple instead of a mere freehold estate. But if it is to be construed as a mere designation of persons to take by purchase, then it refers only to such purchasers. At common law they would have taken an estate for life only, if no other estate had been indicated by the gift. Our statute of 1785 entitles them
460 to an estate in fee *simple, if no other be indicated by the gift. The first taker is not the stock of the descent created by the statute; but the persons who take as purchasers are the stock of such descent.

The case may be illustrated thus: An estate may be given to a certain person for life, with remainder to certain other persons, either for life or in fee simple, at the election of the donor.

Such remaindermen may be described either by their christian and surnames, or in any other mode whereby it may be ascertained, with certainty, at the termination of the life estate, who are the persons then entitled to take the estate in remainder. If the remainder, after the death of the life tenant, be given to such persons as shall at that time answer the description of his heirs at law, that is a valid gift of a remainder to such persons, who will be entitled, as purchasers, to an estate for life or in fee simple, according to the form of the gift.

Suppose such remainder be expressly given to such persons and their heirs; certainly such persons are entitled as purchasers to take the remainder in fee simple. Suppose such remainder, instead of being expressly given to such persons and their heirs, is given to them by implication. Is not the effect precisely the same in this respect,

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whether the gift be express or by implication? Certainly it is. And in either case such persons are entitled, as purchasers, to take the remainder or fee-simple.

Now, is not the gift in remainder in his case, under the operation of the act of 1785, plainly a gift of an estate in fee simple by implication? Certainly it is. The estate in fee-simple is not given to the remaindermen by law, but by the grant, conveyance or devise of the owner of the estate. The act of 1785 relates merely to the construction of the grant, conveyance or devise. This appears, perhaps, more plainly by the
461 act as it now stands *in the Code of 1873 than by the act of 1785, though the two acts are in substance the same, so far as this case is concerned. In the Code the language is: "When any real estate is conveyed, devised or granted to any person without any words of limitation, such devise, &c., shall be construed to pass the fee simple, or other the whole estate or interest which the testator, &c., had power to dispose of in such real estate, unless a contrary intention shall appear by the will," &c.

We think there is no error in the decision of the court in this case, and the motion for a rehearing is therefore overruled.

Rehearing refused and judgment affirmed.

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462 *Dickinson's Adm'r v. Helms & als.

November Term, 1877, Richmond.

Judicial Sales—Purchase Money—Confederate Currency.*—At a judicial sale made in August, 1859, D became the purchaser of a tract of land in the county of Franklin, and gave his bonds, payable in one, two and three years. The sale was confirmed, and the general receiver of the court was directed to collect the money—in advance—if the purchaser chose to pay it, deducting interest. D paid the first bond, and a part of the second before it was due, in his lifetime. Soon after his death D's administrator, in January and February, 1863, paid to the receiver in Confederate money the amount due upon the two last bonds, and took them in. October, 1863, the receiver reported the payment of the bonds, and his report was confirmed and the receiver directed to convey the land to D's heirs; was done. It appearing that at the time which of the payments and confirmation of the sale Confederate money was little depreciated in Franklin, and was generally received in payment of debts —HELD: The payments by D's administrator were valid payments, and the bonds of D are fully discharged.

This was an appeal from a decree of the circuit court of Franklin county, rendered on the 20th of May, 1872, in a cause depending therein, in which some of the devisees and legatees of Thomas Helms were plaintiffs, and the executor and the other devisees and legatees were defendants, for the settlement and distribution of the estate of their testator. After various proceedings had been had in the cause and it had been in this court, on the 21st of May, 1859, a decree was made appointing Hugh Nelson a commissioner
463 to sell a tract of land belonging *to Helm's estate called Hairston's. This land was sold by the commissioner on the terms prescribed in the decree, when Washington Dickinson became the purchaser at the price of $13,600, and paid in cash to the commissioner $300, and executed his three bonds, each for $4,333.33, with surety, payable respectively on the 15th of August, 1860, 1861, 1862. And the commissioner reported the sale and returned with his report the said bonds.

The cause came on again to be heard on the 22d of October, 1859, when the report of the sale was confirmed. And it being suggested that the purchaser of the Hairston tract of land was willing to pay all or a portion of the purchase money of said land, if the legal interest was discounted, the receiver, John S. Hale, was authorized to receive of the said purchaser the amount of all or any of his bonds, after deducting the interest at the legal rate.

In October, 1863, John S. Hale, general receiver of the court, reported to the court that he had collected from Washington Dickinson in his lifetime, and from his personal representative since his death, the whole amount for which the Hairston tract of land was sold. And on the 21st of October the court made a decree confirming the report; and Hugh Nelson was appointed a commissioner to convey the land to the heirs of Washington Dickinson, naming them. And in July, 1864, this conveyance was executed.

On the 18th of May, 1870, an order was made that John S. Hale, former general receiver of the court, do report during that term of the court, what kind of funds he received in payment of the several bonds of Washington Dickinson, the purchaser of the Hairston tract of land, when he received the same, and how he has disposed thereof. And he having made a report that the two last
464 *bonds were paid in January and February, 1863, in Confederate money, on the 20th of May the court made an order that Randolph Dickinson, the administrator, and the heirs of Washington Dickinson, naming them, should appear there on the first of the next term, to show cause why the interlocutory decree made on the 21st day of October, 1863, and the conveyance made in pursuance thereof, should not be set aside and cancelled, with a view to the collection of the last two instalments of the purchase money for the land aforesaid in such money as the parties were entitled to receive.

The proceedings on this rule resulted in a decree made on the 20th of May, 1872, setting aside the decree of October, 21st, 1863, and

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***Payment of Confederate Money by Order of Court—Validity.**—In Taylor v. Lancaster, 33 Gratt. 1, it was held, citing the principal case, that a payment into court, under an order of that court in Confederate money was a good and valid payment where the debtor had obtained the money in 1860 from the court which was holding it in a pending cause, though when the payment was made the Confederate money was at a discount of four for one of gold. See also, Wayland v. Crank, 79 Va. 602.

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rescinding the deed to the heirs of Washington Dickinson, and for a sale of the land. And thereupon Randolph Dickinson, the administrator of Washington Dickinson, applied to this court for an appeal; which was allowed. The facts are stated by Judge Christian in his opinion.

Jones & Bouldin, for the appellant.

Early and Hansbrough, for the appellees.

Christian, J., delivered the opinion of the court.

When this case was before us at the January term of this court, 1877, the court was unanimously of opinion, upon the record then presented, that the decree of the circuit court of Franklin county, rendered on the 30th day of May, 1872, requiring the administrators and heirs of Washington Dickinson to pay into the Franklin bank the two last instalments of the purchase money of the Hairston tract of land in the bill and proceedings mentioned, and, in default of such payment, 465 directing a resale *of said tract of land, was premature, and therefore erroneous. In the opinion then delivered by the court, (which is on file among our records and herein referred to), after referring to various orders and decrees and rules fully set forth in that opinion, this court declared and determined as follows: "The court is of opinion that the decree (of said circuit court) holding the purchaser responsible for the repayment of the two last instalments of the purchase money which he had paid to the receiver, in Confederate money, was premature and plainly erroneous. The said circuit court, before rendering any decree in the cause fixing liability upon the purchasers, should have required the general receiver to be made a party to the petition for rehearing, and should have required him, as well as the purchasers, to answer said petition. And no decree ought to have been rendered in the cause declaring the liability of the purchaser or the general receiver until the inquiries directed by the decree of October 21st, 1870, had been first made by the commissioner and reported by him to the court, and before answer made by the general receiver; this court being of opinion that in the state of the pleadings and in the then condition of the cause when the decree appealed from was rendered, it was impossible for the court below, or for this court, to determine with any degree of certainty whether the purchaser or the general receiver, or either of them, or in what proportion, can be held liable in a court of equity for the loss incurred, by the payment of the two last instalments of the purchase money in Confederate States treasury notes." See pages 6, 7, 8 of former opinion.

In accordance with this opinion, the decree of the circuit court was reversed, and the cause remanded to be further proceeded in according to the principles therein declared.

466 *Upon a motion for a rehearing of the cause here, it is now shown to the court that the very inquiries directed to be made by the decree of the court below, and which this court declared were necessary and proper to be made before any final decree, had in fact been made and reported upon by the commissioner in the court below before the decree appealed from was rendered.

It so happened that the counsel who represented the appellant here was not his counsel in the court below. The report of the commissioner was left out of the copy sent to this court. Both the court and the counsel treated the case as presented in the record then before us. It was only upon this motion to rehear the case that the whole record is now brought up; so that the case is now submitted by the counsel on both sides to be determined on its merits.

Among other inquiries directed by certain interlocutory decrees which the former record did not show had been responded to, was the following, entered on the 16th April, 1872:

"It appearing that further inquiry as to facts pertinent to the issue, and not appearing in the record, should be made before a decision of any question involved in the case is decided, it is ordered that Commissioner Hugh Nelson do inquire and report, as speedily as practicable, what was the value of Confederate treasury notes on 15th day of January, 1863, and on the 1st February, 1863, and also on 20th October, 1863, and also to what extent such notes were available at each of said dates, in the county of Franklin, according to the common usages of business, for the payment of debts payable in specie and well secured on real estate, or for the purchase of property or otherwise."

The inquiry thus directed was in accordance with that required by this court in the 467 case of Mills v. Corbin, *reported in 19 Gratt. p. 438, and was one proper and necessary to be made in order to a right determination of the rights of the parties. Commissioner Nelson reported (returning therewith depositions of certain witnesses), "that in January and February, 1863, Confederate treasury notes were current in Franklin county for all the purposes of a circulating medium; that they were available at that time in the common usages of business for the payment of all debts and the purchase of all kinds of property, at prices but little, if any, advanced above the prices which had existed before the war. * * * In October, 1863, the value of Confederate notes had very materially depreciated, for the purposes of the purchase of property. property generally selling at four or five times its former value when paid for in such notes, but even at that time they were generally available for the payment of all debts. Few persons refused to take them in payment of any debt until February, 1864, when the project of curtailing the notes then in circulation and making a new issue first began to be talked about."

Upon the coming in of this report, to which there was no exceptions, (and others made by this same commissioner not necessary to be noticed here), the court rendered the decree appealed from, in which it declared that receiver John S. Hale had no warrant or author-

ity for collecting the amount of the two bonds which fell due on the 15th day of August, 1861 and 1862, in Confederate treasury notes in the year 1863, at a time when the said notes were greatly depreciated in value with reference to the specie standard, and when the depreciation of said notes was constantly increasing, and that the payments made to him by the personal representative of Washington Dickinson, in said notes, were not legal and valid; and after allowing as 468 a credit on said two bonds *of only what had been paid out by the receiver to the parties entitled, and the interest of said bonds which had been transferred to Samuel Hale, Jr., for the benefit of the receiver, John S. Hale, decreed and ordered that unless the balance should be paid by the administrator and heirs of Washington Dickinson on or before the 1st day of October following, then the land should be resold at public auction by the court's commissioner, to pay the balance of the purchase money.

I am of opinion that this decree is erroneous. It has often been remarked by all the judges of this court that it is impossible to lay down any general rule with respect to dealings of fiduciaries in Confederate money; but each case must be determined on its own peculiar facts and circumstances. I think upon the peculiar facts and circumstances of this case, the administrator and heirs of Washington Dickinson were discharged from all liability by the payment by Dickinson's administrator to the receiver of the court, John S. Hale, on the 15th of January and the 1st February, 1863.

Washington Dickinson was the purchaser at a judicial sale of the Hairston tract of land, on 15th August, 1859, for the sum of $13,600. Making the cash payment required of $300, he executed three bonds for $4,433.33 each, payable respectively on the 15th day of August, 1860, 1861 and 1862.

This sale was confirmed by the court in October, 1859, and the bonds were turned over for collection to John S. Hale, the general receiver of the court, and leave was given to Dickinson to pay before due, if he so desired, and deductions of interest was to be made in that event; and the receiver was directed to distribute such collections when made. Dickinson paid to the receiver the first bond when it became due, on 15th of August, 1860. He also paid on the second bond before it became 469 due *the sum of $1,100.77. He died in July, 1862. Randolph Dickinson qualified as his administrator. A few months after his qualification, to-wit: in January, 1863, he paid to the receiver the amount in full due on the second bond, and in February, 1863, paid off the third bond, and took them both in. On the 20th of October, 1863, the receiver reported to the court that he had collected from Washington Dickinson in his lifetime and from his personal representative since his death, the whole amount of the purchase money for which the Hairston tract was sold. To this report there was no exception, and on 21st October, 1863, the court rendered its decree, reciting that it appeared to the satisfaction of the court that the entire purchase money had been paid; and confirming the collection of said bonds by its receiver, Hale, directed its commissioner, Hugh Nelson, to convey said lands to the heirs at law of Washington Dickinson; which was accordingly done. It thus appears that on that day, the 20th October, 1863, the whole transaction was closed, and the rights of the parties to the suit fixed and determined, and a title to the land conveyed to the heirs of the purchaser. No objection was then made from any quarter, or by any of the parties, that the receiver or the administrator of the purchaser had no right, the one to receive and the other to pay off these bonds in Confederate money. The court must have known, and the parties must have known, that this large amount, of upwards of $9,000, was not paid in gold, but must have of necessity been paid in the only circulating medium existing at that time in the county of Franklin or in this state—Confederate treasury notes. Knowing this, the parties made no exception, and the court confirmed the action of its receiver in collecting the money, and directed the title to the land to be conveyed to the purchaser. Seven years afterwards, 470 when Confederate *money had perished, and when the receiver (as it is alleged) has become insolvent, it is sought to hold the administrator and heirs liable for a loss which they had no part in causing and no power to prevent. The administrator did nothing more than his duty in promptly paying off these bonds due from his intestate, and which he found (under a decree of a court of competent jurisdiction) had been placed in the hands of the court's receiver to collect. He (the administrator) could not know, and was in no way responsible for, what disposition or distribution the receiver was to make of the fund. It was enough for him to know that the receiver was willing to take this money, and that the court would, as it did, confirm the action of the receiver. The fact that it was Confederate money did not make the payment of itself invalid; for this court has time and again recognized and upheld payments and collections in Confederate money by fiduciaries as valid, and has been liberal in upholding such payments by fiduciaries in the absence, as in this case, of all proof or suggestion even of malafides. But in this case, while it may be admitted that Confederate money was considerably depreciated when compared with gold as a standard of value, the report of the commissioner as well as the proof in the cause abundantly shows that in January and February, 1863, in the county of Franklin, Confederate treasury notes were available in the common usage of business for the payment of all debts, and the purchase of all kinds of property at prices but little, if any, advanced above the prices which had existed before the war. Certainly, I think, it cannot and ought not to be said that a payment by an administrator of money which, in the community where it was paid, had the same purchasing power and availability for payment of debts as a

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sound currency, was an invalid and
471 *void payment, as it was declared to be by the court below.

I think payment, under the circumstances under which it was made by this administrator, was a full discharge of his intestate's obligations.

I think that the decree of October, 1863, confirming the report of the receiver that the whole of the purchase money for the "Hairston tract," had been fully paid, and directing a deed conveying the title to the heirs of Washington Dickinson, was a final disposition of the case, as far as Dickinson's administrator and heirs were concerned, and binding upon all the parties (among whom were the appellees) then before the court. It ought not to have been disturbed seven years afterward, or ever afterwards, but ought to have been a finality.

I am, therefore, for reversing the decree of the said circuit court, but without prejudice to the appellees to pursue their remedy, if any they have, against John S. Hale and his sureties, either by an amended bill in this cause, making him and them parties, or by an original bill, as they shall think proper or be advised.

I express no opinion as to whether the receiver, John S. Hale, and his sureties can be held liable to the appellees either for receiving Confederate money, or for the value of that currency at the time it was so received, which, he says, perished on his hands. This may be a subject of litigation when the parties are properly before the court. Upon this question I express no opinion, because in the state of the pleadings it would be unnecessary and improper. But I am confidently of opinion that under the facts and circumstances of the case the administrator and heirs of Washington Dickinson are fully discharged from all liability upon the bonds of their intestate, paid in January and February, 1863, to
472 the *receiver of the court, which payment has been confirmed by the court.

I am, therefore, for reversing the decree of the circuit court of Franklin.

The decree was as follows:

This day came again the parties, by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, is of opinion for reasons stated in writing and filed with the record, that so much of the decree of the said circuit court as declares the payment to the receiver of the court, John S. Hale, in Confederate treasury notes of the two bonds in controversy, on the 15th January, 1863, and the 1st of February, 1863, by the appellant, was invalid and void, and all other provisions of said decree carrying out that opinion of said circuit court, is erroneous. Therefore it is decreed and ordered that said decree be reversed and annulled, and that the appellees (except the heirs at law of Washington Dickinson, deceased, and Charles J. Clement,) pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here.

And this court proceeding to render such decree as the said circuit court ought to have rendered, it is further decreed and ordered that the payments made by the appellant in Confederate money to John S. Hale, the receiver of the court, was a full discharge of the bonds paid off by, and delivered to, said appellant on the 15th January and 1st of February, 1863, and that therefore the rule awarded against the appellant and the distributees of the estate of Washington Dickinson, deceased, at the May term, 1870, of said circuit court, be discharged, and all proceedings thereunder, so far as
473 *they affect the appellant and distributees aforesaid, be quashed and annulled, but without prejudice to the appellees interested in that question, either by amended or original bill, to assert any claim, if any they had, against the receiver, John S. Hale, and his securities.

Which is ordered to be certified to the said circuit court of Franklin.

Decree reversed.

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474 *Curtis v. Thompson.

November Term, 1877, Richmond.

Absent, MONCURE, P.

1. **Judicial Sales—Inadequacy of Price.***—A tract of land was fairly sold by commissioners, pursuant to a decree of court, to a purchaser for $27.50 per acre, subject to a contingent right of dower. The tract was assessed in 1870 at $30; and $30 per acre was the value fixed upon the land by a commissioner of the court, whose report had been confirmed without exception in the cause; in which valuation no allowance was made for the contingent right of dower. The owner of the land objected to a confirmation of the sale on the ground of inadequacy of price, and affidavits touching the value of the land were filed by both parties. The court below set the sale aside and ordered a resale; whereat the same party became the purchaser at the same price. In the meanwhile the assessment of the land had been reduced to $20 per acre. The owner of the land again objected to the confirmation of the sale on the same grounds as before; and the court again refused to confirm the sale, and again ordered a resale—HELD: The first sale should have been confirmed; and the decree setting it aside and all the subsequent proceedings were erroneous.
2. *Quaere*: If inadequacy of price is alone sufficient to set aside a judicial sale.

This was a suit in equity in the circuit court of Culpeper county, instituted by James W.

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*Judicial Sales—Inadequacy of Price.—See Roudabush v. Miller, 32 Gratt. 454, and *note* where the question of setting aside a judicial sale upon the offer of an advance bid is discussed. In Coles v. Coles, 83 Va. 525, the headnote reads as follows, "While no test of inadequacy applies to all cases, and this court is averse to refusing to confirm a sale on the mere ground of inadequacy, yet it will always do so where the inadequacy is so gross as to amount to a sacrifice of the property." See also, citing principal case, Childs v. Hurd, 25 W. Va. 537.

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Curtis to enforce the execution of a deed of trust made in 1858 by George G. Thompson, by which he conveyed a tract of land in that county to James Barbour, to secure a debt by bond of $4,300, with interest. The court 475 having twice set *aside two sales made of the land by commissioners of the court, on the ground of inadequacy of price, Curtis applied to this court for an appeal; which was allowed. The case is stated by Judge Anderson in his opinion.

John A. Meredith and J. Preston Cocke, for the appellant.

There was no counsel for the appellee.

Anderson, J. This suit was brought to subject a tract of 225½ acres of land in Culpeper county to sale, belonging to the appellee, Thompson, to pay a debt which he owed the appellant ever since 1858, for borrowed money. The debt was secured by a deed of trust on the land. The indebtedness of the said Thompson on the 1st of June, 1871, was ascertained by the report of a master, to which there was no exception, and which is confirmed by a decree in the cause, to be $16,637.35, chargeable on the land; and the debt due the appellant, part thereof, as of that date, to be $7,245.50, and to be the first lien; and the fee simple value of the land to be $30 an acre, aggregating for the whole tract $7,575; and its annual value to be such that the rents and profits would be wholly insufficient to pay even the appellant's debt in five years. On the 8th of June, 1871, it was decreed to be sold on unusually favorable terms to the debtor—that is, the purchaser to pay in cash an amount sufficient to pay costs and expenses of sale, and the balance of the purchase money in six equal annual instalments, with interest from the day of sale; and four commissioners, any one of whom was authorized to act, were appointed to make the sale. Two of them reported a sale at the price of $27.25 per acre, aggregating for the 476 whole tract $6,880.62; and that *James W. Curtis, being the highest bidder, was the purchaser, and said commissioners recommended a confirmation of the sale by the court. The other two commissioners reported that they were of opinion that the price was too far below the value of the land, and too great a sacrifice to justify its being cried out to the bidder, and consequently did not recommend a confirmation of the sale.

George G. Thompson, the debtor, excepted to the report of sale, and objected to its confirmation on the ground alone of the inadequacy of price; and filed five affidavits in support of his exception.

The purchaser relied upon the clerk's certificate of the assessment made by the assessor for the year 1870 of the said 225½ acres of land at $30 an acre, aggregating $7,575, returned with the report of sale, and which is the exact valuation made by the commissioners of the court in this cause, and which was confirmed by a decree of the court; and also upon the affidavits of three persons, which he filed, declaring that in their opinion the sale reported of the tract of land on the terms of the sale, subject as it was to Mrs. Thompson's contingent right of dower, was for the fair value of the land.

The first question to be considered is, ought said sale to have been confirmed by the court; and was it error to set it aside?

The decree authorized the sale to be made by any one of the commissioners. Two of them were consequently competent to make it jointly, and when confirmed by the court, was as effectual to transfer the right of property to the purchaser as if all four of the commissioners had united in it. And the only question is as to the adequacy of the price for which it sold.

It is not pretended that there was any unfairness in the sale, or that the commis- 477 sioners had failed in their *duty to give public notice thereof, and in attracting public attention to it, or in the fulfilment of any of the requirements of the decree, or in proper efforts to get the best price they could for the land. The only ground upon which it was sought to be set aside was inadequacy of price.

I do not think that mere inadequacy of price is sufficient ground for setting aside a sale fairly made pursuant to a decree of the court. The creditor is entitled to his money and to a sale of the land to get it, according to contract. And all that the debtor can require, is, that it shall be sold for as much as it will bring in market. After his default he is not entitled to hold the money and the land too, which he contracted should be sold to pay his debt, because, in the opinion of some of his neighbors, it is worth a great deal more than the price at which it was cried out to the highest bidder at public auction, whilst others of his neighbors were of opinion that the price at which it was cried out was as much as it was worth, subject as it was to a contingent right of dower; and their opinion is fortified by an unreserved and subsisting decree of the court in the cause, which fixes its value, and also by the sworn assessor of the commonwealth. In Effinger v. Ralston, 21 Gratt. 430, Judge Moncure said: "To induce a court to set aside a sale fairly made in pursuance of a decree, there ought to be a decided preponderance of the evidence of such inadequacy, even if it be conceded that mere inadequacy of price is in itself a sufficient ground for setting aside such sale." This language implies that he did not think mere inadequacy a sufficient ground.

As it is the right of the creditor to have the land sold for the best price it will bring in the open market for the payment of the debt, it would seem to follow, that to induce a court to set aside a fair sale made pursuant 478 to *its decree, it should not only be shown that the price for which it sold was clearly inadequate, but it should also appear that if exposed to sale again there was an assurance that it would bring materially more. Hence the English rule requiring the offer of an advance on the highest bid, and that, too, not an inconsiderable advance, some of the cases say not less than ten per cent., and the money to be deposited or well secured. If the English practice is

to be established in Virginia, this requirement, which is the best part of it, ought to be strictly carried out. I think if a judicial sale is to be set aside for inadequacy of price it should only be in a case where a higher price is offered and deposited or well secured. But I express no opinion upon the question, whether the practice where it obtains is founded in equity and justice of setting aside a sale for inadequacy of price and reopening the bids, notwithstanding that the property has been cried out to the highest bidder, and the sale was in all respects fairly conducted pursuant to the decree, and the purchaser is ready and offers to comply with the terms of sale. It is a question worthy of grave consideration, but is not involved in the decision of this cause.

The statute prescribes the inadequacy of price for which commissioners of judicial sales for debts contracted or liabilities incurred prior to the 10th of April, 1865, shall not sell the debtor's land. It provides that where the land does not bring, at the first and second exposure to sale, three-fourths of the last official assessment made for the purposes of taxation, it shall not be sold. Code of 1873, ch. 174, § 4, p. 1123. This act was passed in tenderness to the debtor. It may be regarded as a statutory prescription as to what shall be regarded inadequacy of price to avoid a judicial sale of real estate, and that only for the first and second exposure of the land to sale. After that, in deference to the rights of the cred-
479 itor, the *statute interposes no restriction, but allows the land to be sold for what it will bring.

To apply the statutory rule to this case, there was no such inadequacy of price at the first sale as would authorize its avoidance. By the last assessment for the purposes of taxation, (the assessment of 1870), this tract of land was assessed at $30 an acre—three-fourths of which is $22.50. It sold for $27.25 an acre, that is $4.75 more than three-fourths of its last assessed value. By the last assessment in 1872, it was assessed at $20 an acre. Again, the value of the land had been ascertained previous to the sale, by a decree of the court in the cause. The question had been referred to a master who took testimony on the subject, and reported to the court that its fee simple value was $30 an acre, aggregating $7,575 for the whole tract. To this report there were no exceptions, though the party now contesting the sale on the ground alone of inadequacy of price was a party to the suit. The report of the master was confirmed by a decree of the court, which has never been set aside, and it would seem fixes the fee simple value of the land as between the parties to the suit. Deduct from that valuation and from the assessment of the state assessor, which puts the value at the same figures, the value of Mrs. Thompson's contingent right of dower, which is not considered in either the assessment or the master's valuation, and it would most probably leave less than $27.25 an acre, the price for which the land sold subject to that contingent right of dower.

But it is remarkable that the only parties who have a pecuniary interest in setting aside this sale, if there is any probability that the land would bring a better price at a second offering, have taken no exceptions to the sale. They are the other creditors, particularly those of the second and third classes. After the payment of the
480 *appellant's debt, R. M. Bridges, whose debt is of the second class, would then be entitled to satisfaction. His debt, a judgment, with interest to 1st of June, 1871, and costs, amounted to $302.83. If there should remain a balance of the fund after satisfying his debt, John C. Major, whose judgment is of the third class, and amounted on the said 1st of June to $996.51, would next be entitled to satisfaction. Then follows debts of fourth, fifth, sixth, seventh, eighth and ninth classes, amounting on the 1st of June, 1871, to over $10,000, which would have to be paid out of the proceeds of the sale before George G. Thompson, the debtor, the only person who has taken any exception to the sale, could receive anything. It is therefore manifest that the debtor who has so totally failed to fulfil his contract with the appellant, that he has only paid one year's interest on the debt, which he promised and bound himself to pay semi-annually, could not be benefited by setting it aside, whilst those who could be benefited by a second sale if the land sold for more than would be required to pay the appellant's debt, are making no objection to the sale. If they were not satisfied with the sale, or believed there was the least probability, if offered for sale again, that it would bring more than the appellant's debt, can there be a doubt that they, too, would be seeking to set it aside? It may fairly be presumed from their acquiescence, that they did not believe there was the least probability that they would be benefited by a second sale, or that the land could be sold for a better price.

And such has in fact been the result. After giving the notice of the second sale required by the decree, after all the debtor could do, we may presume, to get other bidders, the land sold for precisely the same price it brought before. This fact
481 strongly confirms the opinion *that the price at which it was cried out at the first sale was the fair value of the land.

But the second sale was also set aside by the court, and a third sale directed to be made by the same commissioners, with only this difference, that the commissioners are now required to act jointly, which would most likely be impracticable and prevent a sale. In the meantime the debt is increasing by accumulating interest, and the security is depreciating. It was ample security when the debt was contracted; now it is insufficient. By the default of the debtor in not paying the interest, which he contracted to do semi-annually, the debt now amounts to near $9,000, whilst the creditor is receiving interest only on $4,300. This is great injustice to the creditor, whilst it does not benefit the debtor. It would have been greatly better for him, as well as this creditor and his other

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creditors, that the land had been sold many years ago. Upon the whole, we are of opinion that the decree of the circuit court of the 17th of November, 1871, refusing to confirm the sale made on the 21st of August, 1871, as reported by James W. Green and L. E. Williams, commissioners, at the November term, 1871, of said court, and sustaining the exception of George G. Thompson to said sale and ordering the same to be set aside, and all the proceedings subsequent thereto, are erroneous, and that the same be set aside, and that the cause be remanded with instructions to confirm said sale of the 21st of August, 1871, and for such further proceedings as may be necessary to execute said sale, and for the final decision of the cause in conformity with this opinion.

Christian, J., concurred in the opinion of Anderson, J.

Staples and Burks, J's, concurred in the decree; but were not prepared to say 482 that inadequacy of price was *not sufficient to set aside a judicial sale. They had not considered that question, and it was unnecessary to decide it in this case.

The decree was as follows:

The court, having maturely considered the record in this cause, is of opinion, for reasons stated in writing and filed with the record, that the sale of the tract of land in the bill and proceedings mentioned, made on the 21st day of August, 1871, and reported to the circuit court of Culpeper county by James W. Green and L. E. Williams, commissioners, at the November term of said court, was a valid sale, and ought to have been confirmed, and that the decree of the said court of the 17th of November, 1871, setting it aside, and directing it to be exposed to sale again, and all the subsequent decrees and proceedings of said court based upon said erroneous decree were likewise erroneous; it is, therefore, ordered and decreed that the same be reversed, set aside and annulled, and that the appellees pay to the appellant his costs expended in the prosecution of his appeal here; and the cause is remanded to the said circuit court, with instructions to confirm the said sale of the 21st of August, 1871, and the report thereof made by the said Green and Williams, commissioners, and for such other and further proceedings as may be necessary and proper for the execution of said sale, and for the final decision of the cause in conformity with this order and the opinion of this court.

Decree reversed.

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483 *Alexandria Savings Inst. & als. v. Thomas & als.

November Term, 1877, Richmond.

Absent, MONCURE, P., and ANDERSON, J.

In January, 1856, by deed which was duly recorded T and wife conveyed to D a house and lot in trust to secure W, of Philadelphia, against any loss or damage which he might sustain by his acceptance of any drafts or bills which might thereafter be drawn by T upon W, which acceptances W had agreed to make for the accommodation of T. W, accordingly, from the date of the deed to January, 1861, accepted the drafts of T. to a large amount, and T was indebted to him for much more than the house and lot was worth. In 1871 the A Savings Bank being the holder of three notes of T given on renewals of notes which were due before the date of the deed, filed a bill against T as an absent defendant, to attach the said house and lot, insisting that the deed having been given to secure future advances was null and void as to the creditors of T—HELD:

1. **Lien to Secure Future Advances—Effect as to Prior Creditor.***—Though W was under no liabilities for T when the deed was executed, it is a valid security for all his acceptances for T given before some other creditor had acquired a lien on the house and lot.
2. **Liens—Time of Taking Effect.**—The savings bank had no lien on the house and lot until the filing of its bill.
3. **Deeds—Names.**—Though the acceptances were in the name of W. & Co., the deed is a valid security for acceptances made by W in that name.

This was a foreign attachment in chancery in the corporation court of the city of Alexandria, brought in November, 1871, by the Alexandria Savings Institution, to attach a house and lot in said city, and subject 484 it to *the payment of a debt evidenced by three notes amounting to $375, executed by George J. Thomas. The bill and amended bill after setting out the indebtedness of Thomas, his residence out of the state, and his ownership of the house and lot, set out a deed bearing date the 21st of January, 1856, and admitted to record on the same day, by which Thomas and wife conveyed the said house and lot to Henry Dangerfield, in trust, "to secure and indemnify S. Morris Waln, of the city of Philadelphia, against any and all loss or damage which he may sustain by reason of his acceptance of any draft or drafts, bill or bills which may hereafter be drawn by said Thomas upon said Waln; which acceptances the said Waln has agreed to make or come under for the accommodation of said Thomas." The plaintiff charges that there was no sufficient consideration for the said deed of trust, and that it was null and void, and fraudulent as to creditors. And making Thomas and Waln's administrator parties defendants, prayed for a sale of the property, &c.

Thomas answered the bill. He admitted the plaintiff's debt; and said the deed to secure Waln was executed in good faith, and with no intent to hinder or delay or defraud his creditors; and that on the security of

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***Lien to Secure Future Advances.**—In Didier v. Patterson, 93 Va. 537, the principal case is cited as authority for the proposition that one may transfer a chose in action for other property to secure future loans and advances. Citing also, U. S. v. Hooe, 3 Cranch 89; Shirras v. Craig and Mitchell, 7 Cranch 34; Lawrence v. Tucker, 23 How. 14; Wait on Fraud, Con. sec. 217; Bump on Fraud. Con. sec. 210; Boyce v. Montauk Gas. Co., 3 W. Va. 75, 16 S. E. Rep. 501.

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that deed of trust Waln accepted his bills at different times from the year 1856 to 1860, for large sums of money; and that he (Thomas) is in fact indebted to Waln's estate by reason of said acceptances; and though he cannot then state the exact amount, he believes they would amount to more than $6,000, and that the highest valuation of the house and lot could not exceed $4,000.

In the progress of the cause, Lewis McKenzie and P. C. Claughton, receiver, who claimed to be creditors of Thomas, were upon their petition made parties plaintiffs in the cause, and a commissioner was directed to report the liens upon the property and
485 their priorities. And by *consent of all the parties the house and lot was sold under the decree of the court, bringing the sum of $2,725.

The commissioner reported the deed of trust as the first lien; that the acceptances by Waln for Thomas commenced in April, 1855, and continued until January 23d, 1861, and afterwards in the shape of interest until the 31st of December, 1872, at which day there was a balance due Waln of $14,029.88.

The commissioner reported two judgments recovered, one in February and the other in July, 1857, by persons who did not join in this appeal, and a judgment in favor of P. C. Claughton, receiver, on the 9th of August, 1871, for $764.71, and another in favor of Lewis McKenzie, on the 7th of March, 1873, for $2,702. And it was proved that though the notes exhibited with the bill bore date since the date of the deed, they were given in renewal of notes which were given before that date.

The complainants excepted to the port of the commissioner, for that it treats the deed from Thomas and wife to Dangerfield as a valid deed, and reports the same as the first lien on the property mentioned in it; whereas complainants deny the validity of the deed with respect to the creditors of said Thomas, and maintain it is of no force or effect against creditors.

The cause came on to be heard on the 14th of October, 1873, when the court overruled the exception and confirmed the report, and directed the proceeds of the property, after deducting the expenses of sale, to be paid to the administrator of Waln. And thereupon the complainants applied to this court for an appeal; which was allowed.

H. A. Claughton, for the appellants.

486 *C. W. Wattles, for the appellees.

Staples, J., delivered the opinion of the court.

The deed of trust, which is the subject of controversy here, was executed by George Thomas for the benefit of the appellee, S. Morris Waln, on the 21st of January, 1856, and was admitted to record the same day. It contains the following provision: "To secure and indemnify S. Morris Waln, of the city of Philadelphia, against any and all loss or damage which he may sustain by reason of his acceptance of any draft or drafts, bill or bills, which may thereafter be drawn by said Thomas upon the said Waln, which said acceptances the said Waln has agreed to make or come under for the accommodation of said Thomas."

Between the date of this deed and the 21st of January, 1861, Waln made advances and assumed liabilities for the benefit of Thomas, which, with the accruing interest, greatly exceed the value of the property conveyed in trust.

The deed is assailed by the appellants, who are creditors of Thomas, upon various grounds, which will now be considered. And first, it is claimed that there was no consideration to support the deed, Waln not having made any advances at the time, nor assumed any obligation to do so. The learned counsel for the appellants concedes that a deed to secure future advances is good provided there is an existing indebtedness. But he insists that where the object is merely to provide for future advances or liabilities, without any other consideration, the deed is void as to the creditors whose debts were contracted at the time. The fact of an existing indebtedness (he claims) is the key to a proper understanding of all the cases which sustain this class
487 of securities. One of the *authorities relied on to support this position is an observation of Chancellor Kent's in Kendricks v. Robinson, 2 John. Ch. R., 283, 300, where it is said: "There were large existing responsibilities affording sufficient aliment to support the assignment." It is not very clear what Chancellor Kent meant by this remark. He certainly did not mean to say that an existing indebtedness is essential to the validity of a provision to cover a future indebtedness. Elsewhere in the same opinion he declares, "that if there was no existing engagement or debt whatever, the property might have been assigned in trust to indemnify the parties for advances and responsibilities thereafter to arise. There is no bankrupt system in this country to control the acts of an insolvent merchant, and in the absence of all legal liens he might make such an assignment, provided it bears the marks of a reasonable discretion, and there is perfect candor and honesty in the intention;" and in his commentaries, 4th vol. 175, the same learned judge says: "The principle is that subsequent advances cannot be tacked to a prior mortgage to the prejudice of a bona fide junior encumbrance, but a mortgage is always good to secure future loans when there is no intervening equity."

In the case of Commercial Bank v. Cunningham, 24 Pick. R. 270, the supreme court of Massachusetts say, we think it is clear that a mortgage made bona fide for the purpose of securing debts expected to be contracted in the course of future dealings between the parties, is a just and valid security; and so are the authorities. And in Syle v. Ducomb, 5 Binn. R. 585, 590, Chief Justice Tilghman said: "It was asserted by defendant's counsel, though not much insisted on, that a mortgage intended as an indemnity against acts to be performed at a subsequent time, ought not to have any effect

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against third persons. This point was
488 very properly abandoned. *There cannot be a more fair, bona fide and valuable consideration than the drawing or endorsing of notes at a future period for the benefit and at the request of the mortgagors; and nothing is more reasonable than the providing a sufficient indemnity beforehand." These remarks of the learned chief justice are quoted with approbation by the supreme court of the United States in Lawrence v. Tucker, 23 How. U. S. R. 14, 27. They are fully sustained by the decision in Conrad v. The Atlantic Ins. Comp., 1 Peter's R. 380, by the opinion of Mr. Justice Story in Leeds v. Cameron, 3 Sum. R. 488, and by a multitude of other cases cited in the opinions of learned judges, and in the various elementary works which treat of the subject. See 2 Washburne on Real Property, p. 143; Kramer v. Far. & Mec. Bank, 15 Ohio R. 260; see Leading Cases in Eq. vol. 1, pt. 2, 864, 5 and 6; Am. Law Reg. vol. 2, (new series), p. 12; vol. 11, (new series), p. 273.

It is very true that in many of these cases there was an existing indebtedness secured along with the provision for future loans and advances. But that circumstances is not relied on by the judges as being at all necessary to the validity of the deed.

Some of the courts hold that where the mortgage is made merely to secure future advances without any other consideration, it may be void as to creditors; but that a deed given bona fide to secure existing liabilities will not be invalidated because it contains a provision for future advances. The good will be separated from the bad, and the deed held valid as to existing debts, and treated as void with respect to the residue; and this is all that is meant when it is said "that if the object of the mortgage be to secure an existing demand, the addition of a clause protecting future advances would not necessarily avoid the mortgage." Crane v. Dem-
489 ming, 7 Conn. R. 396. *Deeds providing for future liabilities are sustained by the courts because they are regarded as just in themselves, as highly beneficial in trade and commerce, and as founded on a valid consideration. Their validity is too firmly established to be called in question at this day; and the question ought to be considered as settled.

The cases are generally agreed that when the mortgagee is bound by his contract with the mortgagor to make advances or incur liabilities in the future, he will take precedence of any subsequent encumbrance given by the mortgagor, although he may have had actual notice of such encumbrance at the time the advance was made or the liability incurred. But where it is optionary with the mortgagee whether he will make the future advances and endorsements, he will be affected by any subsequent lien or encumbrance which is brought to his knowledge before the advance is made, or the liability assumed. But if without notice of the second encumbrance he acts under his mortgage, he will be protected and take precedence accordingly. See Shirras & als. v. Craig & Mitchell, 7 Cranch R. 34, and the authorities already cited.

Whether the recording of the second mortgage or encumbrance is of itself notice to the first mortgagee, or whether he can be affected only by express notice, are questions which have given rise to much diversity of opinion. Upon this point the authorities are irreconcilably in conflict. It is not necessary to consider the question now, as the purposes of this case do not require us to decide it. We have not considered it necessary to refer particularly to the case of Siter, Price & Co. v. McClanachan et als., 2 Gratt. 280. The case turned upon the effect of a parol contract as against a subsequent bona fide encumbrance without notice, to hold the trust property as a further security for future advances.

490 *The controversy here is between the appellees claiming under the trust deed and the appellants whose debts were contracted before the date of the deed. Two of the creditors of Thomas, the grantor, recovered judgments against him in the year 1857, to the amount of about six hundred dollars. It does not appear that these judgments were ever docketed. The parties entitled to them do not appear to have taken any active part in asserting their lien in the court below. They have not appealed and are not complaining of the decree of the circuit court. We must therefore throw those judgments out of view and consider the rights of the appellants only. One of them has no judgment, but is proceeding by foreign attachment. Another recovered judgment against Thomas in 1871, and the third in 1873.

The appellants were therefore creditors at large, having no sort of lien upon the debtor's property at the time the deed was executed and at the time the advances were made by the appellee. Nothing can be more firmly settled than at common law, apart from the statutes of bankruptcy, a debtor, even in failing circumstances, until his property is specifically bound to the satisfaction of his debts, has an absolute right to dispose of it at his pleasure. He may give undue preference to a part of his creditors, or even to one, and such preference, in the language of Chief Justice Marshall, cannot be treated as a fraud. See Gordon v. Cannon, 18 Gratt. 387, where the cases are cited by Judge Moncure; 2 Minor's Institutes, 700. It is very true that the common law rule which denies to the creditor at large any right of interference with his debtor's property has been modified by the provision in the Code of 1860, (sec. 2d, page 736,) which authorizes a creditor, before obtaining a judgment or decree, to institute any suit to avoid a gift, con-
491 veyance or charge upon *the estate of his debtor which he might institute after obtaining such judgment or decree. It is manifest that this provision was never designed to give any lien upon the debtor's property, or to authorize any interference with it until the bill is actually filed. Until that is done the debtor's control of his estate is precisely what it was at common law.

Although this statute was in force when

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the deed was executed, no bill was ever filed, no notice given to the appellee of the claims now asserted by the appellants. They were content to lie by saying nothing, giving long indulgence to the debtor until the value of the property is absorbed by the advances; and now, after the lapse of fifteen years, they ask that the deed be vacated on the ground of fraud and want of consideration. As to the charge of fraud, there is not a scintilla of evidence to sustain it. There is no reason to suppose that the appellee had any notice that Thomas was then insolvent, or even in embarrassed circumstances. The advances were made, and liabilities incurred by him in entire good faith, so far as this record discloses, and there is every reason to believe the proceeds were used by Thomas in the business in which he was engaged. If the money had been loaned to Thomas at the time, no one would question the validity of a deed to secure its repayment. The effect is precisely the same where the advances are made after the execution of the deed and before there are intervening equities attaching in favor of third persons. If the appellants or any other creditors of Thomas desired to put an end to the advances or liabilities for his benefit, all that was necessary was to file a bill in equity under the statute and have the property sold, and the proceeds applied according to the rights of all the parties. If the appellants did not know of the deed of trust, it was their own fault, as the rec-
492 ord gave them full notice of the *claim of the appellee. The case of Henderson v. Hunton, 26 Gratt. 926, is a direct authority upon this point, and indeed upon many of the questions in this case, and we beg to refer to it in connection with the views here presented.

Another objection made to the deed of trust is that it does not specify the amount it was intended to secure, or for which the appellee was bound. There is no doubt that, as a general rule, it would be better for the deed in all cases accurately to define the nature and extent of the obligations for which it is given. But in many cases this is utterly impracticable, as where the deed is to indemnify sureties upon official fiduciary bonds. The debtor who gives a mortgage or deed of trust upon his property to secure creditors is often unable to state the names of those to whom he is indebted, or the amount of such indebtedness; but it has never been held that the security was therefore invalid. At all events, it is now well settled that a deed to protect future loans is perfectly valid, although it does not state the amount intended to be secured. Syle v. Ducomb, 5 Binn. R. 585; Moroney's appeal, 12 Harris R. 372; Craig v. Tappan, 2 Sand. Ch. R. 78; Robinson v. Williams, 22 New York R. 380; Collins v. Carlile, 13 Illi. R. 254. In Shirras v. Caig & Mitchell, 7 Cranch R. 34, Chief Justice Marshall, commenting upon a mortgage given in part to secure future advances, said: "If upon investigation the real transaction should appear to be fair though somewhat variant from that which was described, it would be unjust and unprecedented to deprive the person claiming under the deed of his real equitable rights unless it were in favor of some one who had been in fact injured and deceived by the misrepresentation."

In the present case it is perfectly certain that the appellants were not in any manner prejudiced by the failure to define the limits of the advances or liabilities in-
493 tended *to be secured. They make no such complaint in their bills, original and amended, or in their petition for an appeal, or in the printed brief of their counsel. The sole ground of assault upon the deed in this connection is, that its unlimited and indefinite provisions make it fraudulent and void. It has already been seen that this ground is not tenable.

It is further insisted that the deed was only intended to indemnify S. Morris Waln, whereas the account exhibited by the appellee purports to be due S. Morris Waln & Co., and at all events there is no sufficient proof of the claim asserted under the trust deed. It is very probable that S. Morris Waln constituted the firm of S. Morris Waln & Co., but whether he did or not, the deed would be sufficient to protect his advances made as a member of that firm. The account is sufficiently proved by the testimony of Thomas, whose deposition was taken and read without objection. When the commissioner's report was returned sustaining the appellee's claim, the appellants excepted to it upon the ground that the deed is void as to creditors. They did not except because the report was not sustained by the evidence. It is, of course, too late to make the objection for the first time in an appellate court.

Upon the whole, we are of opinion there is no error in the decree, and that the same should be affirmed.

Decree Affirmed.

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494 *Chrisman's Adm'x v. Harman & al.

[26 Am. Rep. 387.]

November Term, 1877, Richmond.

1. **Sureties—Recourse against Indorsers.**—A surety on an injunction bond for the second endorser of a negotiable note, who has been compelled to pay said note, is entitled to recourse against the first endorser to recover the amount so paid.
2. **Same—Same—When Not Barred.**—Such surety is not barred from such recourse by the fact that in a suit in equity, brought by the holder of such note against the maker and endorsers, a decree was rendered in favor of the first endorser.
3. **Same—Same—Same.**—Nor is such surety barred of such recourse by the fact, that in another suit in equity, brought by the second endorser to establish the liability to him of the first endorser, the bill was dismissed upon answer and demurrer, there being set out several causes of demurrer, of which some went to the merits of the controversy, and others did not, and it not appearing for what cause the bill was dismissed.

See Bickle v. Crisman, 76 Va. 678, for the sequel of the principal case.

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4. **Res Adjudicata.***—It is settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment was rendered, the whole subject matter of the action will be at large and open to a new contention, unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined.

5. **Estoppel.**†—The doctrine touching estoppel by matter of record, stated by BURKS, J.

495 *This case was heard at Staunton, but was decided in Richmond. It was an appeal from a decree of the circuit court of Frederick county, rendered in a cause in which M. G. Harman was plaintiff, and John H. Chrisman's administratrix and G. A. White were defendants. The object of the suit was to recover from Chrisman's estate the amount which Harman had paid as surety of White in an injunction bond, to the holder of a note made by Trussell & Coburn and endorsed successively by John H. Chrisman and G. A. White. The questions involved were whether Harman, having as the surety of White in the injunction bond, paid the debt to the holder, was entitled to be substituted to the rights of White against the prior endorser, John H. Chrisman; and whether Chrisman's estate was not protected from such liability by decrees made in prior suits between the holder and the other parties to the note, and one by White against Chrisman and others.

It appears that M. G. Tuley brought a suit in equity against Trussell & Coburn as the makers, and Chrisman and White as endorsers, of a note which the plaintiff alleged had been made and endorsed by these parties, and had been protested for non-payment, and notice given to the endorsers; and which was lost. The bill was taken for confessed as to the makers and White. Chrisman answered denying his endorsement and notice, and calling for proof. And there being no proof of Chrisman's having endorsed the note, when the cause came on to be heard the bill was dismised as to him, and there was a decree for the amount of the note against the makers of the note and White.

Subsequent to the term at which this decree was rendered, White filed a petition for a rehearing and an injunction. An injunction was granted, upon the condition of White's executing a bond with surety in the 496 *penalty of $3,000, conditioned according to law; and the bond was given, with M. G. Harman as the surety. This was in April, 1870. In June, 1870, the case came on upon the petition, and the note with the protest and notice having in the meantime been found, the court refused the petition and dissolved the injunction; and Mrs. Tuley was authorized to proceed in her suit to subject White's land.

In November, 1870, White filed his bill to review the decree first rendered against him, on the ground of after discovered evidence, making M. G. Tuley, Trussell & Coburn, and Chrisman defendants, and asking that Chrisman, as the prior endorser on the note, might be held liable over to him for the amount by said decree adjudged against him (White).

To this bill Chrisman demurred and answered, the demurrer being in the answer; and he stated six grounds of demurrer. 1. That it did not appear from said bill or otherwise that leave had been obtained to file the bill. 2. The plaintiff not having answered the original bill, but the same having been taken for confessed as to him, he will not be permitted to bring his bill of review to repair the consequences of his laches and neglect. 3. The decree was not a final decree as to the plaintiff. 4. The decree was a proper

*Res Adjudicata.—In Allebaugh v. Coakley, 75 Va. 637, the court states the law as follows, "Whenever a former judgment is relied on as a bar, whether by pleading or in evidence, it is competent for the plaintiff to show that it did not relate to the same property or transaction in controversy, and the question of identity thus raised is a matter of fact to be decided upon the evidence if the record itself is silent and so, if the cause of action is divisible or the pleadings involve two distinct propositions, it is competent to show that only one of them was submitted to and passed upon by the jury," citing the principal case, and Green Ev. sec. 532. See also, Southside R. R. Co. v. Daniel, 20 Gratt. 344; Kelly v. Board of Public Works, 25 Gratt. 760; Steam Packet Co. v. Sickles, 5 Wall. 580; Miller v. Wills, 95 Va. 354; Withers v. Sims, 80 Va. 651; LeGrand v. Rixey, 83 Va. 862, citing the principal case. In Railroad Co. v. Cazenove, 83 Va. 753, the following statement of the law from Durant v. Essex Co., 7 Wall. 107, is quoted: "The decree dismissing the bill in the former suit, being absolute in its terms, was an adjudication of the merits of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties. A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination. Where words of qualification, such as 'without prejudice' or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merit." See also, Seamster v. Blackstock, 83 Va. 236. See Tilson v. Davis, 32 Gratt. 92, and *note*.

Same—Doctrine as to the Commonwealth.—In Justice v. The Commonwealth, 81 Va. 209, it was held that the doctrine of estoppel is not applicable to the Commonwealth in a criminal prosecution. The maxim "no one shall be put twice in jeopardy for the same offence" rests upon technical notions of jeopardy, and not upon the principle of *res judicata*.

†**Estoppel—Record.**—In Randolph v. Longdale Iron Co., 84 Va. 465, the principal case was cited for the proposition that no man can be estopped by any record, unless it is shown that he is a party to it, and this should be shown by the record itself.

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decree, even if the alleged newly discovered evidence had been before the court. 5. That it did not appear by the bill of review that the decree complained of had been performed by the complainant. 6. Want of equity on the face of the bill and possession of the note precludes the jurisdiction of this court. And answering, he denies that plaintiff has any after discovered evidence which could not have been produced at the hearing of the cause by the exercise of reasonable diligence.

497 *Chrisman having died, the case was revived against his administratrix; and the cause coming on to be heard in June, 1874, the bill of review was dismissed as to Chrisman's administratrix with costs against White. Tuley then sued upon the injunction bond, and recovered a judgment against White and Harman; which was satisfied by Harman. And he then filed his bill against Chrisman's administratrix and White, to have satisfaction out of the estate of Chrisman. And the court, at its June term, 1876, it being admitted that Trussell & Coburn and White were insolvent, made a decree against Chrisman's administratrix in favor of Harman for $2,003.92, with interest, subject to credits stated. And thereupon Chrisman's administratrix applied to this court for an appeal; which was allowed.

Richard Parker and H. Conrad, for the appellant.

Barton & Boyd, for the appellees.

Burks, J. This is a controversy between the representatives of the first and second endorsers of a negotiable note. The appellee, Harman, as the surety on an injunction bond of White, the second endorser, was compelled by suit to pay the amount of the note to the holder, and he filed his bill to be substituted for indemnity to the rights of White, who was insolvent, against the personal representative of Chrisman, the first endorser.

An examination of the record satisfies me that both of these endorsers had become bound to the holder for the payment of this note. The note was not paid at maturity by the makers, was duly protested for non-payment, and each endorser had due notice of the dishonor. This is shown by the notarial certificate filed with Harman's bill.

498 The circuit court gave Harman a *decree against the personal representative of Chrisman according to the prayer of his bill.

It is objected in the first place, by the appellant's counsel, that this was not a case for the application of the equitable doctrine of subrogation. I do not think the objection well founded. The endorsers were severally and successively bound by their respective endorsements, and inter se Chrisman was primary debtor and White a quasi surety. If White, as endorser, had paid the note to the holder, it would not have been discharged or extinguished, but he would have had the right to hold it as a subsisting security against the prior endorser for the amount paid. A bill is not discharged and finally extinguished until paid by or on behalf of the acceptor, nor a note until paid by or on behalf of the maker. Byles on Bills, side p. 220.

Harman, as surety on the injunction bond, became bound for the payment of the note on which a decree had been rendered against White, and when and as soon as payment was made by him he became entitled in equity to the benefit of all the securities held by White, his principal, for his indemnity, and to be substituted in equity to all the remedies of White to enforce such securities. The note, although thus paid, was not extinguished, but continued a security for the amount paid, to which Harman became entitled in equity to resort for his indemnity. This conclusion results from the equitable doctrine of subrogation, and is supported, I think, by the authorities.

But it is further contended by the appellant's counsel, that even if a court of equity had jurisdiction to grant relief upon the principle of subrogation, yet Harman, standing in White's shoes, is concluded by the decrees of November, 1869, and June, 1874. The doctrine of res judicata and estoppel

499 generally is stated at large by *Mr. Conway Robinson, in the 7th volume of his Practice, from page 1 to page 482. The rule, as stated by Mr. Justice Field, of the supreme court of the United States, will suffice for this case. In Hughes v. U. States, 4 Wall. U. S. R. 236, he says: "In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of the pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."

Again, in a still more recent opinion, the same learned judge says: "It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment was rendered, the whole subject matter of the action will be at large and open to a new contention, unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible. * * * * *

"According to Coke, an estoppel must be

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'certain to every intent'; and if upon
500 the face of a record, anything *is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence. Russel v. Place, 94 U. S. R. 4 Otto, 606.

Applying the law thus laid down, I am of opinion that neither the decree of November, 1869, nor the decree of June, 1874, constitutes any bar to the relief which was prayed and granted in this case.

The first named decree was made in a suit brought by the holder of the note against the makers and the two endorsers, equitable jurisdiction being based on the ground that the note was lost. Chrisman answered the bill and denied his liability as endorser. White made default, and at the hearing of the cause, no evidence being offered by the complainant to contradict Chrisman's answer, the bill was dismissed as to him and a decree entered against the makers and White for the amount of the note. No question was raised or decided between the endorsers as to their respective rights and obligations touching the note. The litigation was wholly between the complainant in the bill on the one side, and the defendants on the other, nor was any such case made either by the pleadings or proofs as warranted any decree between these defendants. After this decree, the lost note was found, and with it the notarial certificate, from which it appeared that the note had been regularly protested for non-payment, and that each endorser had due notice. Thereupon White filed his bill against the holder of the note, the makers and Chrisman, alleging the finding of the note and the facts connected with it, and praying that the decree of November, 1869, be reviewed and reversed, or at least modified so far as to hold Chrisman liable as prior endorser and compel him to make payment of the note to the exoneration and relief of White, who was only secondarily bound.
501 *Chrisman answered and demurred to the bill in the same pleading, and at the hearing the bill was dismissed. In the decree no mention is made of the demurrer as distinguished from the answer, for the reason, no doubt, that the demurrer was regarded and treated as of the same pleading with the answer. Six causes of demurrer were specially assigned, and most of them, as will appear on examination, do not touch the merits of the controversy. For example, one cause assigned is, that the bill was filed without the leave of the court; another, that the decree complained of was not final as to the complainant; and another, that the decree had never been obeyed and performed by the complainant; by which was doubtless intended that the complainant had not paid the sum (the amount of the note) decreed against him, and therefore his bill was prematurely filed.

It does not appear by the record upon what grounds the bill was dismissed, whether upon the merits or upon some of the special causes of demurrer not involving the merits; and as no extrinsic evidence was furnished in the subsequent suit, if indeed any could be in such a case, showing the precise point involved and decided in the former suit, according to the authority of Russel v. Place, supra, "the whole subject matter of the action was at large and open to a new contention."

In this "new contention," I am satisfied that justice has been done between the parties, and I am of opinion to affirm the decree of the circuit court.

Decree affirmed.

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502 *Chesapeake & Ohio R. R. Co. v. Paine & Co.

November Term, 1877, Richmond.

1. **Shares of Stock—Garnisheeing Corporation.***—The shares of a stockholder in a joint stock company, incorporated by and conducting its operations, in whole or in part, in the state are such estate as is liable to be attached in a proceeding instituted for that purpose, by one of the creditors of such stockholder; and such estate may properly be considered, for the purpose of such proceeding, as in the possession of the corporation in which the shares are held, and such corporation may properly be summoned as garnishee in the case.
2. **Same—Same—Jurisdiction of Courts.**—On such a proceeding a court of law has jurisdiction as well as a court of equity.
3. **Same—Same—Claim by Third Party.**—Where, along with the answer of the corporation in such proceeding, an affidavit is filed, alleging that some third person claims that said stock, and that the corporation claims no interest therein, nor colludes with such claimant, but is ready to dispose of the stock as the court shall direct, the court should require such third person to appear and state the nature of his claim, and maintain or relinquish the same.
4. **Same—Same—Judgment against Corporation.**—If, in such a proceeding, the stock should appear to be liable to the lien of the attachment, it ought to be sold for the satisfaction of the same under an order of the court made for that purpose in the attachment proceeding; but it is error for the court to render a judgment against the garnisheed corporation for the value of the stock, unless it appears that the lien of the attaching creditor on the stock was lost by the act of the corporation.

On the 28th May, 1872, Paine & Co. sued out from the clerk's office of the circuit court of the city of Richmond a summons, commanding the defendants therein
503 *named, viz: Trice & Hunter, to appear and answer a plea of trespass on the case in assumpsit.

On the same day, upon affidavit that the defendant Trice was a non-resident of the state of Virginia, and that the affiant believed

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***Shares of Stock—Garnisheeing Corporation.**—In Railroad Co. v. Griffith, 76 Va. 913, the principal case is cited for the proposition that the shares of a stock holder in a railroad company are liable to attachment; and by virtue thereof the attaching creditor requires a claim superior to that of a subsequent *bona fide* purchase of those shares for value and without notice. See Ashley v. Quintard, 10 Am. & Eng. Corp. Cas., N. S., 137, and *note*.

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that the said defendant had estate or debts due him in the city of Richmond, an attachment was issued in said cause of Paine & Co. v. Trice & Hunter, and was executed the same day by delivering to the vice-president and cashier of the Chesapeake and Ohio Railroad Company copies thereof, and summoning them to appear as garnishees and answer said attachment.

On the 20th November, 1872, judgment was rendered in favor of Paine & Co., against Trice & Hunter for the sum of $520.38, with interest thereon from 20th February, 1872.

On the 16th December, 1873, the railroad company filed their answer to the attachment under the corporate seal of said company, alleging that at the time of the service of said attachment the said company was not indebted to the said Trice, nor had in its possession or control any goods, chattels, money, securities, or other effects belonging to said Trice.

Thereupon Paine & Co., by counsel, objected to the receiving of said answer on the ground that said garnishee had not fully answered, and the court sustained said objection and required said railroad company, garnishee as aforesaid, to answer further.

Whereupon the said Chesapeake and Ohio Railroad Company answered further, that on said 28th May, 1872, the said Trice was a stockholder in said company, and on that day had fifteen shares of stock standing on the books of the company in his name; but that it was advised and so insisted that the said shares created no indebtedness from said company to said Trice, nor were they
504 goods, chattels, *money, securities or other effects, belonging to said Trice, in the possession or control of said company; and in addition to said answer, filed the affidavit of the vice-president of said company that one John H. Oley, a resident of the town of Huntington, in the state of West Virginia, had a claim to the said fifteen shares of stock; that the said company had and claimed to have no interest whatever in said shares, and that it did not collude in any manner with said claimant, but was ready to dispose of the said fifteen shares of stock as the court might direct.

Thereupon the railroad company moved the court to require said Oley to appear and state the nature of his claim to said stock, and maintain or relinquish it, and in the meantime to stay proceedings against the said company. Which motion the court overruled; to which decision of the court the company excepted.

Thereupon a jury was waived, and the facts agreed, whereby it appeared that said fifteen shares of stock remained registered on the books of the company, in the name of said Trice, until the 20th January, 1873, when they were transferred to the name of said J. H. Oley, in the manner prescribed by the fifty-seventh chapter of the Code of 1860, (see Code of 1873, ch. 57, § 29-30); that said transfer was accomplished under a power of attorney to transfer said stock, given by Trice to Oley in January, 1873; that the market value of said shares of stock on the 21st January, 1873, was $35 per share; that Trice was indebted to said Oley, and said transfer was made in part payment of said indebtedness; and that Oley had no knowledge at the time of transfer of the attachments, both he and Trice being residents of West Virginia; that the president of the railroad company resides in the city of New York, at which place is the principal office of the company
505 out of Virginia, and that *the stock-ledger on which the transfer of the shares of stock was registered was kept in the New York office.

On consideration whereof, and of the answer of said company, the court being of opinion that at the time the attachment was served on the railroad company there was a liability on said company for the fifteen shares of the stock of said company then standing on the books of said company in the name of said Trice, and that at the time of the transfer of the said stock to the said Oley, it was of the value of $525, rendered judgment against said company for said sum of $525, with interest thereon from the 15th day of December, 1873. To this judgment the Chesapeake and Ohio Railroad Company obtained a writ of error and supersedeas from one of the judges of this court.

Wm. J. Robertson and H. T. Wickham, for the appellant.

Cannon & Courtney for the appellees.

Moncure, P., delivered the opinion of the court.

1. The court is of opinion, that a person's whole estate, real, personal and mixed, subject to such exemptions as are made by law, is liable for the payment of his debts, and may be subjected thereto by judgment and execution, and such ancillary proceedings at law or in equity as may be necessary or proper to enforce such execution. When the debtor is a non-resident of the state, but has estate within the commonwealth, such estate may be subjected by attachment to the payment of the debt.

Such attachment may be levied on the estate itself, if it be tangible and in the debtor's possession, or in the actual possession of no person. But if it be in the possession of another person than the debtor, such other
506 *person must be summoned as garnishee. Such attachment becomes a lien on the debtor's interest in the state from the time of the attachment thereon, or of the service of the summons on the garnishee, respectively, as aforesaid.

2. The court is further of opinion, that shares of a stockholder in a joint stock company, incorporated by and conducting its operations in whole or in part in the state—such stockholder being himself a non-resident of the state—are such estate as is liable to be attached in a proceeding instituted for that purpose by one of his creditors in a proper court of the state; and such estate may properly be considered for the purpose of such proceeding as in possession of the corporation in which the shares are held, and

such corporation may properly be summoned as garnishee in the case.

Whether shares of a stockholder in a joint stock company be chattels or choses in action, has been a vexed question. The better opinion seems to be that they partake of the nature of choses in action. Angel & Ames on Corporations, § 560 et seq. and notes. Barksdale & als. v. Finney & als., 14 Gratt. 338, 357. But whether they be the one or the other, they certainly constitute a part of the owner's estate, and as such are liable to the payment of his debts, and to a proceeding by attachment against him. The statute declares that they shall be deemed personal estate. Code, p. 550, § 21.

Several cases were cited by the counsel of the plaintiff in error in the argument of this case, to show that stock in a corporation is not subject to a proceeding by attachment against the owner—viz: Haley &c. v. Reid, 16 Georgia, 437; Ross &c. v. Ross, 25 Id. 297; Foster v. Potter, 37 Mo. 525. See also the Planters and Merchants Bank of Mobile v. Leavens, 4 Alab. R., New Series, 753.

507 *But these cases depend entirely upon the statute law of the states in which they were decided. Of course it depends upon the statute, wherever the subject is governed and regulated by statute, whether stock in a corporation shall be liable to an attachment against the owner, and if so, in what manner and to what extent. Titcomb v. The Union Marine and Fire Ins. Co., 8 Mass. R. 326.

In this state, the statute law subjects to the proceeding by attachment against a non-resident debtor, all his estate within the commonwealth which could be subjected to the payment of his debt if he resided therein. Before the revision of our statute law in 1849, the only remedy against a foreign debtor, owning or having an interest in property within the state, to subject such property or interest to the payment of the debt, was in equity, by a proceeding known by the name of a "foreign attachment."

But in the revision of our Code in 1849, a radical change was made, at least in the form of proceeding in our attachment law. No change was made, for none was needed, in regard to the liability of a debtor's whole estate, including his stock, if he had any, in a corporation within a state; for that was liable to the remedy by foreign attachment as that remedy aforetime was. But by the change then made, it was provided that, to subject the property within the state of a debtor residing out of it to the payment of the debt, the proceeding by attachment should be at law, if the debt be recoverable by action at law; but should be in equity, if the debt be recoverable in equity. See the report of the revisors, ch. 151, pp. 753-763, and notes.

Very soon after that revision was made, the former equitable remedy by foreign attachment was restored in regard to legal demands, but concurrently with the

508 legal *remedy given in such cases at the revision. Though our attachment law in other respects have ever since remained, and yet remains, substantially the same, or nearly the same, as it was recommended by the revisors in their report, and adopted by the legislature in the revision aforesaid. As it now stands, it may be found in the Code of 1873, pp. 1008, 1016, ch. 148.

By reference to that chapter, it will be seen that the legislature has therein used the most comprehensive terms in describing the estate made liable to attachment; thus plainly showing its intention to embrace all estate of the debtor within the jurisdiction of the court, including his shares, if any, of such stock in a corporation. In the first section the word used is "estate," without limitation or restriction, and the same word, or other words sufficiently comprehensive to embrace shares of stock in a corporation, are used in most of the sections of the same chapter; thus plainly showing that such shares are within the letter, as they certainly are within the spirit, of the law. In addition to § 1, see §§ 7, 9, 11, 12, 13, 15, 17, 18, 19, 23, 24, 25, 27, and 28 of the chapter.

That a corporation may be summoned and proceeded against a garnishee, in such cases, was expressly decided by this court in Baltimore & Ohio R. R. Co. v. Gallahue's adm'rs, 12 Gratt. 655. That the corporation in which the shares are held in this case was properly summoned and proceeded against as a garnishee, seems to be very clear. The corporation is a trustee of the corporate property for the benefit of the corporators, who are the stockholders. They receive the profits of it in the form of dividends while the corporation continues to exist, and when it ends, the surplus which then remains of said property and profits is subject to be divided among them. The corporation alone, while it exists, is in possession of the corporate property. If these shares of stock in

509 such *corporations are liable to attachment, as we have seen they are, how can they be attached but by summoning the corporation as garnishee?

We have examined the case of Rollo, assignee, v. Andes Ins. Co., 23 Gratt. 509, but as there is nothing which is at all in conflict with this opinion, it is unnecessary to make any comment thereon.

3. The court is further of opinion, that although a court of equity might, and no doubt would, have had jurisdiction in this case, yet the court of law in which it was brought also had jurisdiction in it, and ample provision is made by law for obtaining relief in an action at law in such a case. Indeed, the same provision is made by law in regard to the mode and measure of relief in an attachment case, whether it be an action at law or a suit in equity.

4. The court is further of opinion, that the circuit court did not err in requiring of the garnishee a further and fuller answer than the one first given. But no exception was taken to the action of the court in that respect, and therefore no error can be assigned thereon.

5. But the court is further of opinion that the circuit court erred in not making an order requiring J. H. Oley to appear at such time as the court should have appointed, and state the nature of his claim to the stock in

controversy and maintain or relinquish it. The transfer to him of the shares of the said stock on the books of the corporation was made on the 20th day of January, 1873, which was long after the 20th day of May, 1872, when the attachment was issued and served on the Chesapeake and Ohio Railroad Company, and thus became a lien on and from that day, on the interest of the defendant, A. J. Trice, in said stock, which then stood and remained in his name on the books of the said corporation; so that it would appear that the right of the said attach-
510 ment *creditors is prior and paramount to that of the said Oley. But the latter might possibly be able to show, if he had an opportunity; that he had some prior equitable right to the stock.

6. And the court is further of opinion, that the circuit court erred in rendering a judgment against the garnishee for the value of said stock, at least unless it had appeared that the lien of the attaching creditor on the said stock was lost by the act of the said corporation; which does not appear from the record. If the stock be liable to the lien of the attachment, it ought to be sold for the satisfaction of the same, under an order of court made for that purpose in the attachment proceeding.

7. The court is further of opinion, that there is no other error than as aforesaid in the judgment and proceedings aforesaid. But for the errors aforesaid, the said judgment is reversed, and the cause remanded to the said circuit court for further proceedings to be had therein to a final judgment in conformity to the foregoing opinion.

Judgment reversed.

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511 *White & Wife v. McGannon & al.

November Term, 1877, Richmond.

Specific Performance — Inadequacy of Price.*—In a case for the specific execution of a contract for the sale of land, though it appears that the price contracted to be given for the land was double its value, yet as the purchaser was fully competent to contract, and there was no fiduciary relationship between him and the vendor, and very brief acquaintance, and the purchaser made his own examination of the land, though it was mostly covered by snow; in the absence of all fraudulent representations on the part of the vendor the contract will be enforced.

This case was argued at Staunton, but was decided at Richmond. It was a bill filed by James McGannon and Thomas Bennett against Robert White and Frances, his wife, to enforce the specific execution of a contract for the sale of a track of land sold by McGannon and Bennett to Mrs. White. There was a decree in the circuit court of Frederick county for the specific execution of the contract, and an application by White and wife for an appeal; which was allowed. The case is sufficiently stated by Moncure, P., in his opinion.

Richard Parker, for the appellants.

There was no counsel for the appellees.

Moncure, P. This is a suit for the specific execution of a contract for the sale of a tract of land. On the 11th day of February,
512 1868, McGannon and Bennett, *then residents of the city of Wheeling, in West Virginia, and owners of a tract of land, estimated to contain 800 acres, more or less, lying partly in Frederick county, Virginia, and partly in Morgan county, West Virginia, and recently before, to-wit: in the next preceding month of January, 1868, purchased by them of McIntyre's heirs, contracted with Robert White, then also a resident of the said city of Wheeling, to sell to Frances White, wife of the said Robert, 200 acres of the said tract, to be taken off the southern end thereof; to convey to her all rights they had to the said portoin of the said tract; to give possession of the same as soon as they received it from their vendors, only reserving the crop of wheat then growing thereon, with the right to gather and save the same; to have the land surveyed, and to execute a deed with general warranty to the said Frances White for the same; in consideration of which it was agreed that the said Frances should pay to the said McGannon and Bennett the sum of $6,500, to-wit: $3,025, part thereof, in cash, and the residue, $3,475, in three equal annual payments, for which she was to execute her bonds, payable in one, two and three years from the said date, with interest from said date, and should execute a deed of trust to secure the deferred payments. Accordingly the said cash payment of $3,025 was made; possession of the said land was delivered to the said White and wife, who removed to the same about the 1st of March, 1868, and have ever since resided thereon. A survey was made on the 14th of April, 1868, and a deed was executed by the said McGannon and wife and the said Bennett, bearing date the 10th day of April, 1869, which was duly acknowledged and certified for record, and tendered to the said Frances White, conveying the said land to her with general warranty of title. But she refused to receive

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***Specific Performance — Inadequacy of Price—Fraud.**—In Stearns v. Beckam, 31 Gratt. 389, the court says, "the unfairness which will disentitle a plaintiff to call for specific performance at the hands of a court of equity, may be either in the terms of the contract itself, or it may be in matters extrinsic and the circumstances under which it was made. The unfairness may not amount to actual fraud; for there are many instances in which, though there is nothing that actually amounts to fraud, there is nevertheless a want of that equality and fairness in the contract which are essential in order that the court may exercise its extraordinary jurisdiction in specific performance. * * * Inadequacy of consideration, unconnected with any other circumstance, constitutes no valid objection to the specific execution of a contract through the medium of a court of equity unless the inadequacy be so great as in itself to be sufficient evidence of fraud." See also, Terry v. Coles, 80 Va. 700; Hale v. Wilkinson, 21 Gratt. 75.

the said deed, and refused to make
513 the first *deferred payment for the said land when it became payable; in consequence of which the said McGannon and Bennett brought this suit against the said White and wife in the circuit court of Frederick county to enforce the specific performance of the said contract. Let it be here remarked that the vendors have been guilty of no default in the performance of their part of the contract, which is always a circumstance in favor of a party who invokes the aid of a court of equity to enforce specific performance. The defendants, in their answer, relied on alleged inadequacy of consideration and fraud and misrepresentation in the sale, as the grounds on which they had refused to perform the contract on their part, and on which they claimed that the court ought not to decree the specific execution of the same, but ought even to decree its rescission; and it was agreed by the parties, by counsel, in the cause, that it should be considered by the court as if the defendants had filed their cross-bill, making the allegations contained in their answer, and praying a rescission of the said contract, and the plaintiff had answered said cross-bill, denying the allegations on which said relief of rescission was asked, and there had been a general replication to said answer. Many depositions were taken in the cause on both sides, among which were the depositions of the said McGannon and Bennett on the side of the plaintiffs, and the depositions of the said Robert White and wife on the side of the defendants; and on the 22d of August, 1870, a decree was entered for the specific execution of the said contract. From that decree the said White and wife applied for and obtained an appeal from this court.

But afterwards, to-wit: in October, 1873, when the said appeal came on to be heard in this court, it appearing to the court that the said decree appealed from was rendered in vacation, before the passage of the act
514 approved *January 14, 1873, entitled "an act to authorize decrees in chancery causes to be entered by consent of parties in vacation, and to validate decrees heretofore rendered in vacation," (Session Acts of 1872-73, p. 18, ch. 26); and the parties against whom said decree was made not having, either in this court or the court below, entered of record, according to the proviso contained in the second section of said act, a waiver of all objection to the validity of such decree on account of its having been made in vacation: Therefore, without deciding other questions arising in the cause, it was decreed and ordered by this court that the said decree was invalid and be set aside, reversed and annulled; that the appellees pay to the appellants their costs by them expended in the prosecution of the said appeal; and that the said cause be remanded to the said circuit court for further proceedings to be had therein according to law; which was ordered to be certified to the said circuit court, and the same was accordingly so certified and entered of record in said court.

After the cause was remanded to the said circuit court, further proceedings were had therein in the said cause, including the taking of sundry other depositions in behalf of the appellees; and on the 5th day of April, 1875, the cause came on to be heard in the said circuit court, which thereupon made a decree refusing to rescind the contract referred to in the bill, and directing its specific execution. From and to the last-mentioned decree the said White and wife applied for and obtained an appeal to this court, and a supersedeas; which is the case we now have under consideration.

As before stated, there are two, and only two, grounds relied on to show that the contract ought not to be specifically executed, and ought even to be rescinded; and they are: first, inadequacy of consideration;
515 and, secondly, *fraud and misrepresentation in the sale. I will proceed to inquire whether, on either of these two grounds, or both of them together, the defence relied on by White and wife ought to be sustained; and,

First. As to the alleged inadequacy of consideration.

It was held by this court, in the recent case of Hale v. Wilkinson, 21 Gratt. 75, that specific performance of a contract for the sale of land will not be refused on the sole ground of inadequacy of price, unless it be so great as to shock the moral sense, and thus be in itself evidence of fraud. A fortiori, such a contract will not be rescinded on that sole ground, unless the inadequacy of price goes at least to that extent. The question therefore is, whether there was such an inadequacy of consideration in this case, if the consideration can be properly said to have been inadequate at all; for no consideration of any value at all, upon which parties capable of contracting with each other, and in the absence of fraud, may agree, can be said, in a legal sense, to be inadequate.

All the testimony in the cause in regard to the value of the land tends to show that it was actually worth much less per acre than the price stipulated to be paid for it in the contract aforesaid, to-wit: thirty-two dollars and fifty cents per acre. But most of the testimony applies to the time at which it was given, when land in the neighborhood was much lower than at the time of the sale; though some of it applies also to the time of the sale. Of course, the value of the land at the time of the sale is the only material subject of inquiry in regard to such value.

The value of the land varies very widely, according to the testimony of the different witnesses, fluctuating between the extremes of six and fifteen dollars per acre. Some of the defendants' witnesses estimate it
516 as high as *fifteen dollars per acre; which is little less than half of the price at which it was sold by the plaintiffs. Perhaps, according to an average of the estimates of the witnesses, the value of the land would be about twelve dollars per acre.

But all the witnesses evidently testified as to the opinion entertained by them at the time they gave their testimony in regard to

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the actual value of the land, either at that time or at the time of the sale, and not in regard to the price it would bring in the market at the time of the sale. We all know that shortly after the war, and especially during the years 1866 and 1867, there was a great influx of immigrants to Virginia, at least to many portions of it, and that the price of lands in those portions, during that period, was greatly enhanced beyond the actual value of such lands. In every town, and almost every county, to which this tide of immigration was directed, there were "land agents" or "land brokers," whose sole or chief business it was to negotiate sales of land between our people and the new settlers among them. The county of Frederick, in which the land in controversy partly lies, was one of the portions of the state to which these new settlers came; and there were, according to the testimony, as many as twenty or twenty-five real estate agents in the town of Winchester alone, after the close of the war, engaged in the business of negotiating sales. The witness who gave this testimony, and who had himself been a real estate agent from the close of the war, said he never knew of a real estate agent in business in Winchester before the war. The same witness said (he gave his testimony in April, 1870), "lands have been fluctuating very much, until recently. I have sold and resold various tracts of land. I have resold most of them at an advance on the first sale; some of them at a loss. 517 Purchasers have been mostly *from Pennsylvania and New York, and other northern states. The business has been more of a speculative character than anything else. Lands have been fluctuating much more than they did before the war, and some of them have sold for two or three times as much as they did before the war; that is, slate or cheap lands. Good lands have not fluctuated so much in price." Being asked, "Can you illustrate this character of the business by any examples now in your memory?" he answered: "I could illustrate it in several instances if I could just think, but I don't recollect just now. The Jones' tract was sold at a considerable advance in a short time. I sold it the last time for about $18,000; it had been sold previous to that for about $10,000 or $12,000. I sold this Baker farm out here; it was sold in 1867, I think, for $50 per acre. I sold it twice since; the last time for upwards of $60 per acre. I sold a small farm near Newtown, of Baker's, for $1,500; I resold it the same week for $2,000."

Such was the inflation of prices during the period and for the cause aforesaid, that our people did not know where it would end, or at what price to fix their lands in offering them for sale. There was danger of fixing them at too low a price, and thus incurring a sacrifice, as the owners supposed. It was said in the argument that the land in question was not within the range of this speculating business. It is slate land, and the witness aforesaid stated that slate lands sold during the period aforesaid for two or three times as much as they did before the war, and it was in, or partly in, the county of Frederick. This very witness, as land agent, about the 1st of January, 1868, sold the McIntyre farm, estimated to contain about 800 acres, of which the land in question formed a part, to the plaintiffs, McGannon & Bennett, for $10,000, being at the rate of $12.50 per 518 acre. *Though the land was sold to them as being estimated to contain 800 acres, more or less, yet it is mentioned in the agreement with White as containing only 600 acres; it appears from the plat in the record to contain 624 acres, and it was assessed for taxation only as 591½ acres. When the sale was made to White the vendors did not know that the quantity would exceed 600 acres. Had that been the true quantity the vendors would have given $16.66⅔ per acre—that is, more than one-half of the rate at which they sold the choice fourth of the farm, with all the improvements thereon, to White. That whole farm was assessed for taxation for the year 1868, only at $3,161.36—less than one-third of the price at which it had, only the year before, been sold to the plaintiffs! Suppose they had refused to perform their contract on the ground of inadequacy of consideration, would a court of equity have sustained them in such refusal on that ground only? I imagine not. And yet there would have been at least as much reason in so sustaining them as there would be in sustaining a similar refusal of the defendants in this case. There is a greater difference between the price they gave and the assessed value of the land, than there is between the price their vendees agreed to give to them and the price which they, the vendors, gave for the land, in the same proportion.

I make these observations upon the idea that the 200 acres of land in controversy are of the same proportionate value as the residue of the McIntyre farm. But who can say from the record in this case, what is the relative value per acre of these two portions of the farm? The evidence does not show what is that relative value, but it does strongly tend to show that the portion sold to the defendants is of greater, and probably much greater relative value than the residue of the farm. The defendant, Robert White, chose the southern portion of the farm, 519 *including the most valuable, if not the only valuable, improvements upon it, and including the rich lots around the buildings. Who can say, looking to the comparative value of the two portions of the farm, and to the fact that the defendants bought but one-fourth of it, with all, or nearly all the improvements of the whole tract on the part they purchased, that the price they agreed to give per acre for the land, was much, if any greater, (looking to the comparative value of the two portions), than the price paid for the whole farm by their vendors just a month before? But surely those vendors, though non-residents, had the same right to fix their own price upon their own land that everybody who owned lands around theirs had, and was daily exercising or not at pleasure. And if that price, under the

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influence of the views and opinions which generally prevailed at that time in regard to the prospective value of real estate in this section of country, was greatly inflated beyond the actual value of the land, can it be said that the consideration of a sale made at that price is therefore so inadequate that a court of equity should refuse, on that ground alone, to execute the contract? Could any of the sales of land made by any of our people in this section of country during the period aforesaid stand the test of such a doctrine as that? Since that period land in the said section (I mean the section to which immigration has been tending as aforesaid) has greatly fallen in price, and has perhaps fallen even below the price which was usual before the war. Indeed, it has been difficult since to sell such land at any price. Immigrants who bought such land during that period, at the inflated prices of the time, have in many cases been glad, after paying large portions of the purchase money, to return the land to their vendors in consideration of being released from the payment of the balance due. Suppose, instead of 520 *making such arrangements, they had resisted the demands of their vendors for a specific execution of their contracts upon the ground of inadequacy of consideration; and had proved, as they easily might have done, and as was done in this case, that the actual value of the land was greatly less than the price they agreed to give for the same; would their defence have been sustained by our courts? I think clearly not; and for the same reason I think that the defence in this case on the ground of inadequacy of consideration, taken by itself, is clearly insufficient. I now proceed to inquire whether upon any other ground, either taken by itself or in connection with the supposed inadequacy of consideration, a court of equity ought to rescind the contract, or even to refuse to enforce its specific execution. But one other ground of defence is relied on, and that is fraud and misrepresentation in the sale. I therefore proceed to inquire:

Secondly. As to the alleged fraud and misrepresentation.

It is not alleged in the answer, nor attempted to be proved by any testimony, nor is there anything in the record tending to show that the defendant, Robert White, who made the purchase for his wife and alone acted for her in the transaction, was not perfectly competent to make such a contract, or that any confidential relation existed between him and the plaintiffs, or either of them, or that he was in any manner under the influence of them or either of them. All the parties, plaintiffs and defendants, resided in the same place, to-wit: the city of Wheeling; though they seem to have been almost totally unacquainted with each other prior to the negotiations between them for the sale of the land in controversy. Robert White had never, I believe, seen, and certainly was wholly unacquainted with one of them, Bennett, and was very slightly, if at all, acquainted with the other, McGannon. 521 *Neither of them, McGannon and Bennett, appears to have been at any time a land agent or speculator. One of them, McGannon, was by trade a butcher, and engaged in that business at the time of the sale in question; and the other, Bennett, was engaged in the business of shipping goods at a railroad depot in Wheeling. It does not appear what had been the occupation of Robert White. All these parties seem, at the same time, to have been imbued with the then prevailing desire in the northern and other neighboring states and cities, to emigrate to Virginia or some other southern state, and McGannon and Bennett, about the 1st of January, 1868, united in purchasing from Hancock, a land agent in Winchester, the McIntyre farm aforesaid, estimated to contain 800 acres, more or less, for the sum of $10,000. They no doubt bought this farm with no view to speculation, or of reselling it or any part of it, but with a view of dividing it between them and removing to and residing upon it; and they did actually, soon afterwards, divide the remainder of it, after deducting portions resold by them to the defendants and others, between themselves, and have ever since, so far as the record shows, resided upon it. It does not appear, nor is it probable, that they had ever seen the land before they made the purchase. They left it a day or two after they made the purchase; and never saw it again until they returned to it with Robert White about a month afterwards, for the purpose of selling a portion of it to him, if, after his seeing it, they could agree upon the terms. When they bought it it was covered with snow, and they saw little of it. One of them, Bennett, was not upon the land at all before the sale to White. They no doubt bought it, and mainly upon the representations of others, one of which others said the price of it was $17,000, but it could perhaps be bought for less. When they suc- 522 ceeded in buying it for *$10,000 they doubtless supposed they had made a great bargain, though the price they gave for it was more than three times the assessed value of the land. Shortly after they returned to their homes in Wheeling Robert White, who it seems had sold his house in that city and wished to move with his wife and children to the country, hearing in some way, but how does not appear, that McGannon and Bennett had purchased the McIntyre farm, and might be willing to sell part of it, called on McGannon at his house and proposed to purchase a part of the farm. McGannon could not say whether such a purchase could be made without seeing his partner, Bennett, and told White to call again. After McGannon had seen Bennett and White had called again, it was agreed between them that a sale of a portion of the land would be made to White, if, after his seeing the land, they could agree upon the terms. It was accordingly arranged that all three of them would go out and see the land, and ascertain whether such an agreement could be made; and in a week or two thereafter they went out together by railroad to Martinsburg, and thence in an ambulance to

the land; where, after seeing it, they made the contract in question on the 11th of February, 1868. Possession of the land was delivered to the purchaser, who made the cash payment of $3,025, moved with his family to the land about a month thereafter, and has ever since resided thereon. A survey was made of the land, according to contract, in April, 1868, in the presence of White, who then made no objection to it.

Now, what I have thus far stated are facts of the case about which there seems to be no dispute; and taking them to be all the facts of the case, they certainly afford no foundation for any charge of fraud or misrepresentation in the sale.

523 *But the answer alleges that certain fraudulent misrepresentations were made by McGannon to Robert White in regard to the land, before the parties went from Wheeling to see it; and also by both McGannon and Bennett, while they were upon the land; on the faith of which representations said White says he made the purchase. He says that when he went to see McGannon, in Wheeling, to enquire about making a purchase of the land, McGannon "at once stated that he had the prettiest farm to sell, and recommended it so highly for its excellence that the said Robert was induced to accompany the complainants to this county to look at it;" that when they reached the farm, which was on the 9th of February, 1868, "the land was then entirely covered with snow and ice, and it was impossible to examine, or even to see, the soil, so as to form a judgment of its quality. But the most positive assurance was then (as well as at other times) given by the complainants to the defendant, Robert, of its great fertility and value; they asserted that it was good limestone land, was rich, and could not be beat; and one of them alleged that he had dug into the ground two spades deep, without reaching the bottom of the rich upper soil;" that "he relied entirely upon their statements with respect to it, believed them to be true, and being pleased with the exposure or lay of the land, he, in his wife's name, agreed to purchase it."

These are all the allegations of fraudulent misrepresentation contained in the answer, and being affirmative averments, the necessity of proving them, of course, devolved on the defendants. The only testimony in the cause tending to prove them is the deposition of Robert White himself, who says: "We walked over the land on which I now live and through the snow, and they showed me land which they represented as theirs and

524 belonging *to that portion for which I bargained, and which land I afterwards found out did not belong to them at all, but belonged to William McIntyre. We then examined the houses and barn, and found the barn in a bad condition, wanting a new roof; the houses were in a better condition. They also represented it as good land, and said there was plenty of limestone on it for the use of the place. He recommended me to William McIntyre to find the limestone, he (McGannon) never having shown it to me. I have looked all over the place, and have not been able to find any limestone; there is plenty of rock. Mr. McGannon represented it to me to be very rich land; he told me that he had dug two spades deep, and that he had not gotten to the bottom of the soil. The ground was so completely covered with snow that I could not see the soil. I did not see a foot of land at that time that was bare; it was all covered with snow. I think there is fifty or sixty acres of the cleared land that will hardly produce anything, it is so poor. There is no soil on it; is all slate and gravel. They represented it before and at the time of the purchase to be good land, and said there was no poor land on it. McGannon remarked that there was not a foot of poor land on it, and said he had dug two spades deep and had not come to the bottom of the soil. Mr. McGannon recommended it to me very highly in Wheeling before I came on to see it. This occurred at his own house in Wheeling. He explained to me the situation of it. He said it was excellent good land. There was no one present that I know of. Mr. McGannon then showed me a plat of the land by a newspaper, and said it was good land."

On the other hand, we have the testimony both of McGannon and Bennett in regard to these alleged misrepresentations. McGannon denies what is said in the deposition (but not in the answer) of White about

525 representing *certain land to be a part of the land sold, which was not, in fact, a part of it; and being asked, "Please describe how you represented this land to White when selling it to him; did you speak of it as limestone land, and did you represent it as two spades deep of rich soil?" he answered: "I never did describe it as limestone land, and never did represent it as two spades deep of rich soil to any one in my life." In answer to other questions he said: "I bought the land from the McIntyres on the 3d of January, 1868, and I came to Winchester on the night of the 3d or on the morning of the 4th. I never saw the land from that day until the day we went to sell it to Mr. White. When we bought the land from McIntyre it was covered with snow, and the day the land was sold to Mr. White there was snow on a part of it, but there was some of it on which there was no snow." Bennett, in his deposition, says: "I had no conversation with Mr. White until the time of the sale, concerning the sale of the land, except at one time he asked me how it looked, when I told him it was a very pretty farm." In answer to another question, he says: "I never represented the land to Mr. White. All I ever said was that it was a nice farm. I never made such representations (as are mentioned in the question, being those alleged in the answer), to either Mr. or Mrs. White. I never heard McGannon make any such representations; nor did Mr. White ever ask me." Being asked: "In pointing out the land to White, was not some spoken of as belonging to the part he would get, which is outside of the lines?" he answered: "I never said a word. It was the first time I had been on the land, and he knew as much of the lines as I did. I was out there when it was bought

by McGannon and myself, but was not on the land. To my knowledge, I never heard McGannon say anything about it; but 526 we told him we would sell him 200 *acres off the south end of the farm." And in answer to another question, he says: "I remember hearing McGannon in Wheeling tell White he would not sell land to his father without his seeing it."

Now, we must take these three depositions of the parties all together, or we must disregard them all in considering the case. If we disregard them all, then, of course, there is no testimony to sustain the allegations of fraudulent misrepresentation contained in the answer. If we take them all together, then, of course, the depositions of the plaintiffs, McGannon and Bennett, which directly contradict the deposition of the defendant, Robert White, in regard to such of the said allegations as are material, must outweigh that deposition, there being two witnesses to one, and there being nothing in the case to detract from the credit due to any one of these three witnesses more than from the credit due to any other of them; so that in either view the effect is the same.

In regard to the land which Robert White testifies was represented by the vendors to be part of the land sold by them to him, but which is outside of their lines, and which is contradicted by the testimony both of McGannon and Bennett, there is no allegation in the answer of any misrepresentation in this respect; there is no testimony to show that the portion of land in question is any better or more desirable than any of the land included in the survey of 200 acres, and when that survey was made White, though present, and though Bennett also was present, made no objection to it for not embracing the said portion of land, and set up no claim to it, thus showing that the claim set up for the first time in his deposition is an after and a very recent thought.

I think there is nothing in the record which warrants the belief, and certainly noth- 527 ing which would warrant a *decision that these vendors, McGannon and Bennett, made any representation to Robert White in regard to the land sold by them to him, which they knew to be false, or which they did not believe to be true. In regard to the alleged representation of McGannon as to the good quality of the land, there is evidence in the record strongly tending to show that such was his opinion of it, whether it was founded on what he heard from others when he made the purchase, or from the slight examination he then made of the land, or from both together. It appears from the testimony in the cause that he expressed such an opinion after the sale, when he had no apparent motive for making a misrepresentation on the subject, and under circumstances which strongly tend to show the sincerity of his opinion.

Philip Bohrer, a witness for the defendants, being asked to state whether he had ever heard McGannon and Bennett, or either of them, represent this land as of fine quality, and if so under what circumstances, says: "I have heard Mr. McGannon speak very highly of it, saying it was deep soil; that you could spade two feet deep and not come to slate or rock; that the soil was two feet deep and not a foot of poor ground on it. This conversation occurred in a general conversation between us on the subject of farming; it was in April or May, 1868."

The witness says he did not believe this statement of McGannon to be correct, and told him so at the time. The witness was fifty years of age, was acquainted with the land, had been raised within two miles of it, and known it all his life. He was also a farmer. McGannon could not have intended to deceive this man, and could not have expected to be able to do so. Being himself a butcher by trade, the presumption is that he knew little or nothing of the quality or value of land, and really thought the land in question was what he thus 528 represented it to be. *The witness further states that similar conversations occurred on several occasions. As to spading two feet deep and not coming to slate or rock, that may well have been actually done, and no doubt could be easily done in many places on the land. There was a valuable meadow upon the land, and about fifty acres of the land appears to be very good. Upon a part of it White admits that he made as much as two hundred bushels of wheat from between thirteen and fourteen sowed; which was certainly a very extraordinary product, though the year was a good one and the land was heavily manured.

J. G. Omps, another witness for the defendants, and who has known the land all his life, says: "I met McGannon in the spring 1868, and was talking about the land. I gave him poor encouragement about it, but he said there was not a foot of poor land on the entire place."

It does not appear that McGannon and Bennett, or either of them, made any representation in regard to the land on which they intended that White should rely, or on which White intended to rely, in making the purchase. If such intention had existed, the presumption is the parties would have saved themselves the trouble and expense and loss of time of the trip from Wheeling to see the land before they made the contract. The vendors, or at least one of them, expressly refused to sell on representation and insisted that the purchaser should visit the land and see and judge for himself. The vendors may have been so thoroughly impressed with their idea of the actual value of the land, that they did not doubt that it would stand the test of the closet examination. At all events they determined, and the purchaser determined, that the sale, if made, should be made, not upon representation, but upon the view of the land by the purchaser. They accordingly set out together from 529 *Wheeling to visit and view the land. All the testimony agrees in the fact that during their long journey together by railroad, from Wheeling to Martinsburg and thence

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in an ambulance to the land, not a word was said by one to another of them about the land; nor was a word interchanged between them on the subject until the morning after they reached the land. Until then the time had not come for negotiation, and not then until White had examined the land to his entire satisfaction. In the morning, after their arrival, he commenced that examination in their presence and with their assistance. He examined the land and examined the buildings as long as he chose to do so, and was invited by McGannon to make inquiries in regard to the land of one of the McIntyres, who it seems had been one of the former proprietors of the land and knew all about it. It is said there was snow on the ground and White could not well examine the land. But was White compelled to examine the land when the snow was upon it? Could he not have deferred his visit until the snow had melted? Did either of the vendors propose that he should make it before? On the contrary, it appears that at McGannon's suggestion the visit was delayed for a while in consequence of the snow. The probability is, that White, having sold his house in town, and desiring as soon as possible to purchase a place in the country, hastened the visit for his own accommodation. He might have taken as much time as he chose and several days, if necessary, to make examination and inquiry. After spending some time (he says two hours) in viewing the land and improvements and making some inquiry of Mr. McIntyre, he announced to the vendors that he was satisfied and was then ready to negotiate with them for the purchase of a portion of the land. The parties being thus confronted with each other on equal terms, 530 they then commenced *their deailngs at arm's length, each of course desiring, and having a lawful right, to make the best bargain in his power, taking care to practice no fraud in making it. A vendor is expected to commend his wares and express the most favorable opinion of them in his power, consistently with truth, and he has a lawful right to do so. A vendee is rarely misled by such commendation and opinion, and knows that due allowance must be made for the influence of self-interest. And he uses such arguments on his side as may help him to make a good bargain. It is the legitimate right of a vendor to sell at the highest price he can, and of a vendee to buy at the lowest price he can, the parties being competent to act for themselves and not under any undue influence, and taking care to act fairly in their dealing with each other. It does not appear in this case that these parties did not thus deal with each other in making the contract in question. It does not appear that the vendors were guilty of any fraud in making it. Fraud is never to be presumed, but must always be clearly proved. It will never be inferred or conjectured from a fact or circumstance which may be consistent with innocence, even though it may be a ground of suspicion.

The parties being ready to negotiate for a sale and purchase of a part of the farm on which they then stood, the defendant, Robert White, proposed to purchase of the plaintiffs 150 acres of land, to be laid off at the southern end of their farm, embracing all the most valuable improvements on the farm, and inquired of them the price at which such purchase could be made. They answered that they would be unwilling to sell less than 200 acres, being about one-fourth of their farm. White then inquired what they would take for 200 acres, to be laid off, and embrace the improvements as aforesaid. After consulting with each other, they said they would 531 *take $35 per acre; to which price he objected as being too high. McGannon then said that White could have the land at $32.50, even though he (McGannon) might have to pay Bennett $250. White accepted this offer, and a written contract was entered into, and signed and sealed by the parties accordingly, embracing all the terms and stipulations which they intended should constitute their contract. Looking to all the circumstances of the case as they appear in this record, we cannot say that there was any great disparity between the price which the vendors agreed to take for the land sold to White, and the price they gave for the whole farm, having due regard to the average value per acre of each. They had bought the whole, no doubt, as a home for themselves, and they were asked to sell one-fourth and the best part, with all the best improvements on the farm. Of course they desired, and had a right to ask, such a price as would, in their opinion, fully indemnify them from loss, or even increase the supposed advantage of their purchase.

I think, therefore, that the alleged fraud and misrepresentation are not sustained by the evidence, and that no sufficient defence to this suit is afforded by that ground, whether taken alone or in connection with the alleged inadequacy of consideration.

Upon the whole, I am of opinion that the appellees are entitled to a specific execution of the contract in question, and that the decree appealed from ought to be affirmed.

I do not express any opinion in this case as to the competency of the parties thereto as witnesses. In considering the case, I have treated the testimony of the parties as constituting a part of it; because it must necessarily be so treated to sustain the pretensions of the appellants. They cannot succeed, at least without the testimony of 532 *themselves, the competency of which cannot be maintained without admitting the competency of the testimony of the appellees. No such question is presented in the petition of appeal in the case; and in the printed brief of the appellants' counsel he refers to and relies on the deposition of one of the appellees as a part of the testimony in the case.

I do not consider it necessary that the title to said tract of 200 acres should have been referred to a commissioner for investigation, before decreeing a specific execution of the same. The suit was instituted on the 13th of April, 1869, and the decree appealed from was rendered on the 5th of April, 1875. Dur-

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ing the long period of the pendency of the suit no question was ever raised by the appellants as to the title to the land. A deed with general warranty of title from the appellees to the appellant, Frances White, conveying the said 200 acres of land and a release of the only incumbrance thereon which was supposed to be in existence, both duly certified for record, were filed as exhibits with the bill in this case in May, 1869. And in the decree appealed from it was decreed that said deed and release should be taken from the papers and recorded, leaving copies thereof in place of the originals. Under these circumstances, I think it would be unjust to delay any longer the specific execution of the contract for the purpose of having a reference to a commissioner as to the title.

In regard to the complaint made that the circuit court erred in not requiring security for costs of the appellees, as non-residents of the state, I think that was a question for the circuit court to decide, and that the decision is not subject to revision by this court on this appeal. But if it were, I think there is no error in the decision.

533 *Christian and Burks, J's, concurred in the opinion of Moncure, P.

Staples, J., said: He did not sit in the case of Wilkinson v. Hale, 21 Gratt. 75, having been counsel in that case, although the fact is not stated by the reporter. Conceding that case to be a binding authority, he was of opinion the consideration here is so grossly inadequate, the contract so hard and unconscionable, it ought not to be enforced unless it appeared that the conduct of the parties was characterized by the utmost good faith. The evidence, he thought, showed a clear case of fraud and circumvention practiced upon the purchaser.

Anderson, J., concurred with Staples, J.

Decree affirmed.

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534 *Norfolk City v. Chamberlaine.

November Term, 1877, Richmond.

Absent, MONCURE, P.

The common and select councils of the city of N having granted leave to C, who was then erecting a building on a lot owned by him, to extend the steps of said building out upon the public street, afterwards ordered the removal of said steps. Upon a bill filed by C to enjoin such removal—HELD:

1. **Municipal Corporations—Streets—Public Highways.***—Streets in a city or town, though generally subjected to the supervision and control of the municipality, are public highways, the use whereof is for the public at large.
2. **Same—Same—Occupying Public Highways.**—The common and select councils of N had no authority to grant permission to C to occupy any portion of the public highway.
3. **Same—Same—Same—Authority to Remove.**—The common and select councils of N, having the general control over the streets, and power to abate nuisances thereon, and remove obstructions therefrom, the order for the removal of the steps of C's building was within their lawful authority.
4. **Same—Councils—Ultra Vires.**—Inasmuch as the original permission to C to place the steps of his building on the public street was beyond the powers of the municipal authorities of N, they are not estopped to order their removal.
5. **Same—Unjust Discrimination.**—The order for the removal of the steps of C's building was not void as being a partial and unjust discrimination against him.

This was an appeal by the City of Norfolk from a decree of the corporation court of Norfolk perpetuating an injunction which had been granted to prevent the 535 *removal of steps to a building which had been extended into the sidewalk of a street by R. H. Chamberlaine, by the permission of the council of the city. The case is fully stated by Judge Christian, in his opinion.

W. B. Martin, for the appellant.

Baker and Walke, for the appellee.

Christian, J. This case is before us upon appeal from an order of the corporation court of the city of Norfolk, perpetuating an injunction. The material facts in the case are as follows:

Chamberlaine, the appellee, is the owner of a lot and building in the city of Norfolk known as the "Citizens bank," situate on Main street in said city. The front line of said building is on the north line of Main street, and fronts on said street eighteen feet.

In the early part of the year 1867 the building then on said lot was destroyed by fire. Chamberlaine proceeded to rebuild upon the same lot, and before he put up the front wall of said building he made application to the common and select councils of the city of Norfolk "that he might be allowed to have open iron steps to a new building now (then) being erected on Main street next to the First National bank, to extend no further out than the buttresses of the steps of said bank; the space to be occupied being the same used for a broad step and descent to the building recently destroyed by fire."

Upon this petition the common council, on the same day, adopted the following resolution:

"Resolved, That the steps of the building of R. H. Chamberlaine, now being erected on Main street near Bank street, be permitted, provided they do not occupy any more of the pavement than the steps of the building recently destroyed."

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*Municipal Corporations — Occupying Streets—Length of Time.—In Taylor v. Com., 29 Gratt. 780, it was held, citing the principal case, that the streets of a city where there has been a proper dedication and acceptance thereof are public highways and any occupation of a street or part of a street, by the owner of an adjoining lot, however long continued, cannot give such occupant a right to hold it, or bar the right of the public to the use of the street to its full width and extent. See also, Roper v. McWhorter, 77 Va. 218; Roanoke City v. Berkowitz, 80 Va. 624; Yates v. Town of Warrenton, 84 Va. 337; Buntin v. Danville, 93 Va. 208; Spencer v. R. R. Co., 23 W. Va. 423.

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536 *This resolution was concurred in by the select council at their next meeting.

Chamberlaine, having obtained this permission from the select and common councils, completed his building, putting up the front wall immediately upon the line of the street, and extended the steps (of which there was a pair at either end of said building) out upon the sidewalk or pavement, the distance of four feet four inches, and between these steps thus projecting from each end of the building, there was dug out an excavation, and steps were constructed leading to a basement under the house.

In February, 1876, the following petition of the owners and occupants of buildings adjacent to and on the same block with the "Citizens bank," was presented to the select and common councils of the city of Norfolk:

"We, the undersigned, owners or occupants of the stores known as 'Atlantic block,' respectfully represent to your honorable bodies that we find the projection of the steps of the 'Marine and Citizens bank' is a serious detriment and nuisance to us; our stores, at certain times, being almost unapproachable by parties coming from the eastern portion of the city.

"We believe that this trespass upon the public sidewalk, in the business section of the place, is a nuisance to all of our citizens, a drawback to business, and ought to be removed.

"We, therefore, request that you will instruct the city inspector of streets to have the above mentioned steps removed from the pavement within thirty days after the granting of this petition."

In accordance with this petition the councils directed the inspector of streets to remove the steps of the Marine and Citizens bank, if not removed by the owners within sixty days. The Marine bank (which immediately adjoins the Citizens bank), upon 537 notice given by the inspector, *removed its steps, which projected the same distance into the street as those of the Citizens bank. But the latter (the Citizens bank) applied for and obtained an injunction restraining and enjoining the inspector of streets from carrying out the orders of the city councils to remove the steps of the Citizens bank as an obstruction to the street. The bill of injunction was answered by the City of Norfolk, and depositions were taken on both sides, and upon a motion to dissolve the injunction the corporation court, on the 6th July, 1876, entered the following decree:

"This cause came on this day to be heard upon the bill of the complainant, the answer of the City of Norfolk, general replication to the said answer, the exhibits filed, the examination of witnesses; and on the motion of the defendant, the City of Norfolk, to dissolve the injunction awarded in the cause on the 29th day of May, 1876, and was argued by counsel.

"On consideration whereof, and the court being of opinion that the order of the councils of the city of Norfolk directing the removal of the steps of the Citizens bank building, the property of the plaintiff in the bill and proceedings mentioned, from the sidewalk of Main street, is a special and unjust discrimination against the plaintiff, and therefore illegal and void, doth so decide and doth overrule the said motion and continue the said injunction."

Afterwards a decree was entered perpetuating the injunction. From this decree an appeal was allowed by one of the judges of this court.

I am of opinion, that this decree of the corporation court of the city of Norfolk perpetuating the injunction is plainly erroneous.

It is well settled that a street in a city or town is a public highway. The word 538 "highway" is considered as *the genus of all public ways, so that a common street in any city or town being common to all people is a public highway. Angell on Highways, § 24, p. 19, and notes.

Public streets, unless there be some special restriction when dedicated or acquired, are for the public use, and the use is none the less for the public at large as distinguished from the municipality, because they are situate within the limits of the latter. In other words, public streets are not the property of the municipality or of the people of the municipality, but of the public at large. The legislature may, and generally does, of right, give the supervision and control of streets to the local authorities, but the property in the streets is not in the municipality, but in the public at large. The legislature of the state alone represents the public at large, and it alone has full and paramount authority over all public highways. As was well said by Chief Justice Gibson, in O'Connor v. Pittsburg, 18 Pa. St. R. 187: "To the commonwealth here, as to the king in England, belongs the franchise of every highway as a trustee for the public; and streets, regulated and repaired by the authority of a municipal corporation, are as much highways as rivers, railroads, canals or public roads laid out by authority of the state."

Whether the fee of the street be in the municipality in trust for the public use, or in the adjoining proprietor, it is in either case of the essence of the street that it is public, and hence under the paramount control of the legisuature as the representative of the public. Streets do not belong to the city or town within which they are situated, although acquired by the exercise of the right of eminent domain, and the damages paid out of the corporation treasury.

The authority of municipalities over streets, they derive, as they derive all their powers, from the legislature—from charter or 539 statute. The fundamental idea of *a street is not only that it is public, but public for all purposes of free and unobstructed passage, which is its chief and primary use. 2 Dillon on Corporations, §§ 518-541, and cases there cited.

Upon these established principles, I am of opinion that the select and common councils of the city of Norfolk had no authority to pass

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the resolution of the 27th May, 1867, granting permission to the appellee, Chamberlaine, to occupy, by the steps of his building, any portion of a public street in the city of Norfolk. There is nothing in the charter of the city, or in any act of the legislature, authorizing the use of a public street for private convenience or profit; but on the contrary, by an ordinance of the councils in existence, certainly since the year 1848 up to the present time, it is ordained that "no piazza, porch, steps, fence, enclosure, or any other projection attached to any house or lot, shall be extended beyond the line of the sidewalk"—and against a person so offending is denounced a fine of $5 per day, for so long a time as the same shall remain after notice from the inspector to remove them.

The city councils having no authority to grant permission to Chamberlaine to extend the steps of his building into the public street, and the ordinances specially forbidding it, such extension was an unauthorized obstruction of a public highway and a nuisance which the corporate authorities had a right to abate.

By its chartered rights, there is delegated by the legislature to the select and common councils of the city of Norfolk, the power to make such ordinances, by-laws, orders and regulations as they may deem desirable to carry out (among others) the following powers: To prevent the cumbering of streets in any manner whatever; to remove any structure, obstruction or encroachment **540** in *a street or alley, or any sidewalk thereof; to abate nuisances, &c. (Sess. Acts 1870, p. 191-192.)

The 22d section of this act provides that, "in every case where a street in said city has been encroached upon by any fence, building or otherwise, the city councils may require the owner or owners, if known, or if unknown, the occupant or occupants of the premises so encroaching, to remove the same. If such removal shall not be made within the time ordered by the councils, they may impose a penalty of five dollars for each and every day that it is allowed to continue thereafter, and may cause the encroachment to be removed and collect from the owner reasonable charges therefor, with costs, by the same processes, that they are hereinafter empowered to collect taxes. No encroachment upon any street, however long continued, shall constitute an adverse possession to, or confer any rights upon the persons claiming thereunder as against the city."

This statute is in conformity with the recognized principles of the general law, which confers upon municipalities the power to regulate and control the use of the public streets of a city or town. See 2 Dillon, ch. 18, Title Streets, and cases there cited.

I am, therefore, of opinion that, under the charter and under the general law, the city councils had the right to order the removal of the steps from the appellee's building which projected into the street.

But it is contended by the learned counsel for the appellee, in an argument of much ingenuity and learning, that the injunction in this case ought to have been awarded and perpetuated upon two grounds: First, because to remove the steps of his building would necessitate the removal of the entire front wall and involve irreparable damage to the whole structure; and inasmuch as he built the house on the line of the sidewalk, **541** with *permission from the city councils to extend his steps out upon the sidewalk, the city having through its representatives granted such permission, should now be estopped from asserting its right to remove them, particularly where such removal will result in irreparable damage. Second, because the action of the city councils is an unjust discrimination, not general in its operation, but special, partial and oppressive.

It is a sufficient answer to first position to say that the resolution of the city councils in May, 1867, purporting to give authority to place the steps in the public streets, was simply ultra vires and could not bind the corporation.

The general principle of law is settled beyond controversy, that the agents, officers, or even the city council of a municipal corporation, cannot bind the corporation by any contract or act which is beyond the scope of its powers, or entirely foreign to the purposes of the corporation, or which (not being in terms authorized) is against public policy. The doctrine grows out of the nature of such institutions and rests upon reasonable and solid grounds. The inhabitants are the corporators—the officers are but the public agents of the corporation. The duties and powers of such officers are prescribed by statute or charter which all persons not only may know but are bound to know.

The opposite doctrine would be fraught with such danger and accompanied with such abuse that it would soon end in ruin or municipalities. These considerations vindicate the reasonableness and necessity of the rule that the corporation is bound only when its officers or agents by whom it can alone act, if it acts at all, keep within the limits of the chartered authority of the corporation. It was said by a distinguished judge on this subject that "the history of the workings of municipal bodies has demonstrated the salutary nature of this principle, and **542** *that it is the part of true wisdom to keep the corporate wings clipped down to the lawful standard." It results from this doctrine that unauthorized contracts are void, and in actions thereon the corporation may successfully interpose the plea of ultra vires, setting up, as a defence, its own want of power under its charter or constituent statute to enter into the contract. 1 Dillon, § 381; 2 Dillon, § 767, and cases there cited. In the latter section the learned author strongly observes: "There can be no corporate liability where the act complained of is one not authorized by the charter or constituent acts of the corporation, or some valid legislative enactment applicable to it. The principle that a municipal corporation is bound by the acts of its officers only when within the charter or scope of their powers, and that acts outside of the powers of the corporation or of the

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officers appointed to act for it are void as respects the corporation, is vital, and the opposite doctrine has no support in reason, and very little, if any, in the judgments of the courts."

These doctrines, I think, govern the case before us. Indeed, it cannot be said that there was a contract between Chamberlaine and the city authorities. The most that can be said is, that it was a mere license given without authority, and of course revocable. And it is plain that this is not a case where the doctrine of estoppel applies. There is a class of cases (and it is upon these that the appellee relies) where a corporation will be estopped to avail itself of certain irregularities or improper conduct of its own agents or officers. But the doctrine of estoppel can never arise in a case where the act is ultra vires; where the corporation has no power to act, and its action was outside of its chartered authority.

The doctrine of estoppel applies only to a case where the act of the corporation is
543 within the exercise of the *general powers conferred, but never to a case where the act done is beyond the powers conferred by charter or by statute.

Wherever the act is one arising out of matters or transactions within the general powers of the corporation, the corporation will be estopped from pleading any irregularities of its agents or officers in the exercise of those general powers; but it may always show that under no circumstances could the corporation make a contract of the character in question. Dillon, §§ 381, 426, 767, and cases cited in notes.

I am, therefore, of opinion that whatever damage and loss the appellee, Chamberlaine, may sustain in consequence of having to remove the steps of his building, or in consequence of putting the front wall of his building on the line of the street, with the privilege of extending his steps into the street, by permission of the city councils, such loss and damage (if any has occurred) cannot be recovered against the corporation, although it may have arisen by the act of the councils in granting such permission.

Every man is presumed to know the law. Chamberlaine ought to have known and must be presumed to know that the city councils of Norfolk had no authority to dedicate to his use any portion of the public streets of the city. In acting upon the unauthorized permission of the city councils he took all the risk, and if, by such unauthorized act, loss has accrued, he cannot visit that loss upon the city, but must suffer it himself, for there can be, as has already been shown, no corporate liability where the act complained of is not authorized. But in this case there is no great loss or hardship after all. Chamberlaine has for ten years received a rental of $400 per year for the use of the
544 public street, in having convenient *access to which, under the law, he was not entitled. This of itself will compensate him to a considerable extent for any loss he may sustain for the removal of the front wall of his building. But whether it does or not, whatever damage or injury he may sustain, that damage and that injury, whatever it may be, growing out of an unauthorized and unlawful act, cannot be assessed against the corporation.

I am further of opinion, that the order of the councils directing the inspector of streets to remove the steps of the appellee's building, was not an unjust and partial discrimination against the appellee, and therefore void.

The record shows that the same order was made as to the Marine bank on the same square, and that the steps of the latter was removed by the owners. The fact that in one order all the obstructions on the street (if there be others) were not embraced, does not show any partiality or unjust discrimination; non constat that other similar orders have not even been made, or will be made if necessary. We know nothing of this from the record.

Certainly it cannot be said, because when the city councils direct the removal of one obstruction in the streets of a city it does not at the same moment remove all, that the removal of one is unjust, partial and oppressive, and therefore the order is void. Such a proposition cannot be sustained by reason or authority; and the cases referred to by the learned counsel have no application to such a case as the one before us.

Upon the whole case, I am of opinion that the decree of the corporation court of the city of Norfolk should be reversed; that the injunction should be dissolved, and the bill dismissed.

The other judges concurred in the opinion of Christian, J.

The decree was as follows:

545 *The court is of opinion, for reasons stated in writing and filed with the record, that the decree of the said corporation court perpetuating the injunction awarded to the appellee, is erroneous. It is therefore decreed and ordered that the said decree be reversed and annulled, and that the appellant recover against the appellee its costs by it expended in the prosecution of its appeal and writ of supersedeas here. And this court, proceeding to enter such decree as the said corporation court ought to have entered, it is decreed and ordered that the said injunction be dissolved, and the appellee's bill be dismissed. But it appearing to the court that the term of sixty days allowed by the city councils within which the appellee was required to remove the obstruction complained of has expired, while the appellee was engaged in the prosecution of his injunction suit, and this court being of opinion that under the circumstances of this case the appellee should have still further time to effect such removal without incurring the penalties imposed by statute, it is therefore decree dand ordered that the dissolution of said injunction shall not take effect until the 1st day of March, 1878; which is ordered to be certified to the corporation court of the city of Norfolk.

Decree reversed.

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546 *Bank of Old Dominion v. McVeigh.

November Term, 1877, Richmond.

In an action by a bank against an endorser of negotiable notes which were discounted in Alexandria and fell due during the war, when the endorser was within the Confederate lines, to prove notice of protest to the endorser within a reasonable time after the war ceased, the plaintiff offered in evidence a resolution of the stockholders, adopted at a meeting held on the 18th of July, 1865, at which the endorser was present at a previous period of the meeting, though it did not appear he was present when the resolution was adopted, by which payment of these notes and others made by the maker at a branch of the plaintiff's bank within the Confederate lines are declared to be still due to the bank—HELD:

1. **Negotiable Paper—Notice to Endorser—Sufficiency.***—There being no proof that the endorser had any knowledge of the resolution, it was not due notice to him of the dishonor of the notes.
2. **Same—Same—Same.**—The knowledge of non-payment of a protested note is not sufficient to bind the endorser. He must have notice that he is looked to for payment.
3. **Same—Same—Reasonable Time.**—The resolution having been adopted July 8th, 1865, at least two months after communication had been opened between the bank and the endorser, it was not in time if it had been sufficient as a notice.

This is the sequel of the case of McVeigh v. The Bank of the Old Dominion, reported in 26 Gratt. 852. When the cause went back to the corporation court of Alexandria, it came on again for trial at the April term, 1876, when the jury found a verdict against James H. McVeigh for $12,323.55, with interest from the 1st of January, 1866, that 547 being the amount of all the notes *sued on, and against William N. McVeigh for $806.05, with like interest, that being the balance due upon the two of the notes discounted for his accommodation; and there was a judgment according to the verdict.

In the progress of the trial the plaintiff took three exceptions to rulings of the court. The plaintiff, after introducing the notes and protests and the proof of notice, as appeared in the former trial, and the defendant, William N. McVeigh, had proved his leaving Alexandria and living in Richmond, as in the former trial, and the defendants had proved that no demand was made upon them for the payment of said notes, and no notice was given them that they were held bound for their payment until and except as they were served with process in this suit; and further, that William N. McVeigh, before leaving Alexandria on the 30th of May, 1861, informed the officers and a director of the bank of his intention to leave, and of where he was going; the plaintiffs proved by the defendant, J. H. McVeigh, that in May, 1864, he deposited in the branch of the plaintiff's bank at Pearisburg, an amount of Confederate notes sufficient to pay all his supposed indebtedness to the Bank of the Old Dominion, which embraced many notes besides those sued on, and that he informed William N. McVeigh that he had made the deposit for the purpose stated, without specifying, however, what particular notes were embraced in such payment.

Plaintiff further proved that William N. McVeigh was president of the bank when he left Alexandria, and did acts as president in Richmond during the war; that on May 23d, 1865, he, by a note to the directors, dated in Alexandria, tendered his resignation, which was not accepted; and further proved by William N. McVeigh that he was present at a meeting of the stockholders of the bank on the 18th day of July, 1865, and partici- 548 pated in *its proceedings as a stockholder; that he did not know whether said meeting by resolution repudiated the Pearisburg payment, and directed the notes supposed to be paid, to be sued on or not. The plaintiff, for the purpose of proving notice to William N. McVeigh of the dishonor of the several notes sued on, offered in evidence the following resolution, which he proved had been passed at that meeting:

"Resolved, That the notes purporting to have been paid at the Pearisburg branch, but which constituted a part of the assets of this mother bank, are deemed by this meeting as still due to it, and the president and directors now about to be elected be requested to take such legal proceedings against the drawers and endorsers to recover the same as they may find for the true interests of the bank."

To the introduction of this evidence for said purpose the defendant objected, and the court sustained the objection; and the plaintiff excepted.

The plaintiff then offered in evidence the proceedings of a meeting of the stockholders of the bank held on the 18th of July, 1865. This paper showed that there was introduced resolutions censuring the action of William N. McVeigh done as president of the bank, at Richmond during the war; and that he vindicated his conduct in that regard. And

*__Negotiable Paper—Notice—Effect of the War.__—For cases deciding to what extent notice to endorsers of negotiable paper was excused during the war, see Farmers' Bank of Va. v. Gunnell, 26 Gratt. 131; Duerson v. Alsop, 27 Gratt. 229; McVeigh v. Allen, 29 Gratt. 588; McVeigh v. Bank of Old Dominion, 26 Gratt. 785. On notice generally, see 4 Am. & Eng. Enc. Law (2d Ed.) 397.

Appeals—Second Appeal.—In Rosenbaum v. Sedden, 94 Va. 579, the court says, "when the decision of this court in the former appeal was made and certified to the court below, the validity of the contract, as set out in the instruction pronounced to be right and proper, was no longer open to question by the trial court, or to re-examination even by this court upon a subsequent appeal, at least upon the ground on which it had been assailed. That decision became to that extent the law of the case and was final and irreversible. This is well settled by numerous decisions of the court, and of other courts of the highest authority." Citing the principal case, and Holleran v. Meisel, 91 Va. 148; Norfolk R. Co. v. Mills & Fairfax, 91 Va. 625; Chahoon's Case, 21 Gratt. 822; Campbell v. Campbell, 22 Gratt. 649; N. Y. Life Ins. Co. v. Clemmitt, 77 Va. 366; Effinger v. Kenney, 79 Va. 553; Findlay v. Trigg, 83 Va. 539; R. R. Co. v. Cazenove, 83 Va. 744; Turner v. Staples, 86 Va. 300.

that afterwards the resolution hereinbefore given was adopted; but whether McVeigh was then present did not appear from the paper.

The defendant objected to the introduction of these proceedings as evidence, and the court sustained the objection; and the plaintiff again excepted.

The plaintiff then asked the court to give to the jury fifteen instructions. Of these the court gave the 15th, and refused to give the other fourteen. The first eight and the 14th, this court held, were covered by the former *decision of the court, and were therefore properly refused. The 9th, 10th, 11th, and 12th are as follows:

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9.

If the jury believe from the evidence the following facts:

1. That the endorser, William N. McVeigh, resided in the city of Alexandria at the time the notes sued on were respectively made, endorsed and discounted.

2. That the said endorser, before the maturity of said notes, and after the occupation of the city of Alexandria by the Federal forces, went to the county of Culpeper to join his family, who were there on a visit.

3. That the makers, James H. McVeigh & Son, had an agent, duly appointed before the war, residing and acting for them in Alexandria at the time the notes sued on respectively matured, and were protested.

4. That the plaintiff discounted said notes, and was the holder of them at their maturity, and at the time they respectively became due, had them protested for non-payment, and gave notice to the endorser of such protest by leaving notices at the residence or place of business of said endorser in Alexandria.

5. That with the knowledge of the said endorser, both as such endorser and as president of the Bank of the Old Dominion, the amount of said notes was paid at the branch bank at Pearisburg, in depreciated Confederate money, in the month of May, 1864.

6. That the stockholders of the Bank of the Old Dominion, at a meeting at which the endorser, William N. McVeigh, was present, and in the proceedings of which he participated, held on the 18th day of July, 1865, adopted a resolution repudiating the payment made at the branch bank at Pearisburg in Confederate money, in *May, 1864, and directing the officers and directors of the bank, then to be elected, to institute legal proceeding against the drawers and endorsers of said notes to recover the same; and that such notice was, under all the circumstances, given in a reasonable time after the suspension of hostilities; the jury must, under this state of facts, if proved, find for the plaintiff in this action.

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10.

If the jury believe, from the evidence, that the endorser, William N. McVeigh, had knowledge that the notes sued on were dishonored and protested at their maturity, at any time during the war, and that the amount of said notes was paid at Pearisburg, in Confederate money, in 1864, and that in a reasonable time after the suspension of hostilities, all the facts and circumstances of the case being considered, he was notified, either by the officers of the bank or by resolution of the stockholders in general meeting assembled, that the notes sued on were unpaid, and that he was held liable as endorser thereon, they must find for the plaintiff.

11.

If the jury believe, from the evidence, that William N. McVeigh, the endorser of the notes sued on, resided in the city of Alexandria at the time he endorsed said notes, and that he afterwards, and before the maturity of said notes, and after the occupation of said city by the Federal forces, left the city of Alexandria and went within the Confederate lines and adhered to the Confederate government, and that the said notes were not paid at their maturity and were protested for non-payment, and notices of non-payment and protest of said notes *were, on the days of protest respectively, left at the residence or place of business of the said endorser; and that the said endorser, after the occupation of the city by the Federal forces and before the close of the war, returned to the city of Alexandria and when in said city before the close of the war as aforesaid, he, the said endorser, was notified by the Bank of the Old Dominion that the notes sued on were not paid, and that he was held liable therefor as endorser, the jury must find for the plaintiff; and the court instructs the jury that the war closed in Virginia on 2d of April, 1866.

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12.

If the jury believe, from the evidence, that at the time of the endorsement of the notes sued on, the endorser, William N. McVeigh, resided in the city of Alexandria; that before the maturity of the said notes, and after the occupation of said city by the Federal forces, he left the city of Alexandria and went within the Confederate lines, and adhered to the Confederate government; and that the plaintiff, in good faith and acting upon the best information it had or could obtain at the time, left notices of the protest of said notes, on the day of the protest thereof, respectively, at the residence or place of business of the said endorser, in the said city; and that on the 18th day of July, 1865, the stockholders of the Bank of the Old Dominion held a meeting in the said city, at which meeting the said endorser was present, and in the proceedings of which he participated, at which meeting the said stockholders passed a resolution repudiating the payment of all notes due the mother bank the amount of which had been paid in Confederate money, at Pearisburg, in 1864, and claiming that such notes were still due, and that the makers and endorsers *were held liable therefor; and if the jury believe from the evidence that the said endorser knew of the pretended payment of the notes sued on, in Confederate money, at Pearisburg branch, in 1864; the court instructs the jury that such

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action was due diligence on the part of the plaintiff, and was sufficient notice for said endorser, and they must find for the plaintiff.

The 13th need not be stated.

On the motion of the defendant, the court gave the following instruction:

"If, on or about the 30th of May, 1861, and prior to the maturity of said notes, W. N. McVeigh having previously sent his family, went himself within the Confederate lines, with the intention of not returning to Alexandria during its occupation by the United States forces, and remained with them continuously within the Confederate lines throughout the whole period of the war and until the year 1874, and such absence at the maturity of said notes, respectively, was known, or by the exercise of reasonable diligence, must have been known to the plaintiff, there is no such evidence of notice, of dishonor in the case as is sufficient to fix his liability as endorser, and the jury must find for him as to all except the two notes of May 17th and June 17th, as to which notes they will find for the plaintiff."

And to the refusal of the court to give the instructions asked for by him, and to the giving the instruction asked for by the defendant, the plaintiff excepted, and applied to this court for a writ of error; which was allowed.

H. O. Claughton, for the appellant.

John Howard, J. Alfred Jones, and S. F. Beach, for the appellees.

553 *Anderson, J. When this cause was formerly before us, we held (McVeigh & al. v. The Bank of the Old Dominion, 26 Gratt. 852), "that the notices addressed to William N. McVeigh, and delivered to his white servant at his residence in Alexandria, and the notice delivered to Ramsey at the Bank of the Old Dominion, under the facts and circumstances disclosed by the record, were insufficient in law; and that for reasons set forth in the opinion, the court below erred in refusing to give the defendant's third instruction, which is in these words: 'If the jury believe from the evidence aforesaid (the evidence in the cause), that the only notice of the non-payment and dishonor of the notes sued on given to him by William N. McVeigh was the notice contained in the notarial certificate of protest, then said notice was invalid and inoperative to bind the said William N. McVeigh, and they must find for him.' And also that it erred in overruling the defendant's motion for a new trial. And it was considered by the court 'that the judgment of the corporation court of the city of Alexandria be reversed and annulled, the verdict of the jury set aside and a new trial awarded the plaintiff in error.' And the cause was 'remanded to said corporation court for further proceedings therein' in conformity with the principles herein declared, and in the opinion of the court, filed with the record."

Nothing can be clearer, therefore, or more certain, than that it was decided by this court in this cause, when it was here before, that the notarial protests and notices were insufficient in law to fix a liability in law upon the endorser, William N. McVeigh, and that "it was incumbent upon the defendant in error (the bank, now plaintiff in error,) within a reasonable time after communication was restored between the parties by the termination of the war, to give the endorser notice of the non-payment and dishonor of the 554 notes in controversy, *which were endorsed by him for the accommodation of the makers." We have no doubt that these points were rightly decided, as we think is shown by the opinion which was delivered in support of the decision to which we refer, and which on the main point we think is sustained by the supreme court of the United States in the more recent case of Earle v. McVeigh, 1 Otto U. S. R. 503.

But the only question which has not been decided, and which is now properly before the court for its determination is, has such notice been given to the endorser since the termination of the war, in a reasonable time, as was held to be requisite by the former judgment of this court in this cause? The points thus decided cannot be re-examined. After the cause was decided, the then defendant in error (the bank) moved the court for a rehearing, which was overruled, there being no doubt in the mind of any one of the judges who concurred in the decision that it was right. And to allow the plaintiff here to litigate the points which have been decided, would be to give him a rehearing now, which was refused when asked for in time. There ought to be an end to controversy. "According to the established rule of this court, these points are to be taken as settled law in this examination, and the question is, whether the case, as now presented to us, is beyond their influence," as was said by Carr, J., in Bank of the Valley v. Stribbling, ex'or, 7 Leigh 26. In Chahoon's case, 21 Gratt. 822, it was held that a decision which had been made in the first trial upon a question in the cause, although by an equally divided court, was final and irreversible on the second trial, and could not be changed even if the court were disposed to change it; Moncure, P., delivering the opinion. And in the case of Campbell's ex'or v. Campbell's ex'ors, 22 Gratt. 649, Moncure, P., re-555 views the decisions of this court *on the subject, and deduces from them the same doctrine, whether the decision was made upon an appeal from an interlocutory or final decree of the circuit court. It is also the established doctrine in the supreme court of the United States. In a recent case (Supervisors v. Kennicott, 4 Otto U. S. R. 498), Chief Justice Waite, speaking for the whole court, said: "It is settled in this court that whatever is decided here upon one appeal, cannot be re-examined in a subsequent appeal of the same suit. Such subsequent appeal brings up for consideration the proceedings of the circuit court after the mandate of this court." This opinion he fortifies by a reference to numerous decisions of that court. But why make further

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references in support of a rule which has been uniformly acted on by this court, and which is in conformity with established principles? There is nothing in the case, as now presented to us, which takes it beyond the influence of this well established principle. The record of the second trial shows no new facts, or change of circumstances, which have the slightest bearing on the aforesaid decision.

At the second trial the plaintiff submitted a series of propositions, in the shape of instructions, and moved the court to give them to the jury. Of the fifteen instructions thus tendered, the court gave the 15th and rejected the fourteen. All of them, from No. 1 to No. 8 inclusive, and No. 14, controvert the foregoing decision of this court, not upon any new evidence which had any bearing upon the question, but upon grounds which were as cognizable by the court then as now, and were doubtless considered by the court, as far as they were entitled to consideration, or to have any influence in the formation of its opinion. The attempt to introduce political questions, and to create issues between this court and the Federal court, which
556 could have no further influence *upon the decision now than before, as no new fact has been brought into the record on those subjects, cannot be sustained. The court before refused to give any opinion on the constitutionality of the ordinance of secession, as it does now—such question being irrelevant and not involved, as we think, in the decision of the cause. The decision of this court would be the same, whether it held the said ordinance of secession to be constitutional or unconstitutional. For the grounds of our decision, we refer again to the opinion heretofore referred to. 26 Gratt. supra. All these matters which were foreign to the questions in issue, and all the argumentation and enunciation of principles in the aforesaid instructions, were offered in contravention of the decision of this court; and for this cause, if there were no other, the court below very properly refused to give them to the jury.

The 9th and 12th instructions relate to the notice, required by the former judgment of this court, to have been given in a reasonable time after the cessation of hostilities, &c. And the question, has such notice been given, is a proper subject for consideration now.

To show that it was given, the plaintiff exhibits a resolution which was adopted by a meeting of stockholders of the bank, which was held in Alexandria on the 18th of July, 1865. The resolution is in these words:

"Resolved, That the notes purporting to have been paid at the Pearisburg branch, but which constitute a part of the assets of this mother bank, are deemed by this meeting as still due to it, and the president and directors, now about to be elected, be requested to take such legal proceedings against the drawers and endorsers to recover the same as they may find for the true interests of the bank.

557 *Is this a notice to William N. McVeigh? Is it a notice of the non-payment and dishonor of the notes which are the subject of this controversy?

It is not a notice to William N. McVeigh at all. His name is not mentioned. It does not seem to have been intended, and evidently was not, as a notice to him. If the bank had intended it as a notice to him, it would have been actually served on him before he left the city. Or if it had been the intention to give him notice, the president and directors, as soon as they were elected, would have had notices prepared of the non-payment and dishonor of the notes, and had them regularly served on him. It seems to have been intended as a communication to the president and board of directors to be elected; that it was the opinion of the meeting that a certain class of notes were still due to the bank, and an instruction to them to take such legal proceedings for their recovery as they may find will be for the true interests of the bank. It is rather a direction to the board for inquiry. There is no positive decision that it would be to the interest of the bank to institute legal proceedings, and no positive direction to the board to bring suit. But if the resolution had been put in the hands of William N. McVeigh, or if its contents had been brought to his knowledge, it is granted that it would have put him on inquiry, whether the bank intended to dispute the payment of the notes which he had endorsed, and would look to him for payment. But it is not pretended that the resolution was put in his hands, or a copy of it served on him by the bank, but that it had incidently come to his knowledge that the bank had adopted such a resolution. Would that be such a notice as is required to fix his liability as an endorser?

No precise form of words are necessary to constitute a notice. But there are three
558 requisites, Mr. Justice Story *says: 1st. A true description of the note, so as to ascertain its identity. 2d. An assertion that it was duly presented to the maker at its maturity and dishonored; and, 3d. That the holder looks to the endorser for reimbursement and indemnity." Story on Prom. Notes, § 348. The second requisite could not be complied with in this case. He was excused for not complying at the time by the war. His duty to give notice—this second requirement—was only suspended until the obstructions caused by the war were removed, and then, all the authorities say, that in a reasonable time after they are removed, he must give the notice. Notice of what, if not of the non-payment and dishonor of the note, and that he was looked to for payment? Notice is not dispensed with by the war. The requirement to give it at the maturity is all that is dispensed with it. The requirement to give the notice is only suspended until the obstruction to giving it is removed. And this is all; and is necessarily so, as the giving of the notice is a precedent condition to the liability of the endorser. Unless the notice is implied by the contract is given to

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him, he is not liable. The holder of the note may be excused by the existence of war from giving the notice as promptly as the law merchant requires, but he is not excused from giving the notice when the cause which prevents it is removed; for until he gives it, the liability of the endorser is not consummated. There can be no good reason, therefore, why the notice, when it is given, should not comply with all the requisites of the law merchant, except as to the time of giving it. The notice may be given in a reasonable time after the obstruction is removed; but when given, it must be such a notice as would have been required to have been given at the maturity of the note, if there had been no suspension of the contract by war, or excuse for not giving it at the maturity of the note.

559 *But it is contended that he had knowledge of the non-payment and dishonor of the notes both at the maturity, and in a reasonable time after the cessation of hostilities, which is equivalent to notice. This subject is fully discussed in the opinion referred to, delivered in this cause, and will be found on page 847, and the following pages of 26 Gratt. to the close of the opinion. The additional light thrown upon either proposition does not alter the conclusions to which we then arrived, but tends to confirm them; that is, that William N. McVeigh had not a knowledge that the said notes had been protested at their maturity, or of their non-payment and dishonor, at the close of the war, or in a reasonable time thereafter, even if his knowledge would excuse the bank from giving notice; which we think it would not. Knowledge of dishonor does not constitute notice. Juniatta Bank v. Hale, 16 Serg. & R. 157; Caunt v. Thompson, 62 E. C. L. R. 399; Tindall v. Brown, 1 T. R. 169; Brown & Sons v. Ferguson, 4 Leigh, 37, 52-53; Story on Bills, § 375; Story on Prom. Notes, §§ 367 and 286.

But if it were conceded that knowledge by the endorser of the non-payment and dishonor of the notes, and that the bank looked to him for payment, was sufficient, and that the resolution aforesaid was communicative of such knowledge, it would still have to be shown that the said resolution had been communicated to the endorser, or that he had acquired a knowledge of its contents, and that such knowledge was communicated or acquired in a reasonable time after the cessation of hostilities and the restoration of correspondence.

Richmond was evacuated on the 3d of April, 1865, and in a short time thereafter there was regular communication between that city, where the endorser resided, and Alexandria, the domicil of the bank. From the day of the surrender of General Lee, on the

560 9th of April, *there was no organized opposition to the government of the United States in the state of Virginia (Code of 1873, p. 22). The seat of the restored government, as it was called, was transferred from Alexandria to Richmond on the 23rd of May, (Ibid, page 23) and the whole state submitted to it. On that day William N. McVeigh was in Alexandria, and was in correspondence with the bank, as is shown by his letter of that date, tendering to the board of directors his resignation of the office of president, and their non-acceptance of his resignation. What was there to have prevented service at that time of the notice which was necessary to fix his liability? Was it due diligence? Was it reasonable to delay two months longer before giving him an intimation that the notes, which he believed were paid by the makers were still due, and that the bank looked to him for payment, taking the resolution adopted on the 18th of July as equivalent to notice?

But was he notified of that resolution, or had he knowledge that said resolution had been adopted at the meeting of the stockholders? It is not pretended that the bank ever notified him of it. But the plaintiff relies on the fact that he was present at the meeting and participated in its proceedings, to prove that he had knowledge of the resolution. The newspaper report of the proceedings of the meeting, which the plaintiff offered evidence to prove was accurate, shows that William N. McVeigh was present at the meeting and participated in proceedings in relation to another matter in which he was deeply interested, but does not show that he was present after that matter was disposed of, when the resolution in question was offered, or when it was considered and adopted. But it does show that he took no part in that proceeding.

Now it is fair to presume that if he had been present and was aware of it, he would not have allowed a resolution to pass sub silentio, which so seriously affected his

561 interests, *and which assumed a position which he did not believe to be correct, as is shown by his strenuous resistance to it, when afterwards brought to a legal test in the circuit court, presided over by a distinguished judge, who sustained him; though the act of the legislature, under authority of which the makers had paid the notes, was long years afterwards held by a majority of this court to be unconstitutional. We say it is fair to presume that he would not have remained silent and acquiescent, but that he would have made an effort to prevent its adoption, as he had done in other matter affecting him. The presumption is that he was not present when the resolution was offered and passed, or at least that he was not aware of it, as he did not oppose it. The presumption is conclusive in the absence of positive testimony to the contrary. There is no proof that he was then present, or that he knew of it; but there is positive proof to support the presumption that he did not know of it. His own testimony introduced by the plaintiff, proves positively that he had no knowledge of said resolution. And it is further proved by him and James H. McVeigh, for the defence, "that no demand was ever made upon them for the payment of said notes, and that no notice was given them that they were held bound for the payment, until and except as they were served with notice in this suit."

Now, the 9th and 12th instructions tendered by the plaintiff are fatally defective in this, that they in effect not only charge the jury to draw an inference from a fact, (the presence of William N. McVeigh at the meeting), which is not sufficient to warrant such inference, (but, as we have shown, is contrary to the natural presumption,) but also to disregard the positive testimony. The court did not err, therefore, in refusing to give them to the jury.

562 *There is another ground upon which the learned counsel for the plaintiff relies as presumptive evidence of knowledge: that said McVeigh was president of the bank. It is true he was president when he abandoned his residence in Alexandria and crossed the belligerent lines, and never resigned his office until the 23d of May, 1865, and that he attended to some matters of the bank, in that capacity, within the Confederate States, which were after the war disclaimed by the bank. But to infer from the foregoing, and from the duty of the president "generally to superintend, and diligently to attend to the business of the bank," that he had knowledge of the non-payment and dishonor of the notes in controversy, and that the bank looked to him for payment, when the fact is palpable on the face of the record, that he was separated from the bank by hostile armies during the whole period, and that the said duties of president could not be, and were not, performed by him, is to close the eyes to the facts, and has not even the show of plausibility. The inference is at least as illogical as the proposition we have just disposed of.

The 10th instruction is not law, nor adapted to the facts of the case, and was calculated to mislead the jury. The court might properly have reversed it, and instructed the jury that though the endorser had knowledge at any time during the war that the notes were dishonored and protested, but that the amount of said notes was afterwards paid at Pearisburg in 1864, in Confederate money, as authorized by act of the legislature of the state, although years afterwards said law was adjudged to be unconstitutional, and that said endorser believed that said payment was valid, and had no knowledge that the bank claimed to the contrary prior to the adoption of the resolution at a meeting of the stockholders on the 18th of July, 1865, referred to (if he had any knowl-

563 edge then, *which he denied), between three and four months after the cessation of hostilities in this state, and after communication had been restored between his residence and the domicil of the bank, and nearly two months after he was in Alexandria, on the 23d of May, 1865, and in actual correspondence with the bank, although he was present at the meeting which adopted the said resolution and took part in its proceedings, but took no part in the proceedings when the resolution aforesaid was adopted, and that there is no proof that he was then present, but positive proof that he had no knowledge that the meeting had adopted any such resolution, and that the first knowledge that he had that the bank repudiated the said payment at Pearisburg and looked to him for the payment of said notes, was the service of process in this suit; the jury should find for the defendant. The instruction tendered is also objectionable in deducing its conclusion from an alternative hypothesis, that he had been informed by officers of the bank when there is not a scintilla of evidence to support such an hypothesis; and, indeed, the other alternative hypothesis, that he was notified by said resolution is wholly unsupported by the evidence. This instruction, as well as others, was ingeniously framed, and was calculated to confuse and mislead the jury, and was properly rejected by the court.

There is no evidence in the cause of which the 11th instruction can be predicated, and as the court was not bound to enunciate abstract principles of law, whether the instruction correctly asserted the law or not, of which this court does not deem it proper to express an opinion, the court below did right to refuse to give the instruction.

If the court erred in not giving the 13th instruction, the plaintiff is not prejudiced by it, inasmuch as the finding of the jury and the judgment of the court is in conformity with it. This disposes of all the plain-

564 tiff's fifteen *instructions. The defendant only tendered one instruction which was given by the court, and we think properly, as is shown by the views which we have already expressed. This disposes of all the instructions, and of the plaintiff's third exception.

The court is of opinion that there is no error in the rulings of the court as set out in the plaintiff's 1st and 2nd bills of exception, and upon the whole to affirm the judgment of the court below, with costs.

Staples and Burks, J's, concurred in the opinion of Anderson, J.

Moncure, P., and Christian, J., dissented.

Judgment affirmed.

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565 *Gillett v. The American Stove and Hollow Ware Co.

November Term, 1877, Richmond.

Absent, MONCURE, P.

Suits by Corporation—Averments.*—In an action of *assumpsit* the writ and declaration is in the name of a plaintiff which indicates that said plaintiff is a corporation, but it is not stated to be a corporation. The defendant pleads *non-assumpsit*, but does not file an affidavit that the plaintiff is not a corporation. Under the statute it is not necessary that the plaintiff should prove it is a corporation. Code of 1873, ch. 167, § 40, p. 1094.

This was an action of assumpsit in the corporation court of the city of Norfolk, in which the plaintiff declares as The American Stove and Hollow Ware Company, without stating it is a corporation, against J. R. Gillett. On the trial the defendant demurred

*Suits by Corporation—Averments.—See Railroad Co. v. Sherman, 30 Gratt. 602, and note.

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to the evidence; and there was a verdict and judgment for the plaintiff. And Gillett thereupon applied to this court for writ of error and supersedeas; which was allowed. The case is stated by Judge Burks in his opinion.

W. H. C. Ellis, for the appellant.
John J. Burroughs, for the appellee.

Burks, J., delivered the opinion of the court.

The American Stove and Hollow Ware Company brought an action of assumpsit in the corporation court *of the city of Norfolk, against J. R. Gillett, the plaintiff in error here, to recover the amount of an account against him for goods sold and delivered. The declaration contains the common counts only, and the plaintiff's account was filed as a bill of particulars with the declaration.

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The defendant pleaded the general issue, and also filed an account of set-offs against the plaintiff's demand. At the trial the defendant tendered a demurrer to the evidence, in which the plaintiff joined; and upon argument of the demurrer, the plaintiff had judgment for the amount of damages conditionally assessed by the jury in their verdict.

The principles governing a demurrer to evidence are well settled by numerous decisions of this court. It is necessary to refer only to the recent case of Trout v. Va. & Tenn. R. R. Co., 23 Gratt. 619, where many of the cases are cited and commented on in the opinion of the court delivered by the president. The established rule is, that the demurrant allows full credit to the evidence of the demurree (waiving all of his own in conflict therewith), and admits all the facts directly proved by, or which a jury might fairly infer from, such evidence.

It is not denied by the counsel for the plaintiff in error, and if it were it is clearly proved by the evidence in this case, that the goods mentioned in the account filed with the declaration, were sold and delivered to the defendant, and that after sale and delivery, and before suit brought, the defendant admitted his indebtedness for the amount claimed by offering to pay it in weekly instalments until the whole amount should be discharged.

The only error assigned here is that there was no proof that the plaintiff was an incorporated company. No evidence was offered to prove that fact, and under the pleadings none was necessary.

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*In a suit by or against a corporation it was necessary at common law to prove the existence of the corporation whenever that fact was put in issue by proper plea; and it was held that the plea of non-assumpsit did put such fact in issue. Jackson's adm'x v. Bank of Marietta, 9 Leigh, 240, and cases there cited.

So it would be on the plea of nil debet, and the like.

The rule oftentimes operated delay in trials, sometimes surprise, and occasionally a total failure of justice. It was to remedy these mischiefs that the general assembly, by an act approved June 4, 1870, amending section 39, chapter 171 of the Code of 1860, changed or modified the common law rule by providing that where plaintiffs or defendants sue or are sued, as a corporation, it shall not be necessary to prove the fact of incorporation, unless with the pleading which puts the matter in issue there be an affidavit denying such incorporation. Acts of 1869-70, ch. 112, p. 151; Code of 1860, ch. 171, § 39; Code of 1873, ch. 167, § 40, p. 1094.

No affidavit was filed by the defendant with the plea in this case, and it is contended by his counsel here that the case does not come within the operation of the statute, because, as alleged, it does not appear that the plaintiff "sued as a corporation."

We think it does sufficiently appear that the plaintiff "sued as a corporation."

The writ and declaration are in the name of "The American Stove and Hollow Ware Company" as plaintiff. The name imports a corporation, or at least, the description amounts to an allegation that the plaintiff is a corporate body.

Woolf v. The City Steamboat Company, 62 Eng. C. L. 103, was a case in assumpsit. The declaration commenced thus: "The plaintiff complains of The City Steamboat Company, who have been summoned," &c. There *was a special demurrer to the declaration, assigning for causes, that the names of the defendants were not stated; that it did not appear whether they were sued as a corporation or a company completely registered, or by virtue of what act of parliament they were entitled to be sued by the name of a company. Maule, J., in rendering judgment, the rest of the court concurring, said: "The mode of pleading is governed either by positive rules or by a known course of precedents. There is no positive rule that I am aware of, which requires such a mode of description as the defendant's counsel insists upon in this case; nor is the description which is given at all not of the usual form: it impliedly amounts to an allegation that the defendants are a corporate body."

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In Norriss v. Stapps, Hob. 210, the Lord Chief Justice said: "I am opinion that they (the plaintiffs) needed not to show how they were incorporated, for the name argues a corporation, as the like of cities; and the plea nil debet (or the like) requires proof of it."

The decision in Henriquies v. Dutch West India Company, 2 Ld. Raymond, 1532, is to the same effect.

In the case of Rees v. Conococheague Bank, 5 Rand. 326, the declaration was in the name of "The President and Directors of the Conococheague Bank," without further description. It was not alleged in terms that the bank was a corporation, or how or by what power it was incorporated. Judge Green, in his opinion, concurred in by the other judges, said: "Whether the Bank of Conococheague is an incorporated bank or not, or whether they have a legal right to sue in the name of the 'president and directors'

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only, are questions which might have been put in issue by the defendant or raised upon the trial of the general issue. No averments as to these subjects were necessary in the declaration.

569 *The mode of declaring at common law was not affected by the act of June 4, 1870; and as the declaration in this case would have been sufficient prior to that act to indicate that the plaintiff "sued as a corporation," it is sufficient for that purpose since the act; and as the defendant did not file with his plea the affidavit required, proof by the plaintiff "of the fact of incorporation" was dispensed with by the act.

The court is of opinion, for the reasons stated, that there is no error in the judgment of the corporation court of the city of Norfolk, and that the same should be affirmed.

Judgment affirmed.

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570 *Matthews v. Warner's Adm'r.

[26 Am. Rep. 396.]

November Term, 1877, Richmond.

Absent, MONCURE, P.

1. **Death by Wrongful Act—Averments.**—In an action under chapter 145, § 7-9, Code of 1873, to recover damages for the death of a person caused by the wrongful act, &c., of another, it is not necessary to aver in the declaration for whose benefit the action is brought.
2. **Same—Damages—Assessing.**—In such an action the jury, in assessing the damages, are not confined to the mere pecuniary loss and injury, but may give such damages as to them "may seem fair and just."
3. **Same—Defences—Contributory Negligence.**—Where, in such an action, the death was caused by the *wrongful act* of the defendant, it is no defence that the death was the result of the misconduct or neglect of the deceased; but that circumstance may affect the *quantum* of damages.
4. **Grounds of Continuance—Absence of Material Witness.**—In order to entitle a party to a continuance on the ground of the absence of a material witness, it is necessary that he should have used due diligence to ascertain the materiality, and to procure the attendance of the witness.

This was an action of trespass on the case in the circuit court of Accomac county, brought by John J. Tunnell, administrator of Montesco Warner, deceased, against Franklin M. Matthews, to recover damages for the killing of Warner by Matthews. On the trial, the evidence showed that after receiving very abusive language from Warner, and that repeated, Matthews shot him, and that he died from the effects of the shot in about ten days. They were both young and unmarried men, and Warner much the most powerful of the two. His mother was

571 *the wife of the plaintiff, and it did not appear that he had either sisters or brothers. Matthews' estate was estimated at certainly not more than $1,000.

The jury rendered a verdict for the plaintiff for $700, and directed that the same should be paid to Sinah Tunnell, the wife of the plaintiff and the mother of Warner.

The several questions raised in the progress of the cause, are stated in the opinion of Judge Christian. Matthews applied to this court for a writ of error and supersedeas; which was awarded.

Meredith, for the appellant.

Neely, and Walker & Hundley, for the appellee.

Christian, J. This is a writ of error to a judgment of the circuit court of Accomac county.

The suit was brought by the personal representative of Warner to recover damages of Matthews, under the 7th and 8th sections of chapter 145, Code of 1873, which provide that a claim for damages may be maintained by the personal representative of one whose death has been occasioned "by the wrongful act, neglect, or default of any person or corporation." The certificate of facts show that Warner was shot and killed by Matthews under circumstances which, if not such as the law declares to be murder in the second degree, or, at the very least, voluntary manslaughter, certainly must be held to be a wrongful act. Suit was brought by the administrator of the deceased under the statute above referred to, and a verdict was recovered against the plaintiff in error for the sum of seven hundred dollars, for which judgment was rendered by the circuit court, and to this judgment a writ of error was awarded by one of the judges of this court.

572 *The first error assigned is the action of the court overruling the demurrer to the declaration.

The demurrer was intended to assert the proposition, that in an action under the statute, by the personal representative of the person killed, it is necessary to aver in the declaration for whose benefit the suit is prosecuted, whether the family of the deceased, parent, wife or child, or for his creditors, and that under the statute this is essential to enable the jury to distribute the damages in such proportions as they may direct.

This question has been already settled by this court. In the case of Baltimore and Ohio Railroad Company v. Wightman, decided at the present term, Judge Staples, in an elaborate opinion, in which he carefully compares the Virginia statute with those of other states, and reviews the decisions under these statutes, founded upon their peculiar requirements and phraseology, reaches the following conclusion, which was concurred in by the whole court: "The statute was designed to give the personal representative a

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Questions Involved in the Principal Case.—In Railroad Co. v. Noell, 32 Gratt. 394, the court said: "The questions raised by the demurrer are the same as those decided by the court in the case of Railroad Co. v. Wightman, 29 Gratt. 431, and reaffirmed in Matthews v. Warner, 29 Gratt. 570." See these cases and *notes*, for a discussion of the principles involved in the principal case.

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right of action wherever the deceased would have had it, had he lived. The declaration must, therefore, always state such facts as will show a good cause of action on the part of the deceased himself (if he were living). And this would seem to be the only test prescribed by the statute. The defendant knows that the damages are primarily for the benefit of the family, for so the law declares, and he can be very rarely surprised by the evidence on this point. The manner in which the damages are to be distributed is no concern of the defendant and not under control of the plaintiff. It is a question for the jury exclusively, not involved in the issue. It is very probable that no serious inconvenience would result from requiring the plaintiff to state for whose benefit the action is brought, but such an averment is not essential to the action. If we require
573 it to *be made merely because it has a material bearing upon the question of damages, it will be difficult to assign a limit to allegations of that character. In simplifying all the proceedings and pleadings we best promote the objects of the statute." Upon the question, therefore, raised by the demurrer in this case without repeating the argument and the authorities relied upon by Judge Staples, I shall content myself with saying that upon the principles and authorities cited in Baltimore and Ohio Railroad Company v. Wightman, and which are equally applicable to this case, there was no error in the judgment of the circuit court of Accomac in overruling the demurrer to the declaration.

The second error assigned is the refusal of the court to give the instructions asked for by the defendant (plaintiff in error here), as set forth in the third bill of exceptions, which instruction is as follows: "If the jury, from the evidence, should find for the plaintiff, then the measure of damages in this action is the pecuniary loss sustained by Sinah Tunnell, the mother of the plaintiff's intestate, by reason of the death of the said Montesco Warner, and the jury, in assessing the damages, must confine themselves to injuries of which a pecuniary estimate can be made in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, to his said mother, from the continuance of the life of the said Montesco Warner, and cannot take into consideration the mental suffering occasioned by his death to his said mother."

This instruction was refused by the circuit court, and presents for our consideration the important question, What is the true construction to be given to the statute respecting the measure of damages which it prescribes? Whether the jury is confined in its estimate of the damages incurred by the death of
574 the party to the pecuniary loss *thereby sustained by the party for whose benefit the suit is brought, or whether they are justified in giving punitive and exemplary damages. This statute, in this respect, has never been construed by this court; indeed, it has been upon the statute book but a few years, and few cases have arisen under it in this state. We must, therefore, look to the English statute and the statutes of other states of the Union, and the decisions under those statutes in order to arrive at the true interpretation to be given to our own.

The seventh section of our statute is totidem verbis with the corresponding section of the English statute: "§ 7. Whenever the death of a person shall be caused by the wrongful act, neglect or default of any person or corporation, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured, or if she be a married woman, her husband, either separately or together with her, to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony: provided, that in no case shall the recovery exceed the sum of ten thousand dollars." The second section of the English statute provides that "every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall be so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whose benefit such action shall be brought; and the amount so recovered,
575 *after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury, by their verdict, shall find and direct."

The statutes of most of the states of the Union do not differ materially from the English statute, except as to the parties who may recover, and for whose benefit suit may be brought, and except as to the limitation of the amount that may be recovered. In nearly all of them the recovery is limited either in express terms, or by necessary implication to such damages as are pecuniary and actual, and not exemplary. Under the English act, and those modelled after it in the states, the courts have uniformly held that nothing can be allowed as damages under those statutes on account of the physical or mental sufferings of the deceased, or for the sorrow, sufferings or grief of the surviving relatives who may be entitled to recover, but that the damages provided for and recoverable under them are only such as are pecuniary and actual, and not exemplary. Field on Damages, § 630, and cases there cited.

But these decisions, many of which were strongly relied on by the learned counsel of the appellant, are made under statutes which, either in terms or by fair construction, forbid the recovery of punitive and exemplary damages. Such decisions can only be authority when we find the statutes upon which they are founded of like character with ours. The Virginia statute differs most materially from

the English statute and those of the states (as nearly all are) modelled upon the English statute, in this most important particular. In the section which defines the character of the damages recoverable under these statutes, the English statute declares that "in every such action the jury may give such damages as they may think proportioned to the
576 injury resulting *from such death to the parties respectively for whose benefit such action shall be brought."

The statute of New York, and of all the other states, modelled upon the English statute, are found to be in the following terms, or those of like import: "The jury may give such damages as they may deem fair and just compensation (not exceeding a specified sum), with reference to the pecuniary injuries resulting from such death to the parent next of kin," &c., &c. In our statute, instead of these words, or words of like import, being employed, it is declared that "the jury in any such action may award such damages as to it may seem fair and just," &c. Certainly, in the Virginia statute, there are no words of limitation as in the English statute, and those modelled thereon, confining the jury in the assessment of damages to merely pecuniary injury; but, by the very terms of the statute, the damages are such "as to the jury may seem fair and just." We are bound to presume that the legislature which enacted this law was familiar with the English statute, and those of the other states of the Union, and of the English and American decisions under them. And it is a most significant fact, that with the English and American statutes before them, and familiar with the decisions under them, the legislature, after following the English statute and the New York statute up to the point where the measure of damages in the one case is declared to be "proportioned to the injury," and in the other "with reference to the pecuniary injuries resulting from such death," at that point, discarded these terms, and in lieu thereof adopted the language, "such damages as to the jury may seem fair and just." It is impossible to conceive that the omission of such language, and the adoption of other terms meaning the very reverse, could have been accidental. We must conclude that it was done with a design, and that design
577 *plainly, by all the recognized rules of construction, was to declare that in an action for the death of a party caused by the wrongful act, neglect or default of any person or corporation, such damages may be recovered "as to the jury may seem fair and just."

I think it is manifest that the legislature intended, as in Kentucky, Iowa, Connecticut, and California (which states are exceptional to the English statute), to allow the jury in such cases to award punitive and exemplary damages.

It was argued very earnestly by the learned counsel for the appellant, that such a construction of the statute as we have here given would result in great injustice, if juries are to be turned loose to assess damages according to their own notions, as to compensation for the mental sufferings and agony of a mother losing her child, or of a wife losing her husband, unrestrained by statutory enactment confining them to the actual pecuniary injury resulting from death. There are two answers to such arguments—one is ita est scripta lex. The other is—we must presume the legislature knew the force and effect of their own enactments. They must have been cognizant of the statutes and the decisions under them. And they must, with such knowledge, have known the force and effect of the language they used. It may be they intended, as they must have intended to make no distinction in a case where a man of full vigor, devoting his whole life and service to the support of his family, was killed by wrongful act, negligence or default, and an aged man or woman, or a child or cripple who was utterly dependent, whose death is caused in the same way. In either case, as the law is written, the person or corporation by whose wrongful act, default or negligence the death is caused, is liable in damages, and in such damages "as to the jury may seem fair and just."

578 *But if the law as it is written is unjust and oppressive, and contrary to the laws of most of the other states of the Union, it is for the legislature to change the law. This court can neither amend or annul the statute law, (unless it be unconstitutional). That is the province of the legislature. This court can only interpret the law as we find it; and so interpreting it, we are constrained to say, that under our statute the jury are not confined to mere pecuniary damages, and that the circuit court did not err in refusing the instruction offered by the plaintiff in error.

The third ground of error assigned is that raised by the 4th bill of exceptions, which is in these words:

"After the hearing of the evidence, the defendant, by his counsel, moved the court to instruct the jury as follows: 'That if the jury believe, from the evidence, that the death of the deceased, Montesco Warner, was the result of his own misconduct or neglect, then the jury must find for the defendant.'"

This instruction the court refused to give. I am of opinion, that there was no error in such refusal. This is not a case in which contributory negligence can be pleaded. The death in this case was not caused by negligence; it was caused by violence—by a wrongful act. It was sufficient, as the court instructed the jury, that they must believe that the death was caused by a wrongful act before they could find a verdict for the plaintiff. If the death was caused in self-defense, then it was not a wrongful act; but if it was caused under such circumstances as to constitute a wrongful act, whether it was murder in the first degree, or murder in the second degree, or manslaughter, it is still a wrongful act, which is actionable under the statute. Whether the death was caused under such circumstances as the law would make murder or manslaughter, the loss of those
579 *entitled to recover is the same. It is death by a wrongful act, and therefore

compensatory in damages, though it may be in such case a question affecting the measure of recovery.

The fourth and last ground of error assigned here, is the refusal of the court to set aside the verdict and grant a new trial as contrary to the law and evidence. The same questions raised under this motion have already been considered under the second assignment of error, and it is sufficient to say that for the reasons already given, the court committed no error in refusing a new trial.

We have thus disposed of all the errors assigned in the petition for writ of error and urged in argument here. There was, however, one other question raised by bill of exceptions in the circuit court, which, though not assigned as ground of error, it may be proper to notice.

That exception was to the refusal of the court to continue the case for the absence of the witness, Taylor. This witness, it seems, was summoned for the plaintiff. He was not summoned for the defendant until the day when the cause was called for trial. The excuse for not summoning him at an earlier day was that the materiality of his evidence was not known to his counsel until that day. But it was proved that the deposition of this same witness, disclosing the facts now relied on as material, had been filed in the clerk's office of Accomac county, with other evidence taken at the coroner's inquest, for several months before the trial; and if due diligence had been exercised by the plaintiff in error or his counsel, the fact could surely have been ascertained as to the materiality of the witness, so as to summon him and compel his attendance. The summons, at the term, and on the very day fixed for the trial, came too late to justify the court in the continuance of the cause; and
580 *such motion was properly overruled.

This court has repeatedly held, that upon questions of the continuance of a cause, very large discretion must of necessity be vested in the court of trial. It is only in a clear case, where this discretion has been abused, and injustice has been done, that the appellate court will interfere. Especially it ought not to interfere, I think, in a case where the failure to grant a continuance is not even assigned as ground of error in the appellate court.

Upon the whole, I am of opinion, there is no error in the judgment of the circuit court of Accomac, and that the same be affirmed.

Anderson and Burks, J's, concurred in the opinion of Christian, J.

Staples, J., fully concurred in the opinion of Judge Christian upon all the points, except that he was not satisfied that the jury had the right to give vindictive or punitive damages. Upon a view of the whole statute, he was inclined to think the object was to give compensation to the family of the deceased, and not to punish the defendant, which belongs rather to the criminal law. While the jury, in estimating the compensation or damages, may give a solatium, as it is termed, they have no right to go beyond and assess damages by way of punishment. He had, however, no decided opinion, and therefore, preferred not to express any; more especially as the question is not fairly presented by the record.

Judgment affirmed.

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581 *Backhouse's Ex'x v. Selden.

November Term, 1877, Richmond.

Absent, MONCURE, P.

1. **Appellate Court—Demurrer to the Evidence.***—Where neither party requires a jury, and the whole matter of law and fact are heard and determined and judgment given by the court, and the whole evidence is certified by the court in the bill of exceptions, the bill must be regarded as a demurrer to evidence by the plaintiff in error.
2. **Wrong—Foreign Contracts—What Law Governs.**—Where a bond dated in Texas, signed by the principal obligor, a resident of Texas, and by two sureties, residents of Virginia, payable to a resident of Virginia, where the drafts, which were the consideration of the bond, were sent to and received in Texas, and the money borrowed used in Texas by the principal obligor—HELD: To be a contract governed by the laws of Texas, and not affected by the laws of usury in Virginia.

Robert C. Selden brought an action of debt in the circuit court of the county of Gloucester against John W. Backhouse, who was co-obligor with Thomas L. Taylor and Fielding

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***Appellate Court—Demurrer to the Evidence.**—In Old Dom. Steamship Co. v. Burckhardt, 31 Gratt. 664, the court says: "And first, it is to be premised that the question as to how the appellate court will regard and give effect to a bill of exceptions in which the *evidence* and not the facts proved are certified, in a case tried by the court without a jury, and where the evidence is conflicting, is a question not definitely settled by the decisions of this court. There is certainly some conflict of authority on this point. Some of the cases hold that the same rule is to be applied to a case where a jury is waived and the case is tried by the court upon the law and facts, as to a case where there is a verdict of a jury; and that in both cases where the *evidence* (and not facts proved) is certified, and the evidence is conflicting, the bill of exceptions must be taken as a demurrer to the evidence, and so regarding it, the appellate court will only reverse when it appears that by rejecting all the oral evidence of the plaintiff in error and giving full credit to that of the defendant in error, together with all fair and legal inferences to be deduced from said evidence, the judgment is erroneous. See Pryor v. Kuhn, 12 Gratt. 615, and Backhouse's Ex'or v. Selden, 29 Gratt. 581; Hodges' Ex'or v. First National Bank of Richmond, 22 Gratt. 61. In Mitchell v. Baratta, 17 Gratt. 445, two judges out of three (the court then composed of three judges) held that a different rule prevailed where the judgment is by the court upon the law and facts; and it was so held also in Wickham & Goshorn v. Martin Lewis & Co., 13 Gratt. 427, by two judges out of four. According to these last-mentioned authorities, the rule in such case is different from that which prevails where there is a verdict of a jury; the bill of

L. Taylor, on a bond in these words and figures, to-wit:

Victoria, Texas, February 3d, 1860.
$3,000.

Two days after date, we promise to pay to the order of Robert C. Selden, with interest at the rate of ten per centum per annum, three thousand dollars and —— cents, for value received, to which payment we
582 *bind ourselves, heirs, executors, administrators and assigns.

Witness our hands and seals.
Thomas L. Taylor, [Seal.]
Fielding L. Taylor, [Seal.]
John W. Backhouse, [Seal.]

Endorsed:

December 29th, 1860.—Received interest to 3d February, 1861.

The defendant pleaded payment, and filed a special plea of usury. The defendant then died, and the case was revived by scire facias against Ann Matilda Backhouse, his executrix.

On the 31st of October, 1871, neither party requiring a jury, the whole matter of law and fact was submitted to the court, and judgment was rendered for the plaintiff against the defendant, to be levied de bonis testatoris, for the amount of the bond, with interest from the 3d of February, 1860, till paid, and the costs, to be credited by the interest paid to February 3d, 1861. A motion was made to set aside the judgment as being contrary to the evidence, which was overruled; to which the defendant excepted and tendered her bill of exceptions, which was signed and sealed, and in which the court certified all the evidence adduced on the trial, which was in substance the following. The plaintiff first introduced the bond above set forth, and then a letter from Thomas L. Taylor in these words and figures, viz:

Victoria, February 25th, 1860.

Dear Sir: Your letters enclosing the three drafts of $995 each, have come to hand
583 safely. I would have *acknowledged the receipt of the first, but was expecting the others every day, and thought that I would wait until the last arrived. I am very much obliged to you for sending them so promptly. We are now having fine rains and the chance for a crop is good.

With kindest regards to cousin Courtney, I remain yours,

Thomas L. Taylor.

Endorsed:

This letter is the handwriting of my brother, Thomas L. Taylor.

Arch'd Taylor.

and proved that the name subscribed to the paper and the paper are in the handwriting of said Thomas L. Taylor, one of the obligors on the bond; and said plaintiff introduced and read in evidence the statute of the state of Texas, regulating the rate of interest at the date of the bond and now, which allowed a rate of interest by contract of the parties not exceeding twelve per centum per annum.

The defendant introduced Fielding L. Taylor, a son of Fielding L. Taylor, one of the obligors to the bond, who testified that Thomas L. Taylor, who resided in Texas, came to Virginia in 1859 or 1860, when witness was about eleven years old, living with his father; that he understood that Thomas L. came to Virginia to borrow money; that his father went with Thomas L. to Texas about the last of January, 1860, but that John W. Backhouse did not go to Texas at that time; that he saw Backhouse every day or two while his father was in Texas, and that he could safely say that Backhouse was in Virginia at the date of the bond; that the
584 writing in *the bond was in the handwriting of his father, and that his signature thereto was genuine; that he did not know whether Selden went to Texas when his father and Thomas L. Taylor went or not. The defendant then introduced a book containing printed forms of bonds and certain memoranda made upon the margin of the two first pages, which the witness testified was the bond-book of his father; that it was found at his late residence in Gloucester county, Va., and that the memoranda on the margin of the two first pages from which the bond was cut were all in the handwriting of his father.

The defendant also introduced Archibald Taylor, who testified that his brothers, Thomas L. and Robert Taylor, lived in Texas several years previous to 1860; that in 1859 they purchased land in Victoria county, Texas; that in the winter of 1859-60 Thomas L. came to Virginia to borrow money to pay for this land; that he learned this from conversations with his brothers, and also learned in the same way that Thomas did borrow money from Robert C. Selden and some from John W. Backhouse, and that his brother, Fielding L., and said John W. Backhouse became his sureties; that his brothers, Thomas L. and Fielding, went away together about the last of January, 1860, but that Backhouse did not go. He never heard of Backhouse's going to Texas. The bond-book showed that the bonds were cut from the first

exceptions is not in such case to be regarded as a demurrer to evidence, but in case of a conflict of evidence in *such* a case, the preponderance will be given to that side which prevailed in the court below. In the case before us, I do not think it necessary to reconcile these conflicting decisions and to declare which is the true rule settled by the weight of authority."

Mr. Barton says (Barton's Law Pr. 2d Ed. 667): "Where, however, the matter in controversy was submitted to the judge without the intervention of a jury, the rule, amid some differences of opinion, was held to be that the appellate court would not refuse to reverse the case because the evidence instead of the facts was certified; but the bill of exceptions would be regarded in the light of a demurrer to evidence; and when there was a conflict of evidence the conflicting evidence of the exceptor was disregarded by the court." See also, Randolph v. Longdale Iron Co., 84 Va. 459; Weiss v. Hobbs, 84 Va. 490, citing the principal case.

and second pages of said book, leaving the margins; that on the margin of the first page, on a line with the printed figures "18," was written the words "January 20th, '60;" that immediately under the printed word "dolls." was "1000;" opposite the printed word "drawer" on the margin was written "Thomas L. Taylor;" opposite "residence" was written "Victoria, Texas;" opposite "in whose favor" was written "John W. Backhouse;" opposite "time" was written "twelve months," and opposite "when due" 585 was *written "January, 1861;" that on the margin of said book, on a line with the figures "18," was written "January, '60;" that in a line with "dolls." and "cts." were the figures "3000;" that opposite the word "drawer" was written "Thomas L. Taylor;" that opposite the word "residence" was written Victoria, Texas;" that opposite the words "whose favor" was written "Robert C. Selden;" and upon placing the printed bond in evidence in the book it was shown to have been cut from the second page thereof. It was admitted by the parties that Backhouse resided in the county of Gloucester, Va., and never went to Texas. It was also admitted that the obligor, Fielding L., was, in 1859 and 1860, a resident of Gloucester, and did not change his residence, and that Selden, at the time of the execution of the bond, was also a citizen and resident of said county of Gloucester, Va., and the court certified that this was all the evidence in the case. The defendant obtained a writ of supersedeas to the judgment of said circuit court of Gloucester.

M. B. Seawell and John S. Wise, for the appellant.

Ould & Carrington, Friend & Davis, for the appellees.

Anderson, J., delivered the opinion of the court.

The court is of opinion, that the whole matter of fact and law in this case having been submitted to the court, neither party requiring a jury, and the judgment of the court being upon the evidence which is certified in the bill of exceptions as all the evidence in the cause, the bill of exceptions must be regarded as a demurrer to the evidence, by the plaintiff in error. Hodge's ex'or v. First Nat. Bank, Richmond, 22 586 Gratt. 51; Dodson v. Culpepper, *23 Gratt. 352. And the plaintiff in error, the exceptor, must be taken to have admitted, as in case of a demurrer to evidence, all that could be reasonably inferred by a jury from the evidence given by the plaintiff below, and to have waived all the evidence on his part which conflicts with it, or which tends to establish a case inconsistent with the case proved by it. Tutt v. Slaughter's adm'r, 5 Gratt. 364.

And the court being further of opinion, that the evidence of the plaintiff below, taken by itself and unimpeached and unaffected by contradictory evidence, or taken in connection with so much of the defendant's evidence as is not in conflict with it, to-wit: that the principal obligor in the bond resided at Victoria, Texas; that the bond is dated there; that the drafts, which are the consideration of the bond, were received there, and that the money borrowed was used there in paying for land which he and his brother had purchased there, justified the court in the inference that the contract was made at Victoria, Texas, (Wilson v. Lazier & als., 11 Gratt. 481), and was to be performed there, and was consequently controlled and governed by the laws of Texas, which allowed a rate of interest, by contract of parties, not exceeding 12 per centum per annum. Arrington v. Gee, 5 Ired. Law R. p. 593.

Undoubtedly the bond was executed by Thomas L. Taylor, the principal debtor, at Victoria, Texas, and it is obligatory on him to pay the stipulated interest, which did not exceed the rate of interest allowed by the law of Texas. The other obligors resided in Virginia. It is conceded that they executed the bond as sureties of Thomas L. Taylor, and it is impossible to suppose that they could have contemplated the payment being made here by them, and not at Victoria, Texas, by the principal. In the nature of things they 587 expected only to be *secondarily liable, and they are liable for what the principal had bound himself. Ruffin, C. J., in case cited, supra.

The court is of opinion, therefore, without deciding other interesting questions which were raised in the argument by the learned council, that the plaintiff in error, upon whom the onus rested to establish her plea of usury by conclusive testimony, has wholly failed to establish it, and that there is no error in the judgment of the circuit court, and that the same be affirmed with costs.

Judgment affirmed.

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588 *McVeigh & al. v. Allen.

November Term, 1877, Richmond.

Absent, MONCURE, P.

1. **Bills of Exception—Instructions.**—Where it does not appear that all the evidence given on the issue joined is stated in the bill of exceptions, an instruction to the jury that if they believe certain facts stated they must find for the plaintiff, the appellate court must reverse the judgment, on the ground that the facts are too imperfectly stated to enable the court to decide whether or not the instruction is correct.

2. **Negotiable Paper—Notice to Endorser—Excuses.***—In an action against the accommodation endorser of a negotiable note, the fact that the endorser resided at the time in Alexandria, where the notes were discounted, and before the note became due he went into the Confederate lines, and was there when the note was protested, and at the time of such protest he had no known agent in Alexandria to receive notice of the dishonor of

*Negotiable Paper—Notice—Excuses.—See Bank of Old Dominion v. McVeigh, 29 Gratt. 546, and *note*.

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the note, is not of itself sufficient to render the endorser liable.

3. **Same—Same—Same.**—And in such case, the fact that the endorser had a residence in Alexandria at the time the note was protested, and that a written notice of said protest was left at his residence is not sufficient to render the endorser liable.

4. **Same—Accommodation Endorser—Liability to Purchaser after Maturity.**—In such a case, the plaintiff having purchased the note after maturity and dishonor, by purchase at a sale of the effects of the bank which had discounted it, he is not thereby prevented from recovering from the endorser the whole amount of the note, though he paid for it much less than its nominal amount.

This was an action of debt in the corporation court of Alexandria, brought by Richard S. Allen against James H. McVeigh & Co., as makers, and William N. McVeigh as endorser of two negotiable notes, one of
589 them for *$2,502.50 and the other for $1,502.50, both of them dated at Alexandria, 31st May, 1861, and payable in sixty days at the branch of the exchange bank at Alexandria.

The defendants appeared and pleaded nil debit; and there was a verdict and judgment for the plaintiff against both the defendants.

On the trial, the defendants took two exceptions to rulings of the court on the trial of the cause. In the first it is stated that the plaintiff offered in evidence the notes and certificates of protest. These are embodied in the bill; and in each of the certificates of the notary it is stated on the same day he delivered a notice of protest to W. N. McVeigh, by leaving it at his dwelling in the hands of his white servant, informing him that he (the said endorser) was held liable for the payment of said note. And here the plaintiff rested.

The defendant then, to maintain the issue on his part, proved that both of said notes were made and endorsed for the accommodation of the makers without any value received from the makers by the endorser, and that neither the makers nor the endorser ever received any value for said notes or endorsements from the plaintiff; that R. H. Allen, the plaintiff, became the holder of said notes by purchase of them at a judicial sale of the effects of the Exchange Bank of Virginia some eighteen months ago, and gave for them at said sale seventy-five dollars. The defendants then proved that William N. McVeigh left his residence in Alexandria on the 30th May, 1861, and went within the Confederate lines, and remained there with his family throughout the war, having sent his family away to his farm in Culpeper several weeks before he himself left, and that he has never returned to Alexandria to reside since he left in May, 1861. The defendants there rested.

590 *The plaintiff then, to maintain the issue on his part, offered evidence tending to prove that the notes mentioned had been discounted by the branch exchange bank of Virginia at Alexandria before their maturity; and to the introduction of this evidence, the defendants objected; but the court admitted the evidence, and the defendants excepting to this action of the court, and asking that this his bill of exceptions may be signed, sealed and enrolled, the same is done accordingly.

Second Bill of Exceptions.

On the trial of this cause, the plaintiff and defendants having proved and offered evidence respectively, as stated in the first bill of exceptions, the plaintiff proved by William N. McVeigh, that when he left Alexandria on the 30th of May, he expected to be absent and remain away so long as the town was in the occupation of the Federal forces, which he supposed would continue only for a short time; that he left his dwelling open in charge of a white domestic, whom he advised to go to the country, and left also several colored servants there and the chief part of his wardrobe; that while in Richmond during the war, he voted for members of the legislature as a refugee from Alexandria.

It was proved that the two notes were originally drawn and endorsed in blank and left with Mr. Crupper, the agent of the makers, with authority to fill them up, such authority being known to the endorser prior to the 30th of May, 1861, but when they were filled up was not shown.

Thereupon the court, on motion of the plaintiff, gave the following instructions to the jury:

1. If the jury believe from the evidence that the plaintiff purchased the notes
591 sued on at a judicial sale of *the assets of the Exchange Bank of Virginia, and now holds the same as purchaser, he is entitled to maintain this suit against the maker, James H. McVeigh, and if the jury shall find the facts as stated in the second or third instructions, against the endorser, William N. McVeigh, also.

2. If the jury believe from the evidence that William N. McVeigh, the endorser, endorsed the said notes, the dates of said endorsements being the dates of said notes; while he was a resident of the city of Alexandria, and before the same became payable had left his said residence and gone within the Confederate lines, and was within the said Confederate lines at the time of said notes were protested, and at the time of such protest there was no known agent of said William N. McVeigh in the city of Alexandria to receive notice of the dishonor of said notes, that then they will find for the plaintiff.

3. If the jury believe from the evidence that the endorser, William N. McVeigh, had a residence in the city of Alexandria at the time the said notes were protested, and that a written notice of said protest was left at his residence, they must find for the plaintiff.

The defendants excepted to the granting of each of said instructions, and moved the court to instruct the jury as follows:

1. If the notes sued on were originally made by James H. McVeigh & Son, and endorsed by William N. McVeigh for the accommodation of James H. McVeigh & Son, and without valuable consideration, and the plaintiff

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acquired and became the holder of the notes after their maturity and dishonor, without payment of value therefor either to James H. McVeigh & Son or to William N. McVeigh, the jury must find for the defendant.

592 *2. If the facts are, as stated in the above instruction, the jury must find for the defendant, William N. McVeigh.

3. If the plaintiff acquired notes after dishonor, the note having been accommodation paper in its origin, the plaintiff can recover of his immediate endorser only the amount actually paid by him to such endorser.

The instructions so prayed by the defendants were each and all refused; to which action of the court the defendant also excepted.

On the application of the defendants, this court awarded a writ of error and supersedeas.

John Howard and S. F. Beach, for the appellants.

H. O. Claughton, for the appellee.

Staples, J. I am of opinion, that the circuit court erred in giving the second and third instructions asked for by the plaintiff. The second instruction tells the jury that if the defendant, William N. McVeigh, went into the Confederate lines between the date and maturity of the notes in controversy, and that he left no known agent in the city of Alexandria to receive notice of the dishonor of the notes, they must find for the plaintiff.

The third instruction declares that if the defendant, William N. McVeigh, had a residence in Alexandria at the time the notes were protested, and a written notice of the protest was left at his residence, the jury must find for the plaintiff. So that under the first instruction the sole inquiry for the jury was whether the defendant had an agent in Alexandria to receive notice of the protest; and under the second, whether the defendant had a residence in that city, and whether notice of the protest was left there.

593 *It will be observed that these instructions do not assume that certain facts, if believed by the jury, constitute sufficient notice, but that they entitle the plaintiff to a verdict. The effect of the instructions was, therefore, to exclude from the minds of the jury all the other testimony in the cause, and to restrict the inquiry to the particular facts set forth in the instructions. No rule of law is better settled than that which forbids a court from selecting certain detached portions of the evidence as the basis of an instruction to find for one of the parties. The jury should be left free to consider all the evidence in the cause bearing upon the issue joined, without having their attention directed to any part of it in rendering their verdict. See Hilliard on New Trials, pp. 293-4, where the cases are cited. In Fisher's ex'or v. Duncan & Turnbull, 1 Hen. & Mun. 563, 567, it was decided by this court that an instruction which declared that from the whole testimony before them the demand of the plaintiff was not barred by the act of limitations, is erroneous, as being an infringement on the privileges of the jury, whose right it was to judge of the sufficiency of the evidence.

In Brooke v. Young, 3 Rand. 106-111, the defendant filed two bills of exception. The first, after stating the evidence adduced on the trial, concluded by saying: "And this was all the evidence in the cause. Whereupon the defendant moved the court to instruct the jury." The second bill of exceptions, after referring to a part of the evidence offered by the defendant, proceeded to state that the plaintiff had moved the court for an instruction "that the notes in controversy were not a legal set-off unless the defendant should satisfy the jury that he had acquired them before he received the notice of the assignment." Which was objected to by the defendant, but given by the

594 court. This court was of opinion, *that although the evidence stated in the first bill of exceptions might be all when it was sealed, there might be other important facts brought forward afterwards, and that it was not allowable to supply the defects of one exception from another, and thus shut out evidence material for one party not noticed in either bill. The statement of facts was therefore too imperfect to enable this court to form an opinion as to the correctness of the instruction. See also Bogle, Somerville & Co. v. Sullivant, 1 Call. 487; Crabtree v. Horton, 4 Munf. 59.

In Wash. & New Orleans Tel. Co. v. Hobson & Son, 15 Gratt. 122, 133-4, the rule laid down in Brooke v. Young was referred to and approved. Judge Daniel, in delivering the opinion of the court, said: "It (a bill of exceptions to the ruling of the court refusing to give instructions) may, and sometimes does, set out fully all the evidence of either side down to the period of the ruling of the court objected to; yet, as instructions may be and often are prayed for and given or refused before the testimony is closed, such a bill of exceptions cannot of itself merely be relied on as a complete statement of all the facts, or all the evidence on which the jury rendered their verdict. It could not be so relied on, even though in terms it should purport to be a statement of 'all the evidence in the cause,' as was the case in Brooke v. Young, 3 Rand. 106, for the reason stated by the court in that case, that although the evidence stated in the bill might be all when it was sealed, there might be other important facts brought forward afterwards."

These decisions would seem to be decisive of the present case. There are two bills of exceptions, but they do not profess to set forth all the evidence introduced on the trial. The first bill was taken to the opinion of the court admitting certain testimony offered by the plaintiff. The object was, of course,

595 merely to state so much of the *evidence as related to the admissibility and relevancy of the testimony objected to. The second bill of exceptions was taken to the action of the court in giving plaintiff's instructions and in refusing those asked for by defendants. It refers to a part of the evi-

dence set out in the first bill of exceptions, but there is not a word in it from which it can be inferred it was intended as a certificate of the facts proved, or of all the evidence adduced on the trial. It may be conceded that the giving of notice, the facts being agreed, is always a question of law; but here it is impossible to say we have all the facts proved on the trial. And even if it be conceded that the notice was sufficient, it did not follow that the plaintiff was entitled to a verdict. Unless we can say positively that it is, it is impossible to sustain the instructions of the court. At all events, in the language of the court in Brooke v. Young, the statement of facts is too imperfect to enable this court to form an opinion, and following the authority of that case and others there cited, the judgment of the court below must, on that ground, be reversed and a new trial awarded.

I am of opinion the instructions are erroneous upon another ground. Under the facts set forth in the two bills of exception the notice left at the residence of William N. McVeigh, after the commencement of the war, was insufficient to charge him as endorser. This question was fully considered in the case of the Bank of the Old Dominion v. McVeigh, 26 Gratt. 785, and the same case more recently decided by this court. That part of the opinion of Judge Anderson, in which a majority of this court concurred, relating to the sufficiency of the notice, equally applies to the present case. The only material difference between the two cases is, that in the former it was proved that the bank had notice of the removal of the endorser when the notice was given,
596 *whereas, in the present case, it does not appear whether the Exchange Bank had or had not such notice. The bill of exceptions does not show, nor is it necessary to decide now whether such knowledge would work a difference. Where the holder and endorser reside near to each other in a small city like Alexandria, the jury may presume from the proximity of the parties and the frequency of their communication, and the circumstances of notoriety attending the removal, that the holder was apprised of the change of domicile. Harris v. Memphis Bank, 4 Humph. R. 519; Farmers and Merchants Bank v. Harris, 2 Humph. R. 311; Bank of Utica v. Phillips, 3 Wend. R. 408.

The instructions given by the corporation court peremptorily excluded every inquiry of the kind from the mind of the jury, confining them to the consideration of certain facts mentioned by the court as entitling the plaintiff to a verdict. I think this was manifest error.

With respect to the instructions asked for by the defendant, I think the court very properly refused them. But for the error already mentioned, the judgment must be reversed, the verdict set aside, and a new trial awarded.

Anderson and Burks, J's, concurred in the opinion of Staples, J.

Christian, J., dissented.

The judgment was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated
597 in writing *and filed with the record, that the corporation court did not err in giving the first instruction asked for by the defendant in error, or in refusing to give those asked for by the plaintiff in error; but that it did err in giving the second and third instructions asked for by the said defendant in error. Therefore, it is considered that for the error aforesaid, the judgment of the said corporation court be reversed and annulled, and that the defendant in error pay to the plaintiffs in error their costs by them expended in the prosecution of their writ of supersedeas aforesaid here; that the verdict of the jury be set aside, and that the cause be remanded to the said corporation court for a new trial to be had therein in accordance with this judgment; which is ordered to be certified to the said corporation court of the city of Alexandria.

Judgment reversed.

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598 *Lloyd v. Erwin's Adm'r.

November Term, 1877, Richmond.

Absent, MONCURE, P.

1. Judicial Sales—Defects in Commissioner's Bond—Liability of Purchaser.*—A purchaser at a judicial sale of land pays the purchase money to the commissioner; but the commissioner has not executed the bond required by the decree, or the bond executed by him is disapproved by the clerk. The purchaser has paid in his own wrong, and the land is liable for the purchase money received by the commissioner and misapplied, though the land has been conveyed by the commissioner to the purchaser, as the decree directed to be done when the purchase money was paid.

2. Same—Same—Same—Remedy.†—In such a

***Judicial Sales—Defects in Commissioner's Bond—Liability of Purchaser.**—The headnote in Whitehead v. Bradley, 87 Va. 676, states the law as follows, "Where purchaser, at sale made under decree of court, pays the purchase money to sale commissioner who has not given the bond required by law, such payment is invalid, unless certificate of clerk that such bond has been given was published with advertisement of sale. Code 1887, secs. 3397, 3399." See for very similar cases, Woods v. Ellis, 85 Va. 471; Lee v. Swepson, 76 Va. 173; Tyler v. Toms, 75 Va. 125. See also, Brown v. Taylor, 32 Gratt. 135, where the principal case is cited for the proposition that the mere possession of a bond is not such evidence of property as will justify a payment to the holder, without authority express or implied, for the owner to collect the same. Thornton v. Fairfax, 29 Gratt. 682; Donahue v. Fackler, 21 W. Va. 130; Flesher v. Hassler, 29 W. Va. 405, 1 S. E. Rep. 581.

†**Same—Same—Subrogation.**—In Lee v. Swepson, 76 Va. 173, and Tyler v. Toms, 75 Va. 116, it was held that if in such case the purchaser should have to pay the purchase money a second time, he would be substituted to the creditor's rights under a decree requiring the commissioner to pay them.

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case, the parties entitled to the fund are not bound to proceed against the commissioner and his sureties in the bond he executed, but which the clerk disapproved, before proceeding against the land, to have it subjected to the payment of the purchase money misapplied by the commissioner.

This was an appeal from a decree rendered by the circuit court of Fairfax county, in a cause depending therein, in which William H. Erwin's administrator was plaintiff, and the heirs of said Erwin were the defendants. The object of the suit was to have a sale of a part of the real estate of William H. Erwin, deceased, for the payment of his debts. The cause was so proceeded in that at the June term, 1871, of the court a decree was made for the sale of a house and lot in Falls Church, upon the terms of ten per cent. of the purchase money in cash, and the balance on a credit of six, twelve and eighteen months, with interest, to be secured by the bonds of the purchaser, with retention
599 of the title until *the last payment is made. And M. D. Ball and J. C. DePutron were appointed commissioners to execute the decree. But before receiving any money under the same they, or one of them acting, shall execute bond in the penalty of $1,000, before the clerk of this court, conditioned for the faithful performance of this or any future decree in this cause.

At the June term, 1872, of the court, the commissioners reported that they had made a sale of the house and lot to Lester Lloyd, for $1,800, and that he had paid $50, and was ready to make the full cash payment on confirmation of the sale, and that he had executed his notes for the deferred payments, and desired to anticipate the same.

At the same term of the court the sale was confirmed, and the purchaser was authorized to anticipate the deferred payments; and upon the money being paid, the commissioners were directed to pay the costs of the suit, pay off the debts reported against the estate, and bring the balance into court.

There was a further report of debts due from Erwin's estate; and at the June term, 1873, the court made a decree that the commissioners should pay these creditors forthwith, and pay over the balance of the money on hand, and the unpaid bond to the guardian of the infant heirs of Erwin. And it was further decreed that upon the payment of the balance of the purchase money of the property sold by the commissioners to the guardian of the said heirs, the said commissioners, or either of them, were authorized to convey to the purchaser the said property by deed. And it appears that the said commissioner did, by deed bearing date the 7th day of July, 1873, convey to Lester Lloyd the said house and lot, reciting that he had paid all the purchase money; and the deed was duly admitted to record.

600 *The purchase money received from Lloyd not having been paid over by the commissioners, at the November term, 1874, M. D. Ball, the commissioner who had received the purchase money, was directed to carry out the provisions of the decree formerly made in the cause within sixty days, and that he should settle his accounts before a commissioner. And a rule was made upon Lloyd, returnable to the next term of the court, to show cause why he should not bring into court the amount of the cash payment and of the first two instalments of the purchase money for the property sold to him; it being suggested to the court that the payment thereof by him to the commissioner of sale was unauthorized, because of the failure of the commissioner to file with the clerk the bond required of them by the decree.

Lloyd answered the rule. He says he had no connection with the case and knew nothing of the proceedings in the cause until his purchase of the property; that after the property was cried off to him as the purchaser he was informed that M. D. Ball, one of the commissioners, was the party duly qualified to receive of him the amount of the purchase money, and that he paid to Ball the cash payment and two bonds of $540 each, of the deferred instalments. The third bond he had paid under the decree of the court to the guardian of the infant heirs of Erwin. He refers to the several decrees of the court made since the report of the sale, and to the conveyance to him by the commissioners, and insists that he cannot be prejudiced by the action of the commissioners; that he was entirely ignorant of any irregular or improper acts on their part, or on the part of either of them; and that their acts being subject to the supervision and control of the court, and finding them, so far as he was concerned, sanctioned and approved by
601 *the court, he rested securely upon their sufficiency and regularity.

It appears that, prior to the sale of the house and lot, Ball executed a bond with sureties in the penalty of $1,000, with condition for the faithful performance of his duties under the decree for the sale, and left it with the clerk of the court; but this bond was endorsed: "Not received by the clerk."

It appears that on the day of the sale DePruton, the other commissioner, who was counsel for the estate of Erwin, went to the clerk's office to execute the bond directed by the decree of sale, with his surety, and accompanied by Lloyd and the administrator of Erwin. As to what occurred there, he (Lloyd) and the clerk give different and conflicting accounts.

At the November term, 1876, the cause came on to be heard upon the rule, and it appearing to the court that Ball was insolvent and nothing could be made out of him; and the court holding that he had never executed a bond as required by law, and was therefore unauthorized to accept payment of the purchase bonds, and that the payments made by Lloyd to him on said bonds did not discharge Lloyd, but that he and the property purchased was liable therefor in the hands of the purchaser; but it further appearing that of the money received by Ball he had properly accounted for $436.14, leaving $840.06 unaccounted for, it was decreed that Lester Lloyd do pay to commissioners named the

said sum of $840.06, with interest from the 1st of September, 1872; and unless it was paid in sixty days, the said commissioners should resell the property upon the terms of the original decree. And thereupon Lloyd applied to this court for an appeal; which was allowed.

Thomas and Wells, for the appellant.
602 *S. F. Beach, for the appellee.

Burks, J., delivered the opinion of the court.

The court is of opinion that the decision of this case is controlled by the authority of Hess & als. v. Rader & wife & als., 26 Gratt. 746.

In each case the commissioner collected the purchase money from the purchaser of land at a judicial sale without giving the bond required by the statute and the decree under which he acted, and then made default. The attempt is made to withdraw this case from the controlling influence of Hess & als. v. Rader & wife & als. as authority, upon the pretension that in making payment the purchaser acted, after due inquiry, on information furnished him by the clerk of the court, that the commissioner had given the bond required by the decree. Some evidence was taken as to that matter on both sides, and is more or less conflicting. It is immaterial, however, in this case, whether such information was given or not, or whether, if given, it induced the payment to the commissioner. The fact remains that no bond was given and therefore the commissioner had no authority to collect. There was a bond filed among the papers in the cause, but whatever the clerk may have said to the purchaser about it, it is certain that the bond was never approved and accepted by the clerk, and his refusal to accept it was endorsed upon it at the time it was tendered and filed. Whatever remedy, if any, the purchaser may have against the clerk, his payment to the commissioner was a payment in his own wrong, and he continues personally bound for so much of the purchase money collected by the commissioner as was not accounted for by him.

603 *The court is further of opinion, that the land purchased by the appellant under the decree of the court also continues bound for the purchase money collected and not accounted for by the commissioner, notwithstanding the deed of conveyance made by the commissioners. The title was retained by the decree ordering sale as a security for the payment of the purchase money, and the commissioners were not empowered by the decree to convey until payment was completed; and as no valid payment was ever made, the deed of the commissioners passed no valid title. None of the decrees in the cause subsequent to the decree made on the — day of June, 1871, by which the commissioners were appointed and authorized to make collections only on condition of first giving bond, dispensed either expressly or impliedly with the performance by the commissioners of this condition precedent to the exercise of the powers conferred. The 11th section of chapter 174, Code of 1873, relied on by the appellant in his answer to the rule against him, has no application to a case like this. The decree under which the appellant purchased has never been reversed or set aside, nor has there been any attempt to reverse it or set it aside. On the contrary the proceeding against him was to enforce the decree and compel him to complete his purchase by payment of the purchase money remaining unpaid.

The court is further of opinion, that the complainant in the court below and the other parties in this cause were not, nor were any, nor was either of them, bound to resort to any remedy they may have had, either against the defaulting commissioner separately or against him and his sureties on the bond aforesaid filed in this cause, before proceeding to subject the land purchased by the appellant for the balance of purchase money not accounted for as aforesaid. The
604 bond, as before stated, *was never approved and accepted as a bond authorized by the court, and it is recited in the decree complained of that the commissioner is insolvent, and such is doubtless the fact, or this controversy would never have arisen. But whether the commissioner be insolvent or not, the appellant is himself in default; and as to those entitled to the purchase money for which he is bound, he is the primary if not only debtor.

The court is of opinion, for the reasons stated, that there is no error in the decree of the circuit court of Fairfax county, from which an appeal has been allowed in this case, and that the same should be affirmed, with costs and damages.

Decree affirmed.

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605 *Booker's Adm'r v. Booker's Rep.

[26 Am. Rep. 401.]

November Term, 1877, Richmond.

Absent, MONCURE, P.

1. **Bonds—Presumption of Payment.***—The common law rule of presumption of payment of bonds arising from the lapse of time has not been affected by the statutory provisions adopted at the revisal of 1849, prescribing the limitation of such instruments.

2. **Same—Same—How Rebutted.**—When more than twenty years has elapsed between the date of payment of a bond and the institution of suit thereon, it affords a presumption of payment, which the obligee may rebut by satisfactory evidence; and whether the evidence is sufficient for that purpose, is a question for the jury, and not for the court.

***Bonds—Presumption of Payment.**—The rule laid down by the principal case in regard to the presumption of payment of bonds arising from lapse of time, is cited approvingly in Jameson v. Rixey, 94 Va. 346; Lightfoot v. Green, 91 Va. 514; Bowman v. Hicks, 80 Va. 810; Norvell v. Little, 79 Va. 143; Tunstall v. Withers, 86 Va. 892; Updike v. Lane, 78 Va. 136; Brewis v. Lawson, 76 Va. 45. See also, Barton's Ch. Pr. (2d Ed.) 86; 4 Min. Inst. (3d Ed.) 603.

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This was an action of debt in the circuit court of Elizabeth City county brought by Elizabeth Booker's personal representative against George Booker's administrator. The action was brought on a bond which said:

"On demand, for value received, I promise to pay Elizabeth Booker the just and full sum of seven hundred and fifty-five dollars and eighty-seven cents, with interest from the date, and the interest to be paid half-yearly. For the true payment and performance of which I bind myself, my heirs, &c., jointly and severally, firmly by these presents. As witness my hand and seal this 1st September, 1837.

Geo. Booker [Seal.]"

The defendant pleaded payment by George Booker, in his lifetime, to Elizabeth Booker.

And on the trial of the cause there was
606 to verdict and judgment for the *plaintiff for the amount of the bond, with interest from its date to the 1st day of May, 1861, subject to a credit of $300, paid the 1st of November, 1843.

The defendant took a bill of exception to an instruction given by the court, and a second exception to the refusal of the court to set aside the verdict and grant him a new trial. The first, after giving the testimony of a number of witnesses and papers, states:

And after all the said evidence had been introduced before the jury, the plaintiff, by his attorneys, moved the court to instruct the jury as follows:

"That as the act of limitations has not been pleaded or relied upon by the defendant, the defendant cannot rely upon the presumption of payment arising from the mere lapse of time in defence of the plaintiff's action."

But the court declined to give the said instruction in the form in which it was submitted as aforesaid by the plaintiff, and then gave to the jury the following instruction, to wit:

"That there is no rule of law which authorizes the jury in this case to presume payment of the bond, in the declaration mentioned, from the mere lapse of twenty years since its execution; but the jury is authorized to consider the lapse of time as a circumstance or matter of evidence in connection with the other evidence introduced by the defendant under his plea of payment; it being the opinion of the court that the effect of the statute of limitations (Code of Virginia, ch. 149, §§ 5 and 19, ed. of 1860), is so to change the law as to prevent the defendant from relying upon the former rule of law which raised a presumption of payment of the said bond from the mere lapse of twenty years. By this the court means to say to the jury, in explanation, that if the only evidence offered in this cause were the writing obligatory in

the declaration mentioned, and the
607 mere lapse of time *from its date to the present time, then it would be the duty of the jury to find for the plaintiff."

It is unnecessary to state the second exception. Upon the application of Booker's administrator, a writ of error and supersedeas was awarded.

Scarburgh & Duffield, for the appellant.

M. B. Seawell, for the appellee.

Staples, J., delivered the opinion of the court.

According to a well-settled rule of the common law, a bond is presumed to have been paid after the lapse of twenty years from the time it becomes due. It is, however, a mere presumption which may be repelled by satisfactory evidence; but in the absence of such evidence, this presumption is of itself sufficient to sustain a plea of payment. If a shorter period than twenty years has elapsed, even a day, this legal presumption does not arise. In such case, however, the lapse of time may be relied on in connection with other circumstances as evidence of payment. 2 Minor's Institutes, page 886, and cases there cited; 2 Best on Evidence, 696.

The instruction given by the circuit court in this case declares that this rule of the common law has been changed by statute, so that the defendant cannot now rely upon the presumption of payment arising from the mere lapse of twenty years, but the jury may consider the lapse of time as a circumstance or matter of evidence in connection with the other evidence introduced by the defendant under the plea of payment. The statute to which the instruction refers is contained in sections 5 and 19, chapter 149, Code of 1860,

and was incorporated in the revisal of
608 1850. One of these sections *prescribes a limitation of twenty years in actions upon bonds, and the other provides that where the bond was executed before the 1st of July, 1850, if a right of action existed that day, the action may be brought within twenty years thereafter. The learned judge seems to have thought that as the statute was passed before a presumption of payment had attached to the bond in controversy, and as the action was brought in 1869, within the time limited by the statute, the defendant could not rely upon the bar of the statute, neither could he rely upon the legal presumption of payment. The instruction is not so clearly drawn as to show with absolute certainty what was meant by the court, but this is the fair inference from the language used. We are of opinion, that the statute in question was not designed to change the rule of the common law. The object was simply to apply to actions, on sealed instruments, a statutory limitation in like manner as to actions on parol contracts, the only difference being that a greater time is allowed in the former case than in the latter.

Where the bond has been executed since the 1st of July, 1850, and has been due twenty years or more, the defendant may rely upon the statutory limitation, or he may waive that and take his chances before the jury upon the mere presumption of payment from lapse of time.

There is no decision in our reports upon this precise point, but the courts have held substantially this doctrine in analogous cases. For example, although there is an

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express statutory limitation with respect to parol contracts in an action upon a promissory note the defendant, without pleading the limitation, may rely upon the presumption of payment after the lapse of twenty years. In Duffield v. Creed, 5 Esp. R. 52, which was an action of assumpsit upon a promissory note, with a plea of payment *Lord Ellenborough said: "If this had been a bond twenty years would have raised a presumption of payment, in which case he would have left the presumption to the jury, and he thought as this note was unaccounted for, the same presumption of payment ought to apply." There is no doubt that this is the settled doctrine in the English courts. See 1 Phillips on Evidence, page 576; 1 Rob. Prac. (N. E.), page 461, where the authorities are cited. That it is also the rule in this state is manifest from the cases of Tomlin's adm'r v. Howe's adm'r, Gilmer R. page 1; Ross v. Darby, 4 Munf. 428; Wells v. Washington's adm'r, 6 Munf. 532.

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If in an action upon an unsealed instrument the defendant may waive the statutory bar and rely upon the presumption of payment arising from lapse of time, there is no good reason why he may not do the same thing in an action upon an instrument which is sealed.

With respect to bonds executed before the 1st day of July, 1850, the limitation under the statute is the same as upon a bond executed and payable the day after the statute took effect, that is to say, the 2d day of July, 1850. This was in pursuance to the uniform policy of the legislature to give the statute of limitations a prospective operation, and therefore it is, that in applying the limitation, the lapse of time which accrued before the adoption of the statute is always excluded. Under the provisions of the statute, therefore, an action may be maintained on a bond, although executed more than twenty years before the statute was passed. In such case the obligee cannot be defeated by a plea of the statute, although he might be by the presumption of payment. In thus preserving all the rights of the obligee, it was not intended to impair those of the obligor, nor to deprive him of any defence he might have made if the statute had not been passed. *The common law rule already adverted to does not, as the statute, create an absolute bar to the action. It simply raises a presumption of payment after the lapse of twenty years, which the plaintiff may rebut by evidence. It is a rule of evidence and not of pleading. It is founded upon the idea that in the ordinary course of human affairs it is not usual for men to allow real and well-founded claims to lie dormant a great length of time. Starkie on Evidence, 72. The statute is but an affirmation of this principle. In the present case the bond was executed in 1837, thirteen years before the 1st of July, 1850; the action was brought in 1869, nineteen years afterwards; so that thirty-two years had elapsed between the date of the bond and the institution of the suit. It can scarcely be supposed it was the intention of the legislature, while adopting a statute for the security of the obligor, to deprive him of the benefit of the common law presumption arising from the lapse of time. The most that the obligee can require is that his his right of action shall not be affected by the statute, leaving to the obligor every defence he might have made if the statute had not been passed.

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It is said, however, that the defendant was not injured by the instruction, because the evidence clearly rebutted the presumption of payment. This view is fully met by the case of Wells v. Washington's adm'r, 6 Munf. 532. At the trial of that case, on the plea of payment, the defendant moved the court to instruct the jury that twenty years having elapsed between the time when the note became due and the institution of the suit, they ought to presume it paid unless evidence be offered of some acknowledgment of the debt within twenty years, or unless interest or a part payment was proved within twenty years. This instruction was refused, and this court held that refusal to be error, and that the court *below could not be justified in refusing to give such instruction on the ground that the defendant in his application has not stated the evidence given in the cause, or because, in the court's opinion, the principle of law did not apply to the case under the circumstances appearing in proof; for this would be undertaking to judge of the weight of evidence of which the jury are the proper judges. And so in the present case, the court ought to have told the jury that more than twenty years having elapsed between the date of the bond and the institution of the suit, they ought to presume it paid unless the defendant rebutted the presumption by satisfactory evidence. Whether the evidence was sufficient for that purpose was a question exclusively for the jury and not the court.

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Judgment reversed.

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612 *Mutual Assur. Society of Va. v. Holt & als.*

January Term, 1878, Richmond.

I. M leases to F a lot in Norfolk for ten years, renewable every ten years until M shall elect to take the buildings which may be put upon it and pay for them at valuation. F builds, and then M, as owner of the land, and F as owner of the buildings, join in a declaration for insurance in the Mutual Assurance Society of Virginia; which was granted—HELD:

1. **Fire Insurance—Land.***—The land is not insurable, and M is not liable to the assurance society for the quotas on the insurance.
2. **Same—Insurable Interest.**—As F did not have the fee in the land or a perpetual lease, and M may take the buildings at the end of any ten years, it seems that F did not have such an interest in the property as was insurable in the Mutual Assurance Society, according to its constitution.

***For monographic note on Fire and Marine Insurance, see end of case.**

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II. The lease and buildings having been sold to W, and he dying, one of his nine children, for himself and his co-heirs, insured the property in the society, and this continued until 1864, when it was insured in other insurance companies—HELD:

1. **Same—Double Insurance—Effect.**—By insuring in other companies without complying with the regulations of the assurance society, the insurance in that society, according to its express rules, became null and void. And as the society was no longer liable for loss, the assured is only liable for the quotas due at the time the insurance became null and void, and is not liable for any quotas assessed after that time.

This was a suit in equity in the corporation court of Norfolk city, brought in April, 1874, by the Mutual Assurance Society of Virginia, to subject the property in Norfolk known as the National Hotel, formerly
613 French's *hotel, to sale for the payment of quotas of insurance thereon for the years 1863 to 1874. Prior to the year 1836, the ground on which the hotel was built was owned in fee by the Mechanical Benevolent Society of Norfolk. In that year this society leased the land at a ground rent of $400 to William and Daniel D. French for ten years from the 1st of January, 1837; and it was optional with the society at the end of the lease to take the buildings at a valuation, or to renew the lease for the further term of ten years on the same terms; and so in like manner from term to term until the buildings should be taken and paid for as aforesaid. In August, 1837, the Frenchs assigned their interest in the term of ten years to French's Hotel Company, and that company built upon the ground French's hotel.

In July, 1841, John Southgate, president of French's hotel company, as owners of the building, and the president of the Mechanical Benevolent Society of Norfolk as owners of the land, declared for assurance in the Mutual Assurance Society for $12,500 on this property; the building being valued at $40,000 and the land on which it stands in fee simple at $10,000. The policy was issued in the usual form, and is numbered No. 11,516. In December, 1843, there was a second declaration by the same parties in the same form.

On the 1st of January, 1847, the Mechanical Benevolent Society of Norfolk, by deed reciting its previous lease to the Frenchs, and their assignment of it to French's Hotel Company, and that the Mechanical Benevolent Society have declined to take the buildings and pay for the same in the manner prescribed in said deed, and so the said French's Hotel Company, assignees as aforesaid, are bound to accept, and have requested a renewal of the lease with the same conditions and covenants, &c., demised the said ground to the French's Hotel
614 Company *until the 1st of January, 1857, upon the same terms and conditions.

In September, 1850, John Southgate, president of French's Hotel Company, alone, declared for insurance in the Mutual Assurance Society on the same property; and in his declaration he says he holds the building with the land for the stockholders. This policy was issued, and is numbered No. 14,837.

On the 1st of May, 1855, the French's Hotel Company assigned their lease of the property to Bray B. Walters, and on the same day Walters conveyed it in trust to secure said company $13,500, payable within ten years with interest. And in October, 1857, William L. Walters, for himself and the other heirs of Bray B. Walters, there being nine of them, made a declaration of insurance in which he says he holds the building and the land on which it stands on a lease of seven or ten years, renewable, &c. This is numbered No. 18,615.

The property seems to have been in 1869, conveyed by different heirs of Bray B. Walters, by several deeds, in trust to secure debts to different parties; and by the heirs and trustees in the deeds to Thomas J. Corprew, in December, 1870; and by him it was conveyed in several deeds to secure debts. And subsequently the property was sold to James R. and Joseph H. Holt, who were the owners of it at the time this suit was brought, and was subject to three liens for debts due respectively to the Norfolk Trust Company, the Merchants and Mechanics Savings Bank, and the Exchange National Bank. It appears, too, that several policies had been obtained in 1864 upon the property in several other insurance companies, amounting to $20,000, which were continued in force until 1869; and that there was no agent of the Mutual Assurance Society in Norfolk from May, 1862, to May, 1865; and all communication between
615 the city *of Norfolk and the home office of the company was forbidden.

The Holts and the above mentioned creditors, and the Mechanical Benevolent Society of Norfolk were made defendants. They all filed answers, or pleas, denying their liability on various grounds, which are stated in the opinion of Judge Anderson.

The cause came on to be heard on the 10th of June, 1875, when the court dismissed the bill with costs. And thereupon the Mutual Assurance Society applied to this court for an appeal; which was allowed.

The case was argued by A. Meade Smith, for the appellants, and Goode & Chaplain and Baker & Walke, for the appellees.

Anderson, J. The building known as the National hotel in the city of Norfolk, was erected on a lot of land which was held by French's Hotel Company, under a demise by deed from the Mechanical Benevolent Society of Norfolk for a term of ten years, renewable for ten years, and for every successive period of ten years, determinable at the election of the lessor, at the expiration of any term, upon six months' notice, by taking the building and paying for it at valuation.

On the 1st of May, 1855, French's Hotel Company, by deed conveyed, transferred and assigned all their right, title and in-

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terest in the leasehold and building to Bray B. Walters. And at a sale made by public auction under deeds of trust by the heirs of B. B. Walters, of said property, Thomas J. Corprew became the purchaser at the price of $34,000, and the trustees and the heirs united in a deed conveying the same to him, bearing date December 31st, 1870.

616 *Subsequently Corprew conveyed the same by several deeds of trust to secure debts due from him to the Merchants and Mechanics Bank; to the Norfolk Trust Company, and to the Exchange National Bank of Norfolk. And on the 31st of July, 1872, the said Corprew and his said creditors and trustees united in the sale of the same to the appellees, James R. Holt and Joseph H. Holt, and conveyed it to them by deed bearing date December 26, 1872, for the consideration of $37,100.

This suit was brought in chancery by the Mutual Assurance Society of Virginia against the said James R. and Joseph H. Holt, to subject the property to the payment of arrearages which they allege to be due them, and to be chargeable on the said property by virtue of a declaration for insurance made in their society on the 17th of July, 1841, by the president of the Mechanical Benevolent Society of Norfolk, owner of the land, and the president of French's Hotel Company, owner of the building, which was valued at $40,000, making the Merchants and Mechanics Savings Bank, the Norfolk Trust Company, and the Exchange National Bank and the trustees, and the Mechanical Benevolent Society also defendants.

James R. and Joseph H. Holt, in their joint answer, say that they have no knowledge of any of the allegations of the bill with regard to the insurance of the property, and they call for strict proof thereof; and they allege and prove that they had no notice of said alleged insurance, or of any claim for arrearages by said assurance society when they purchased, and in fact did not know of the existence of said society, and if there is anything due it, which they do not admit, they deny that the property in their hands is liable for its payment, and insist that the society should look to the former owners of the property for payment. But if it should appear that the society has any claim which is chargeable

617 *on the property, they insist that inasmuch as there is a balance of the purchase money still due from them for the property they should be allowed to pay it out of the same.

Their answer and the several pleas of the Merchants and Mechanics Savings Bank also put in issue the validity of the alleged contract of insurance, averring that it was contrary to the constitution, rules and regulations of the society; that the hotel company had not such interest in the property as was insurable, and the contract was, at the time of its inception, and now is, void and of none effect. And the Mechanical Benevolent Society, in its answer, denies that it owes anything to the plaintiff, or that there is now or ever has been any liability on it for quotas, or that there now is or ever has been any lien upon the land therefor; and it avers that its president, by uniting with the president of the hotel company in the original declaration for assurance, did not create, nor was it intended to create, any lien or charge on said land, but was only intended to indicate its willingness and consent to the insurance of said buildings, upon which it had a previous lien, to the extent of the ground rent and the taxes.

And in this position it seems to be sustained by the acts of the plaintiff, and the hotel company subsequently; the latter making, and the former receiving from it a sole and separate declaration for insurance of the same property, in which reference is made to the former declaration, in which the Mechanical Benevolent Society had united as aforesaid, as the sole declaration of the hotel company, and the issue of a policy thereon accordingly. And in all the subsequent dealings between them no reference is made to the Mechanical Benevolent Society, but the hotel company is treated as the party solely insured, and liable for the quotas and requisitions of the

618 *Mutual Assurance Society. And it could not be otherwise if the Mechanical Benevolent Society be regarded only as owner of the land, as represented in the original declaration. The land under the act of incorporation was not insurable. It was only an insurance on buildings against fire that was authorized by the act of incorporation. An insurance of land against fire involves an absurdity. And yet it seems to be contemplated by the constitution, rules and regulations of the society that the insured should have an interest in the land also, upon which the buildings stand. By article VIII, section 4, "Any person holding a complete unencumbered fee simple title to buildings, with the land on which they stand;" "any tenant under lease renewable forever, or any persons holding buildings erected on land to which they have a legal title but subject to a ground rent forever, may make a complete and effectual insurance." The averment of the joint answer of the Messrs. Holt is that the Mechanical Benevolent Society had no interest in the buildings, and that they and the preceding owners of the property have no other than a leasehold interest in the land, determinable at the expiration of every ten years, at the option of the Mechanical Benevolent Society. But when the leasehold of the land was terminated their title to the buildings was terminated also, and became vested in the Mechanical Benevolent Society. So it would seem that by the terms of the contract between the hotel company and the Benevolent Society, by which the former was privileged to erect buildings on the latter's land, it had no better estate in them when erected than in the land. It held them precisely as it held the land—at the option of the Benevolent

Society, only for the term or for any succeeding term. And it not being a fee, nor a lease renewable forever, and the hotel company not having a legal title to the land upon which the buildings stand,
619 *but subject to a ground rent forever, it would seem to follow that it did not hold such interest in the property as was, according to the rules and regulations of the society, insurable. The question whether it was insurable jointly by the two companies need not be considered, as that was not done, if the plea of the Merchants and Mechanics Savings Bank is sustained; and if the acceptance by the Assurance Society of the separate declaration for insurance of the same property by the hotel company (No. 14,837), and the issuing a policy thereon to said company, can be held to be a surrender or waiver by the Assurance Society of any right it might have had to hold the Benevolent Society bound by its having united in the original declaration. As to what is the effect of a declaration on revaluation is involved in some obscurity by the practice of the Assurance Society. If it was intended merely to revalue the property, and not for a renewal or modification of the contract, why should there be a declaration for insurance? and why should a new policy issue thereon?

There is another ground upon which it might be argued that the original contract of insurance was void, viz: that the property had been insured elsewhere for ten thousand dollars, when the original declaration for insurance was made in this society. By article VIII, section 14, "buildings insured elsewhere shall not be insured in this society." And such insurance, it is declared, "shall be void." There is a proviso; but that does not apply to this clause of absolute inhibition; but only to insurances obtained elsewhere, after the property has been insured in this society, which are permitted on certain express conditions. These are interesting and important questions. As by article X, section 13, the society has declared that "if a policy be at any time issued for the purpose of insuring a building, which according to
620 *the rules and regulations of the society, is not insurable, the fact that such building is not insurable being ascertained shall render the policy void and of no effect." And by article XIII, section 1, "the society only undertakes to pay for loss by fire, when the building has been insured in strict conformity to the constitution, rules and regulations of the society." And the party claiming compensation is required to make affidavit that he "doth believe that the said building" was "insurable and was properly insured in or by the said society according to the constitution, rules and regulations thereof."

In view of these prescriptions and regulations of the society, I think it is but just and right that it should be held to make out a clear case of liability on its part to repair the loss if the building was damaged or destroyed by fire, before its claims for premiums and quotas, or other requisitions, could be enforced against the property, and consequently, that the proprietors of the buildings are entitled to the benefit of any doubts with regard to the validity of the insurance.

But this case must be considered in another of its aspects. The hotel company sold and conveyed its interest in the land and building by deed bearing date the 1st of May, 1855, to Bray B. Walters. And on the 12th day of October, 1857, William L. Walters, for himself and the other heirs of Bray B. Walters, then deceased, by declaration No. 18,615, declared for the assurance of said building, valued at $40,000, in the said assurance society, for $12,500, "subject to a deed of trust to French's Hotel Company; the sum of $5,000 being insured in the American and $5,000 in the Franklin offices." It is agreed that there was no agent of the society in the city of Norfolk from about the 10th of May, 1862, to the 30th of May, 1865, and that all communication between the city of Norfolk and the home office in the city of Richmond
621 *during that period was forbidden; and that on the 14th of January, 1864, the said property was insured in several other offices, together, for the sum of $20,000. And this was before the sale and conveyance to Thomas J. Corprew.

According to article VIII, section 14, the insurance in this society, if it was valid and in force up to the 14th of January, 1864, when it was insured elsewhere to the amount of $20,000, then became void. The language of the section is: "Buildings insured elsewhere shall not be insured in this society, and if any person or persons owning a building or buildings now insured, or which may be hereafter insured in the office of this society, shall effect insurance thereof elsewhere, he, she or they shall forfeit all benefit of the insurance made by this society on such building or buildings. Every insurance which has been, or hereafter may be, effected contrary to this rule, is, and shall be void." But there is a conditional proviso in favor of any person "who has made, or may hereafter make, insurance in the office of this society, and shall be desirous of making farther insurance in any other office on the same buildings," that he "shall be at liberty to do so, and his insurance in this office shall be good and effectual; but on condition only that the whole sum insured by this society and elsewhere, does not exceed four-fifths of the whole value shown by his * * declaration; and provided also, that such person or persons give written notice to the principal agent, of such farther insurance and the amount thereof, which shall be endorsed on the policy issued by this society and on the declaration filed in this office."

Neither of the foregoing conditions was complied with in this case. The insurance in this society, if it be only for $12,500, and the insurance elsewhere for $20,000, amount together to more than four-fifths of
622 the whole *value of the property, as

shown by the declaration. Nor was the second condition complied with. The notice required is not shown to have been given, nor the endorsements made upon the policy and declaration as required. This case does not fall within the proviso, and consequently by the positive declaration of said 14th section, the insurance is void.

But the clause next following provides that "all premiums and quotas paid, or which may be required to be paid under any such insurance, shall be considered as forfeited to the society." This language imports that the invalidation of the insurance shall not entitle the insured to a restoration of what he had previously paid under the lawful requisitions of the society; nor to be released from premiums and quotas for which he was liable when the insurance became void, which may still be required to be paid, and the property held to be liable for them. But to hold that when the property is no longer insured, the owner is liable to pay for losses by fire, which parties insured have incurred, beyond what he had incurred a liability to pay before his insurance became void, would be to hold him liable to contribute for losses which others had sustained when there was no corresponding obligation on them to contribute for his losses, which would be violative of all mutuality in the contract, and destructive of the fundamental principle upon which this whole scheme of insurance is projected.

This plainly appears from the title to the act of incorporation, "an act for establishing a mutual assurance society against fire," &c.; and by the first clause of the second section, which enacts, "that an assurance be established to be called and known by the name of the Mutual Assurance Society," and the principles whereof shall be "that the citizens of this state may insure their buildings against the losses and dam-
623 ages occasioned *accidently by fire, and that the insured pay the losses and expenses, each his share according to the sum insured." To construe the clause of the article under consideration, as requiring the owner of the property after it had ceased to be insured, and when he is not one of the insured, to be subject to future orders for quotas and contributions to repair losses afterwards incurred by the insured, and when he would not have a corresponding right to a contribution from them, if his property was damaged or destroyed by fire, would be a plain violation of the foregoing provision of the act of incorporation in its letter and spirit.

The same remarks are applicable to the next clause of the said section, which is as follows: "Nevertheless, the property insured and the owners thereof, shall remain liable for all demands until regularly discharged, according to the laws and rules of the society." "All demands" can only mean what the society had a right to demand, which we have seen were only arrearages due, and with which the property was chargeable when the insurance was terminated.

There is a mode prescribed by article IX, section 12, by which a member may be discharged, but it is not declared to be the only mode; and if it were, until so discharged, he could not, as we have seen, be held liable for after-requisitions made upon the insured when he was no longer insured, but only for such as were prior to the termination of his insurance. This mode provides for a voluntary and express withdrawal from the society; and there are two requisites to entitle him to a discharge in that mode: first, the payment of all premiums, quotas and other claims as are then due from him; and second, notice of his withdrawal. If these requisites have been met they are effectual for his discharge, although a regular discharge may not have been granted him. But, as has been
624 *said, it is not the only mode by which he may be discharged, as is implied by article VII, section 13. It provides that any member having paid the premiums on his buildings, the same being insurable, &c., shall be insured at 12 o'clock at noon of the day on which he may have made such payment, and such insurance shall continue to be in force until the same shall be withdrawn, unless the proprietor of the building so insured shall render the insurance void by some act which may be contrary to the rules and regulations of the society.

The effect of a discharge upon the interests of the society is not materially different, whether it be in one way or the other. In both cases the existing liabilities for arrearages remain, but none can be subsequently created. And as to the notice, in the one case it is necessary to show that the insurance does not continue, nor the obligation of the society to repair his losses. In the other case notice was not necessary to invalidate the insurance. It was absolutely void by the insurances effected elsewhere, whether the society had notice thereof or not. The insured thereby lost his right to compensation if his buildings had been damaged or destroyed by fire, whether the society had had notice or not prior thereto that insurances had been effected elsewhere. It might have been of advantage to the society, in determining what amount of quotas should be levied to meet contingencies and risks, to have been informed of the insurances made elsewhere during the war; but such notice could not have been given pending the war, and it seems to me could not have been material, as the requisitions on the insured and the contingent liabilities of the society, so far as the buildings in question were concerned, were alike unenforceable; but the evidence shows, I think, that the society was informed of it soon after the war.

625 *I am of opinion, therefore, that the insurance being made absolutely void by the declaration of the society, after the insurances of the 14th of January, 1864, were effected elsewhere, the heirs of Bray B. Walters, the then owners of the property,

were not liable, after that period, to contribute quotas to raise a fund to repair losses by fire of the insured except on account of arrearages due from them before they ceased to be insured, and consequently the property being uninsured when it was conveyed to Thomas J. Corprew by deed on the 31st of December, 1870, it was not liable for quotas which accrued subsequently to the 14th of January, 1864. A fortiori it is not liable in the hands of the present owners, James R. and Joseph H. Holt. The property was insured, at the time they purchased, in the Liverpool and London Globe for $15,000; in the Loyd, $10,000; and in the Queen, $5,000; together, $30,000; and they had no knowledge of any insurance in this society, or of any charge upon the property in its favor.

If this were a claim to enforce a penalty for a wrongful act committed by the heirs of B. B. Walters, then it would be a question for a court of equity to determine whether the penalty, under the circumstances of the case, ought to be enforced against them; and if it could, whether it was not a personal liability, which attached to the person of the wrong-doer, and not chargeable on the property in the hands of an innocent purchaser, who had no participation in the wrong. But it is not a suit to enforce a penalty, but the payment of quotas, which by the act of incorporation only the insured could be required to pay. It appears from the testimony of Samuel Pulliam that the society itself, in 1866 and '67, instead of talking of imposing penalties, had formed the same conclusions I have reached, and was willing to have made
626 an adjustment *on substantially the same terms, upon the payment of all claims which had accrued up to the date of the period when insurance had been effected elsewhere during the war, and to abate all quotas accruing subsequent thereto. It was also willing to abate quotas for 1863 and 1864.

In this case all dues and requisitions had been paid up to the 14th of January, 1864, except the quotas for 1863, which, if there had been a settlement, would have been abated under a resolution of the board of directors. Why should it now be asserted? It is true that a formal notice of withdrawal was not executed; but the society was just as safe from liability of losses as if said formal notice had been executed. Its insurance was void. If the views I have presented are correct, it had no right to claim what it seems it was willing to relinquish—not even the quota of 1863, if the declaration of Walter's heirs was designed to be a continuation of the original contract; and if not, if it was a new contract, the property was insured elsewhere for $10,000. And by article VIII, section 14, before recited, the society was absolutely forbid in such case to grant insurance; and if given, it is declared to be void. Moreover, William S. Walters, with whom the last contract of insurance, in 1857, was made, was only one of the nine heirs to whom the property descended from B. B. Walters; and it does not appear that he had authority to execute the contract for the co-heirs. And the declaration is not subscribed by them; and it was necessary that all the parties in interest should have been united in the declaration.

I am of opinion, upon the whole, that there is no error in the decree of the court below dismissing the plaintiff's bill, and am for affirming the same, with costs.

627 *Moncure, P., and Staples, J., concurred in the opinion of Anderson, J. Christian and Burks, J's, dissented.

Decree affirmed.

FIRE AND MARINE INSURANCE.

***See monographic note on Life and Accident Insurance. McLean v. P. & A. Life Ins. Co., 29 Gratt. 361.**

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A. THE CONTRACT.

I. Fire Insurance.

1. General.

a. Definition.—"Fire insurance is a contract whereby the insurer undertakes, for a stipulated consideration, to indemnify the assured against all losses, to an extent not exceeding the amount set forth in the contract, in his houses, buildings, furniture, ships *in port*, or merchandise, by means of accidental fire happening within a specified period. The consideration paid to the insurer for his contract of indemnity is styled a *premium*, and the instrument that evidences the contract is known as a *policy*." 3 Min. Inst. (2d Ed.) 1168.

b. Subject-Matter—Location.—Where the policy was on vehicles and harness, plaintiff's own or sold, until removed, "contained in" a building occupied as livery and sale stables, and those destroyed were, at the time of fire, at a repair shop several hundred yards off, it was held that the words "contained in" designate the usual place of deposit of the vehicles when not in use, or being repaired, and cover the destroyed property. Niagara F. Ins. Co. v. Elliott, 85 Va. 962. See also, "Contain," 7 Am. & Eng. Enc. Law (2nd Ed.) 23.

c. The Risk.

(1) Military or Usurped Authority.—The United States forces, before the ordinance of secession, anticipating an attack by the Confederate troops, set fire to the navy yard at Portsmouth. This fire was communicated to the insured buildings. *Held*, That, as the ordinance of secession was not then in force, the burning caused by firing the United States buildings did not bring the loss within the operation of the proviso as to military or usurped power. Portsmouth Ins. Co. v. Reynolds, 32 Gratt. 613.

(2) Explosions.—Where the policy contains a provision stipulating for exemption from liability from explosions, such provision does not relieve the insurer from losses by fire caused by explosions. Smiley v. Citizens F., etc., Co., 14 W. Va. 33.

d. The Consideration — Premium.—The payment of the premium is of the essence of the contract of insurance. Punctuality in such payment is essential. A failure to pay within the specified time will avoid the policy, unless the company has waived such payment or the delay is due to some omission on its part. Richards on Insurance (2d Ed.) p. 205; So. Mut. Ins. Co. v. Taylor, 33 Gratt. 743; Easley v. Ins. Co., 91 Va. 161. The payment of the first premium is a condition precedent to the liability of an insurance company upon a policy. Oliver v. Ins. Co., 97 Va. 134.

A provision avoiding a policy unless the premium is actually paid is waived by the delivery of the policy without requiring prepayment of the premium. Eagan v. Ins. Co., 10 W. Va. 583. Where the company charges the premium personally to the agent who gives credit to the insured, it amounts to a payment of the premium. Wytheville Ins. Co. v. Teiger, 90 Va. 277. In Croft v. Ins. Co., 40 W. Va. 902, 52 Am. St. Rep. 902, where credit had been given in an oral contract for insurance, the court says: "Insurance can be sold on credit as well as anything else. The agent can give credit. Eagan v. Ins. Co., 10 W. Va. 583, 588; Wood on Insurance, sec. 28; May on Insurance, sec. 360 d; Ins. Co. v. Colt, 20 Wall. 560; Long v. Ins. Co., 137 Pa. St. 335, 21 Am. St. Rep. 883, and *note*. Prepayment is not necessary to the conclusion of an oral contract. Wood on Insurance, secs. 22 a, 43 b."

The possession of a policy is sufficient evidence of the payment of the premium, on a demurrer to the evidence by the insurance company. Fidelity, etc., Co. v. Chambers, 93 Va. 138.

Where a policy provides that if a note given for the premium be not paid at maturity such nonpayment shall terminate the insurance and the note shall be considered the premium for the risk thus terminated, the policy is forfeited for nonpayment of the note when due. Muhleman v. Ins. Co., 6 W. Va. 508.

2. Parties.

a. The Insured.

(1) Corporations.—A corporation may insure

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its property under its corporate name, and an insurance company, which has accepted premiums from an invalid corporation, cannot avoid the policy by denying the corporate existence of the insured. Bon Aqua Imp. Co. v. Standard F. Ins. Co., 34 W. Va. 764, 12 S. E. Rep. 772.

(2) Insurable Interest.

(a) Definition.—Any interest, however slight, may be insured, as where A advances money to B in any venture, and by agreement is to be paid out of the proceeds of the property purchased, he has an insurable interest in such property to the extent of his advances. Tilley v. Connecticut Fire Ins. Co., 86 Va. 813. See V. C. 1887, § 2415.

An insurable interest may arise from some liability which is the legal result of obligations assumed. Murdock v. Franklin Ins. Co., 33 W. Va. 407, 10 S. E. Rep. 777.

(b) Necessity.—It is essential that the insured have an insurable interest in the property. Colby v. Parkersburg Ins. Co., 37 W. Va. 789, 17 S. E. Rep. 303; Sheppard v. Peabody Ins. Co., 21 W. Va. 368; Quarrier v. Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582.

(c) Who Has—Administrator.—An administrator of an insolvent estate has an insurable interest in the property of the estate. Sheppard v. Peabody Ins. Co., 21 W. Va. 368.

Charterer of Ship.—The charterer of a ship has an insurable interest in such ship. Murdock v. Franklin Ins. Co., 33 W. Va. 407, 10 S. E. Rep. 777.

Grantee.—The grantee in a deed of trust has an insurable interest in the property covered by the deed. Tilley v. Connecticut F. Ins. Co., 86 Va. 811.

Lessor.—A lessor has an insurable interest in the furniture of his tenant on the leased premises where there is rent due and unpaid by the tenant. Mutual Fire Ins. Co. v. Ward, 95 Va. 231.

Mortgagor.—A mortgagor may insure for the benefit of the mortgagee. Where it is provided in the covenants of the mortgage that the mortgagor shall insure for the benefit of the mortgagee, and the mortgagor takes out a policy in accordance with such agreement, the mortgagee is entitled to the proceeds in case of loss. Colby v. Parkersburg Ins. Co., 37 W. Va. 789, 17 S. E. Rep. 303.

Occupant.—An occupant in lawful possession of property, with some duty to perform regarding it, or in some measure responsible for its safety, has an insurable interest therein. Sheppard v. Peabody Ins. Co., 21 W. Va. 368; Murdock v. Franklin Ins. Co., 33 W. Va. 407, 10 S. E. Rep. 777.

Remainderman.—A remainderman has an insurable interest in the property to which he is entitled in remainder. Haxall v. Shippen, 10 Leigh 536. It seems that a reversioner has such interest also. Brough v. Higgins, 2 Gratt. 408.

Tenant for Life.—A tenant for life may insure the premises in his own name and for his own benefit. Brough v. Higgins, 2 Gratt. 410.

The tenant for life and the remainderman or reversioner may take out insurance jointly, and, in case of loss, the insurance money will belong to them in proportion to their interest. Haxall v. Shippen, 10 Leigh 561, 34 Am. Dec. 745. See also Brough v. Higgins, 2 Gratt. 410.

Mr. Barton distinguishes the cases of Haxall v. Shippen (*supra*) and Brough v. Higgins (*supra*) as follows: "When property is insured and is destroyed by fire, the insurance money is a mere personal debt to the individual who has the insurable interest, and hence it has been held that while, where a building insured (in which one person was entitled to a life estate and another to the reversion), sustained a *partial injury* by fire, both of the parties in interest were entitled to have the insurance money applied to the repair of the building, yet when the building was *entirely destroyed*, the parties had the like interest in the insurance money that they had in the building; that is, the tenant for life was entitled to the use of it for life, and the reversioner to the principal at the death of the life tenant, and that neither could, by applying the money to rebuilding the property, defeat the right of the other to have his interest in money." 2 Bart. Ch. Pr. (2d Ed.) 958.

Vendee.—A vendee of property, even where the parties have agreed to rescind the contract of sale, has an insurable interest, if he is still in possession and the agreement is not consummated. MacCutcheon v. Ingraham, 32 W. Va. 378, 9 S. E. Rep. 260.

Vendor.—Where the vendor retains legal title to property until the conditions of the sale are performed, he has an insurable interest although he has given up possession to the vendee. Wheeling F. & M. Ins. Co. v. Morrison, 11 Leigh 354, 36 Am. Dec. 385.

The vendor in a conditional sale is not divested of his insurable interest in the premises until the conditions are performed and the sale becomes absolute. MacCutcheon v. Ingraham, 32 W. Va. 378, 9 S. E. Rep. 260. Where the vendee fails to perform the conditions, the interest of the owner remains unchanged. Wheeling F. & M. Ins. Co. v. Morrison, 11 Leigh 354, 36 Am. Dec. 385.

b. Parties by Assignment.

(1) Before Loss.—Stipulations avoiding the policy on the ground of an assignment before loss without the consent of the insured are valid. Such stipulations, however, may be waived by the insurer. Stolle v. Ætna F. & Ins. Co., 10 W. Va. 546, 36 Am. Dec. 385.

The rule that a policy is not assignable without consent of the insurer applies to absolute assignments. A parol agreement to assign will not avoid the policy. Wheeling F. & M. Ins. Co. v. Morrison, 11 Leigh 354, 36 Am. Dec. 385.

(2) After Loss.—Although the policy provides that it shall be void if assigned without the consent of the insurer, such assignment is valid if made after the loss. Nease v. Ætna Ins. Co., 32 W. Va. 283, 9 S. E. Rep. 233; Bentley v. Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. Rep. 584; Stolle v. Ætna F. & M. Ins. Co., 10 W. Va. 546, 27 Am. Rep. 593.

No formal words are necessary to constitute an assignment after loss. An oral assignment is sufficient. Bentley v. Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. Rep. 584.

3. Form of Contract—Parol Contracts Valid.—A contract of fire insurance need not be in writing, an oral contract is valid. Haskin v. Agricultural F. Ins. Co., 78 Va. 700; Wooddy v. Old Dominion Ins. Co., 31 Gratt. 362; Croft v. Hanover F. Ins. Co., 40 W. Va. 508, 21 S. E. Rep. 854.

Equity will enforce performance of a contract of insurance, made with an agent having authority to issue policies or to bind the company, in favor of one who has paid the premium. Haden v. F. & M. F. Ins. Co., 80 Va. 683; Haskin v. A. F. Ins. Co., 78 Va. 700; Wooddy v. Old Dominion Ins. Co., 31 Gratt. 362; Croft v. Hanover F. Ins. Co., 40 W. Va. 508, 21 S. E. Rep. 854.

4. Prohibitions and Exceptions.

a. Alienation and Encumbrance.

(1) Statements as to Title.

(a) In General.—The insured is bound to disclose only such matters as may be inquired about, and

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not particulars of his title not inquired about, unless such disclosure is required by a condition of the policy. Wytheville Ins. Co. v. Stultz, 87 Va. 629; West Rockingham M. F. Ins. Co. v. Sheets, 26 Gratt. 854.

(b) Substantial Accuracy Sufficient.—Any material misrepresentation will avoid a policy, but a misrepresentation simply technical, unintentional and immaterial will not have such effect. Haden v. F. & M. F. Association, 80 Va. 683.

(c) Sole and Unconditional Ownership.—The fact that the insured had given a deed of trust on the property to secure a debt, without informing the insurer that he had done so, constitutes no breach of the clause avoiding the policy if the ownership be any other than the sole and unconditional ownership. Manhattan F. Ins. Co. v. Weill, 28 Gratt. 389; Quarrier v. Peabody Ins. Co., 10 W. Va. 507; Wolpert v. N. Assur. Co., 44 W. Va. 734, 29 S. E. Rep. 1024. Nor is the "Sole and Unconditional Ownership" clause broken by the existence of a mortgage on the property at the date of the policy. Morotock Ins. Co. v. Rodefer, 92 Va. 747. Nor by a lien for the purchase money. Wooddy v. Old Dominion Ins. Co., 31 Gratt. 362. Nor by the contingent right of dower in the wife of the insured, if she was his wife at the date of the deed. Va. F. & M. Ins. Co. v. Kloeber, 31 Gratt. 749.

A statement by the insured that he is owner of the fee simple is substantially complied with where he has a life estate in the property and also an undivided two-thirds interest in the remainder. Haden v. F. & M. Fire Association, 80 Va. 683.

(2) Alienation Clause.

(a) Time to Which Clause Relates.—Conditions against change in interest, title or possession of the subject of insurance relate to future changes, and not to any encumbrance subsisting at the date of the policy. Morotock Ins. Co. v. Rodefer, 92 Va. 747.

(b) Agreement to Convey.—An executory contract of sale, where there has been no conveyance or delivery of the property, is not a change in the title so as to avoid the policy. Wheeling F. & M. Ins. Co. v. Morrison, 11 Leigh 354.

(c) Change of Interest.—A transfer by one partner of a firm of his interest in the insured property to the other partner is not such a change in the title or interest of insured as to avoid the policy. Va. M. & F. Ins. Co. v. Vaughan, 88 Va. 832.

Nor does the death of the insured and descent of title upon his heirs constitute a change of interest, alienation, or transfer within the meaning of a prohibitory clause in the policy. Ga. Home Ins. Co. v. Kinnier, 28 Gratt. 88.

Nor is a change of receivers a breach of this condition, where the insurance is obtained by a receiver as such. Ga. Home Ins. Co. v. Bartlett, 91 Va. 305.

Nor is a deed of trust given as security for a debt a breach of conditions against change of title or interest. Quarrier v. Peabody Ins., Co., 10 Wa. Va. 507, 27 Am. Rep. 582.

(3) Encumbrance Clause.

(a) In General.—A provision avoiding the policy if the property be or become encumbered without consent of the company is valid, and such encumbrance, unknown to the company, avoids the policy. Sulphur Mines Co. v. Phenix Ins. Co., 94 Va. 355.

The condition against encumbrances is held to apply only to encumbrances created by or with the consent of the insured and does not apply to a judgment recovered *in invitum*. Gerling v. Agricultural Ins. Co., 39 W. Va. 689, 20 S. E. Rep. 691.

(b) Where Clause Omitted.—Where the policy contains no such provision against encumbrances existing or future, neither an encumbrance at the time of the policy and undisclosed, where no inquiries were made as to encumbrances on the application, nor a subsequent encumbrance without consent will affect the insurance. West Rockingham Mut. F. Ins. Co. v. Sheets, 26 Gratt. 858.

b. Vacancy—Disuse and Neglect.

(1) In General.—A description of the premises in the policy as a "building occupied as a hardware store and dwelling" is no warranty within itself that the premises shall continue to be so occupied during the risk, and the policy is not rendered void by a subsequent vacancy. Bryan v. Peabody Ins. Co., 8 W. Va. 605.

Nontenancy alone will not avoid a policy under a clause prohibiting increase of risk or hazard. Ga. Home Ins. Co. v. Kinnier, 28 Gratt. 88.

(2) Partial Vacancy Not Fatal.—Where the policy covered a two story building, the vacancy of the second story did not avoid the policy. Bryan v. Peabody Ins. Co., 8 W. Va. 605.

Where eight double tenement houses were insured under a policy containing a clause forbidding the premises to be left unoccupied, the policy was forfeited as to each house vacant at the time of the fire. Connecticut F. Ins. Co. v. Tilley, 88 Va. 1024. See also Watertown F. Ins. Co. v. Cherry, 84 Va. 72.

c. Hazardous Use and Occupation.

(1) Increase of Risk or Hazard.—Vacancy or nontenancy will not of itself constitute a breach of the clause prohibiting increase of risk or hazard. Ga. Home Ins. Co. v. Kinnier, 28 Gratt. 88.

(2) Keeping Inflammable Materials.—Where a policy was issued on materials for manufacturing barrels, in the absence of proof, benzine was held not to be included, and the insurance company could not be presumed to have knowledge that it was used in painting the barrels. McFarland v. Peabody Ins. Co., 6 W. Va. 425.

(3) Manufacturing.—A policy insuring a tin shop, although it contains a provision against manufacturing, allows making tin cans and such other work usually done in such shops. Va. F. & M. Ins. Co. v. Thomas, 90 Va. 658.

d. Other Insurance.

(1) Definition.—Other insurance may be defined to be "additional and valid insurance, prior or subsequent, upon the same subject, risk and interest effected by the same insured, or for his benefit, and with his knowledge and consent." LACY, J., in Home Ins. Co. v. Gwathmey, 82 Va. 823.

(2) Must Be Valid Insurance.—In order to avoid a policy on account of subsequent insurance against an express condition therein, it must appear that such other insurance is valid and can be enforced. If it cannot be enforced, it is no breach of the condition of the prior policy. Sutherland v. O. D. Ins. Co., 31 Gratt. 176; Woolpert v. Franklin Ins. Co., 42 W. Va. 658, 26 S. E. Rep. 521; Woolpert v. Northern Assur. Co., 44 W. Va. 734, 29 S. E. Rep. 1024.

(3) Waiver of Prohibition.—The adjustment of a loss by an insurer, with full knowledge of all the facts, operates as a waiver of a condition in the policy against other insurance. Levy v. Peabody Ins. Co., 10 W. Va. 560, 27 Am. Rep. 598.

e. Iron Safe Clause—Warranty.—Where in his application for a policy, the insured answered in

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the affirmative to the question whether he kept his account books in an iron safe, this was held to constitute a warranty. Va. F. & M. Ins. Co. v. Morgan, 90 Va. 290.

5. Loss and Adjustment.

a. Notice and Proof of Loss.

(1) In General.—Where no policy has been issued, the provisions of the policies usually written by the insurer with regard to notices and proofs of loss need not be complied with. Due diligence in giving notice of the loss of the building under all the circumstances is all that can be required. Wooddy v. Old Dominion Ins. Co., 31 Gratt. 362.

A substantial compliance with the requirements of the policy is all that is required in a proof of loss. Ga. Home Ins. Co. v. Goode, 95 Va. 751; Home Ins. Co. v. Cohen, 20 Gratt. 312.

(2) Time of Furnishing.—If no forfeiture of the policy is provided for in case of failure to furnish proofs of loss within the time prescribed, such failure merely postpones the time of payment to the specified time after they are furnished. Rheims v. Standard F. Ins. Co., 39 W. Va. 672, 20 S. E. Rep. 670.

When the policy provides that "in case of loss the assured shall give immediate notice thereof," due diligence under all the circumstances is all that is required. Wooddy v. Old Dominion Ins. Co., 31 Gratt. 362.

A condition in a policy requiring immediate notice of loss and that proofs thereof be furnished within a limited time may be waived by the insurer. Many acts and circumstances may constitute such waiver. Ga. Home Ins. Co. v. Kinnier, 28 Gratt. 88; Rheims v. Standard F. Ins. Co., 39 W. Va. 672, 20 S. E. Rep. 670.

By statute in Virginia, blanks for proof of loss must be furnished within ten days after a written application therefor. If made by mail, letter must be registered. If not so furnished, proofs are considered waived. Acts 1889-'90, p. 66.

(3) Waiver.

(a) Acting on Notice.—Where the notice is acted on by the insurer, all defects in its form or contents are waived. West Rockingham Mut. F. Ins. Co. v. Sheets, 26 Gratt. 854.

When the insurance company does not point out and object to defects or informalities in the proofs of loss, such failure constitutes a waiver of the defects. Morotock Ins. Co. v. Cheek, 93 Va. 8; Va. F. & M. Ins. Co. v. Goode, 95 Va. 762; Rheims v. Standard F. Ins. Co., 39 W. Va. 672, 20 S. E. Rep. 670.

When the company by its acts, or through its agent, induces failure or delay in making or perfecting the proofs, it is held to have waived such defect. Ga. Home Ins. Co. v. Kinnier, 28 Gratt. 88; Peninsular Land Transp., etc., Co. v. Franklin Ins. Co., 35 W. Va. 666, 14 S. E. Rep. 237.

(b) Failing to Specify Defects.—Where the insured, in sending proofs, inquires whether further statements are required and the company does not specify the defects or informalities in the proofs of loss, it is held to have waived them. Home Ins. Co. v. Cohen, 20 Gratt. 312; Mason v. Citizens', etc., Ins. Co., 10 W. Va. 572.

(c) Denial of Liability.—A denial of liability by the insurance company on the ground that the policy was not in force at the time of loss, or that it had been forfeited, is a waiver not only of defects of time but of any proofs whatever. Va. F. & M. Ins. Co. v. Goode, 95 Va. 762; Portsmouth Ins. Co. v. Reynolds, 32 Gratt. 613; West Rockingham Mut. F. Ins. Co. v. Sheets, 26 Gratt. 854; Sheppard v. Peabody Ins. Co., 21 W. Va. 368; Deitz v. Providence, etc., Ins. Co., 33 W. Va. 526, 11 S. E. Rep. 50; Gerling v. Agricultural Ins. Co., 39 W. Va. 689, 20 S. E. Rep. 691.

(4) Fraud or False Swearing.—Fraud or false swearing as to one part of the subject insured by the policy is held to be a forfeiture of the whole policy, and the insured cannot recover for any part of his loss. Moore v. Va. F. & M. Ins. Co., 28 Gratt. 508; Moore v. Fireman's F. Ins. Co., 28 Gratt. 524. A material and fraudulent alteration of the invoices avoids the policy. Va. F. & M. Ins. Co. v. Vaughan, 88 Va. 832.

b. Arbitration and Appraisement.

(1) Demand and Notice.—The declaration alleged that the loss exceeded the insurance, and no demand for an award by the defendant was alleged. *Held*, that the provision that no suit is maintainable until after an award was waived. Tilley v. Connecticut F. Ins. Co., 86 Va. 811.

(2) When Contribution Clause Applicable.—The contribution or *pro rata* clause does not apply unless the concurrent insurance is upon the same interest in the property, as well as upon the same property. Hence, the insurer of a warehouseman is not liable for loss to goods in storage where the policy limits liability to loss affecting insured's interest in the goods, and provides that goods on storage be insured separately, and the depositors of such goods have insured them in a different company. Home Ins. Co. v. Gwathmey, 82 Va. 923.

6. Recovery after Failure of Adjustment—The Limitation Clause.

a. Validity.—A condition in a policy that suit shall not be brought except within a period less than that fixed by the statute of limitations is valid. Va. F. & M. Ins. Co. v. Aiken, 82 Va. 424; McFarland v. Peabody Ins. Co., 6 W. Va. 425.

b. When Limitation Commences.—An insurance policy contained a provision that no action should be sustained thereon unless brought within six months after the loss should occur, and another stipulation that the loss or damage should be paid to the assured sixty days after the receipt by the company of satisfactory proof of loss. *Held*, that the statute commenced to run when the loss occurred and not sixty days thereafter. Va. F. & M. Ins. Co. v. Wells, 83 Va. 736. See also, McFarland v. Peabody Ins. Co., 6 W. Va. 425.

In Barber v. F. & M. Ins. Co. of Wheeling, 16 W. Va. 658, 37 Am. Rep. 800, where the policy provided that no action should be sustained thereon unless commenced within six months after the loss should occur, and also that no action should be maintained until arbitrators had fixed the amount of the loss, it was held that the action could be commenced within six months after the arbitrators had fixed the amount of the loss, although more than six months after the loss occurred. See also, Murdock v. Franklin Ins. Co., 33 W. Va. 407, 10 S. E. Rep. 777.

c. Waiver of Limitation.—The insurer may waive the limitation by not relying upon it after the time has expired. Va. F. & M. Ins. Co. v. Aiken, 82 Va. 424.

d. When Action Is Commenced.—Where service of summons on defendant's agent had been made within ten days of return day, and suit remanded to rules to be properly matured, and an *alias* summons had been issued and duly served, it was *held*, that the commencement of suit was the issuance of the original summons and saved the suit from being

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barred by the statute of limitations. Va. F. & M. Ins. Co. v. Vaughan, 88 Va. 832.

A provision in a policy that no action for loss or damage shall be sustainable unless the same is brought within six months after the loss or damage shall occur, is valid. The mere pendency of negotiations between the parties, or the fact that occasional interviews are had between them in regard to the adjustment or settlement of a loss, will not, of itself, operate as a waiver of the above provision, or be an equitable estoppel. McFarland v. Peabody Ins. Co., 6 W. Va. 425.

7. Agents.

a. Authority of.

(1) In General.—When an insurance company supplies one with all needful blanks, responds to his acts, approves of his permits to remove insured property, and pays the rent of his office, it is bound by his acts as its agent. Hardin v. A. Ins. Co., 90 Va. 413.

(2) Agents to Solicit.—An agent whose powers are limited by the charter, constitution or by-laws of the company, to receiving and forwarding applications for insurance, together with the premiums to the company for acceptance or rejection, can make no contract of insurance binding the company. Haden v. F. & M. F. Association, 80 Va. 683.

(3) General Agent—Private Instructions Limiting Same.—If at the time of issuing a policy, I had been authorized by the insurance company to receive and accept proposals for risks, subject to their approval and ratification, to issue and deliver policies and renew the same, and receive premiums therefor, and had been supplied with blanks signed by the president, to be filled and countersigned by him, this constituted I the general agent of the company, and the company is bound by all his acts as such within the scope of his authority, so long as it existed, notwithstanding any private instructions which he may have received limiting that authority, of which the assured had no notice. Ga. Home Ins. Co. v. Kinnier, 28 Gratt. 88; Coles v. Jefferson Ins. Co., 41 W. Va. 261, 23 S. E. Rep. 732. See also, Goode v. Ga. Home Ins. Co., 92 Va. 392, 53 Am. St. Rep. 817.

b. When Knowledge of Agent Binds Company.—Where the agent knew at the time of issuing the policy that the building was on leased premises, such knowledge is imputed to the company, and they, having received the premiums on the policy, are estopped to deny its validity. Manhattan F. Ins. Co. v. Weill, 28 Gratt. 389.

Where the company's agent inspected the property, was as well informed as to its cost as the insured, and concurred in her estimate and inserted it in the application, the company is estopped to set up that the insured exaggerated the cost of the property. Va. F. & M. Ins. Co. v. Saunders, 86 Va. 969.

Where an incumbrance on the property was mentioned to the agent of an insurance company at the time of the application, and he informed the insured that it was too small to note in the application, the company is estopped to set up such encumbrance as a defence to an action on the policy. Ga. Home Ins. Co. v. Goode, 95 Va. 751.

Facts relating to the risk, communicated to a general agent of an insurance company before or at the time of issuing the policy, bind the company, whether communicated to it by such agent or not. Mutual F. Ins. Co. v. Ward, 95 Va. 231; Va. F. & M. Ins. Co. v. Goode, 95 Va. 762.

8. Rules of Construction.

a. In General.—"The principles of interpretation applicable to contracts of insurance are the same as those which obtain in the case of other contracts. The same rule of construction which applies to other instruments applies also to these. They are to be construed according to the sense and meaning of the terms used, and if these are clear and unambiguous, parol evidence will not be admitted to contradict, vary or to explain them." LACY, J., in Home Ins. Co. v. Gwathmey, 82 Va. 924; Merchants Ins. Co. v. Edmond, Davenport & Co., 17 Gratt. 138.

"In a case where it can be fairly claimed that two constructions can be placed upon the language used in the policy, it is now well settled that the one is to be adopted which is most favorable to the insured; and in a case of doubt as to the meaning of terms employed by an insurance company, they are to be construed most strongly against the insurer." LACY, J., in U. S. Mutual Accident Ass'n v. Newman, 84 Va. 52. In support of this rule, see Ga. Home Ins. Co. v. Bartlett, 91 Va. 305; Va. F. & M. Ins. Co. v. Thomas, 90 Va. 658; Mutual Assur. Society v. S. U. & Nat. Ins. Co., 84 Va. 116; Watertown F. Ins. Co. v. Cherry, 84 Va. 72; Lynchburg F. Ins. Co. v. West, 76 Va. 575; Ga. Home Ins. Co. v. Kinnier, 28 Gratt. 88. Parties are not held to have entered into warranties unless they clearly so intended. Morotock Ins. Co. v. Fostoria, etc., Co., 94 Va. 361.

b. Provision as to Size of Type.—Section 3252 of the Code of Virginia, requiring that conditions and restrictive provisions of insurance policies must be written or printed in type of a prescribed size, should be liberally construed. The whole provision relied on must be in writing or printed in type of the prescribed size, or else it is not available as a defence to an action on the policy. Nat. Life Assoc. v. Berkeley, 97 Va. 571.

c. Application Construed as Part of Policy.—The application to an insurance company for insurance upon a building, which is granted and a policy issued based upon the application, is a part of the policy. So. Mut. Ins. Co. v. Yates, 28 Gratt. 585.

9. Evidence.

a. Parol Evidence.

(1) When Admissible.—In Lynchburg F. Ins. Co. v. West, 76 Va. 575, STAPLES, J., says that parol evidence is admissible "in those cases in which the assured is misled by assurances, or declarations of the assurer, or his agent, or where the insurer seeks to take advantage of a forfeiture of his own creation, or where the insured has given a correct description of the property, and that description has not been followed by the insurer or his agents in preparing the policy, or where the parties stand upon unequal grounds, and one of them uses his superior knowledge, or his influence, to mislead the other as to the true import of the contract. In such cases the oral evidence is not offered to contradict the writing, but to show that the representation, as it is written, ought not to be used against the party upon the ground of an equitable estoppel." The same rule was laid down in Va. F. & M. Ins. Co. v. Goode, 95 Va. 762.

In Farmers, etc., Ins. Assoc. v. Williams, 95 Va. 248, parol evidence was admitted to show the circumstances under which a written application for insurance was made.

Parol evidence is admissible to prove that conditions inserted in the receipts were in violation of an agreement between the agent of the insured and the secretary of the company, and that by that agreement the forfeiture of the policy, if it had been forfeited, was unconditionally waived. McLean v. P. & A. Life Ins. Co., 29 Gratt. 361.

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Parol evidence, not tending to vary the contract of the parties, but in confirmation of such contract, is admissible. So. Mut. Ins. Co. v. Trear, 29 Gratt. 255.

(2) When Not.—After the answers to the questions are written in the application, and it is signed by the applicant, parol evidence is not admissible to prove that he did not read the application, or that no question was asked him as to the existence of encumbrances. Va. F. & M. Ins. Co. v. Morgan, 90 Va. 290; So. Mut. Ins. Co. v. Yates, 28 Gratt. 585.

b. Burden of Proof.

(1) Chattel Mortgage.—Where the policy contains a clause avoiding it if there be a chattel mortgage on the personal property insured, the existence of such chattel mortgage is a matter of defence which it is encumbent upon the company to prove. Morotock Ins. Co. v. Rodefer, 92 Va. 747.

(2) Proofs of Loss.—The burden of proving compliance with the requirements of a policy as to proofs of loss, or the waiver of such compliance by the company, is on the insured. Flanaghan v. Phenix Ins. Co., 42 W. Va. 426, 26 S. E. Rep. 513; Adkins v. Globe F. Ins. Co., 45 W. Va. 384, 32 S. E. Rep. 194.

c. Possession of Policy.—The possession of a policy is sufficient evidence of the payment of the premium, on a demurrer to the evidence by the insurance company. Fidelity, etc., Co. v. Chambers, 93 Va. 138.

d. Fire Caused by Insured.—Where the defence to an action on a policy is that the fire was caused by the insured, it is not necessary to prove beyond a reasonable doubt that the plaintiff intentionally and fraudulently set the property on fire. A preponderance of evidence to that effect is sufficient. Simmons v. Ins. Co., 8 W. Va. 474.

10. Foreign Insurance Companies—Interstate Commerce.—The legislature of a state has authority to prescribe such conditions and restrictions upon foreign insurance companies doing business within the state as it may see fit to impose, since such legislation does not pertain to matters of interstate commerce, nor to the privileges or immunities of citizens in the several states. Liverpool, etc., v. Oliver, 10 Wall. (U. S.) 566; Paul v. Virginia, 8 Wall. 168; Ducat v. Chicago, 10 Wall. (U. S.) 410; Home Ins. Co. v. Augusta, 93 U. S. 116.

11. Marine Insurance.

1. Definition.—"Marine insurance is a contract, whereby one party, for a stipulated premium, undertakes to indemnify the other against certain perils or sea risks, to which his ship, freight and cargo, or some of them, may be exposed, during a certain voyage, or a fixed period of time." 3 Min. Inst. (2d Ed.) 1037.

2. Capture.—The M. Co. issues to E. a policy of insurance in the usual form and at the usual rates, dated December 24, 1860, on a cargo of coffee to be shipped on board the S. from Rio to Richmond or some other Atlantic port in the United States. The cargo is shipped on the 10th of May, and in July is seized or captured some miles outside the capes of Virginia by a United States vessel. The owners of the ship, the insurers and insured are all citizens of Virginia. The policy is unaffected by the public events that had occurred; the capture and condemnation was as of enemy's property; and the insurer is liable upon the policy. Merchants Ins. Co. v. Edmond, Davenport & Co., 17 Gratt. 138.

3. Deviation.—A marine insurance, "at and from Norfolk to Curracoa, with liberty of going to any other island in the West Indies, or any one port on the Spanish Main, and at and from thence back to Richmond," must be understood as an insurance, "at and from Norfolk to Curracoa, in the first place, with liberty of going from Curracoa to any other island." If, therefore, the vessel put into the island of St. Thomas, and thence return to Norfolk, without ever going to Curracoa, it is a deviation from the voyage, and, there being no proof that such deviation was occasioned by stress of weather, or other unavoidable accident, the person insured is entitled to no return of premium, such being the terms of the policy. Marine Ins. Co. v. Stras, 1 Munf. 408.

4. Construction.—Contracts of insurance are to be constructed accurately, and neither liberally nor severely, and without favor to either party. Such contracts are to be considered and construed as a whole; and particular clauses or passages are not to be wrested from their context so as to destroy the unity of the contract and create conflict where there should be agreement; but one part is to be elucidated by the other, so as to reconcile them, if practicable, to one common intent or design, present to the minds of the contracting parties. Merchants Ins. Co. v. Edmond, Davenport & Co., 17 Gratt. 138.

But where there is doubt as to the meaning of the terms employed by an insurance company, they are to be construed most strongly against the insurer. In Miller v. Ins. Co., 12 W. Va. 116, the court says: "No rule, in the interpretation of a policy, is more fully established, or more imperative and controlling, than that which declares, that in all cases it must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to the indemnity, which in making the insurance it was his object to secure. When the words are, without violence, susceptible of two interpretations, that which will sustain his claim and cover the loss, must in preference be adopted. While courts will extend all reasonable protection to insurers, by allowing them to hedge themselves about with conditions intended to guard against fraud, carelessness, want of interest, and the like, they will nevertheless enforce the salutary rule of the condition is theirs, and it is therein in construction, that as the language of their power to provide for every proper case, it is to be construed most favorably to the insured."

B. PLEADING AND PRACTICE.

1. Suits in Equity.

a. Specific Performance.—Where an agreement to insure has been made with an agent having authority to issue policies or to bind the company to issue policies, and the premium has been paid, and a loss occurs before the policy is written, the remedy is in equity. A court of equity will decree specific performance of such contract by directing the issuance of the policy and the payment of the loss. Haden v. F. & M. F. Association, 80 Va. 683; Wooddy v. Old Dominion Ins. Co., 31 Gratt. 362.

b. Subrogation.—Where the insurer has paid a loss to the mortgagee covering only a part of the mortgage debt, he acquires no right to have from the mortgagee the evidence of the debt to an amount equal to the loss paid by him. The debt must be paid in full before he can take from the mortgagee any part of the debt by subrogation. Phenix Ins. Co. v. First Nat. Bank, 85 Va. 765.

2. Actions on Policy.

a. Who May Sue—Administrators.—The administratrix may sue on a policy insuring the deceased and his legal representatives. Ga. Home Ins. Co. v. Kinnier, 28 Gratt. 88.

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Agents.—Agents or bailees obtaining insurance in their own names, for the benefit of others, on property in their care or custody or the subject of the agency, or having an insurable interest in such property, may sue in their own names. Murdock v. Franklin Ins. Co., 33 W. Va. 407, 10 S. E. Rep. 777; Deitz v. Providence, etc., Ins. Co., 31 W. Va. 851, 8 S. E. Rep. 616.

Where an insurance contract not under seal is made by an agent in his own name for an undisclosed principal, either the agent or the undisclosed principal may sue upon it. Murdock v. Franklin Ins. Co., 33 W. Va. 407, 10 S. E. Rep. 777; Deitz v. Providence, etc., Ins. Co., 31 W. Va. 851, 8 S. E. Rep. 616.

Assignee.—Where the insured assigned to B before loss with consent of the insurer, and after loss B assigned to L, it was held that the legal title was in B, and that he might sue in his own name notwithstanding the assignment. Bentley v. Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. Rep. 584.

Mortgagee.—Under Va. Code 1887, § 2415, providing that any person having an interest in the property insured, though not a party to the policy, may sue in his own name to the extent of his loss, a mortgagee, whose interest extends to the whole loss, may sue. Tilley v. Connecticut F. Ins. Co., 86 Va. 811.

b. Where Action Brought.—In Virginia an action may be brought to recover a loss under a policy of insurance in any county wherein the property insured was situated. V. C. 1887, § 3214; Wytheville Ins. Co. v. Stultz, 87 Va. 629.

Where the purpose of the action is to subject the deposit required by law to be made by foreign insurance companies within the state of Virginia for the protection of the insured, the policy holder may sue in the circuit court of the city of Richmond. Universal Life Ins. Co. v. Cogbill, 30 Gratt. 72.

In West Virginia the action may be brought in any county where a non-resident company does business, or in which it has property or debts due it, or in which the cause of action or part thereof arose. Carson v. Phœnix Ins. Co., 41 W. Va. 136, 23 S. E. Rep. 552; Harvey v. Parkersburg Ins. Co., 37 W. Va. 272, 16 S. E. Rep. 580.

c. Service of Process.

(1) Domestic Companies.—The same rules which govern the service of process on other corporations apply to insurance companies. For service of process on corporations, see Va. Code 1887, section 3225, Lile's Notes to 1 Minor's Inst., p. 318 *et seq.* It is to be noted, however, that the provisions of section 3214 that an action to recover a loss under a policy of insurance may be brought in any county or corporation wherein the property was situated, or the person whose life was insured, resided, at the date of the policy, are not embraced in section 3215. Hence, these provisions are not governed by the inhibitions of section 3220, and process may, therefore, issue to some other county or corporation than that in which the action was brought, and, where there is no agent residing in the county, the process may be by publication. See 2 Bart. Law Pr. (2nd Ed.) 1298. In Wytheville Ins. Co. v. Stultz, 87 Va. 629, where there was no agent in the county in which the action was brought, it was held that service by publication was proper, although the company was doing business both in banking and insurance, and another kind of service is provided for in an action against banks.

(2) Foreign Companies.—In Virginia it is provided by statute that every foreign insurance company doing business in the state shall appoint an agent in the city of Richmond upon whom process may be served, and that in case of his death or inability to act, process may be served upon the Auditor of Public Accounts. V. C. §§ 1266, 1267, as amended by Acts 1889-90, p. 9. Continental Ins. Co. v. Kasey, 27 Gratt. 216.

In West Virginia there is a similar statute providing for an agent upon whom process may be served. Code W. Va. chap. 124, § 9.

Where a company withdrew from a state and revoked its appointment of an agent, but afterwards re-entered the state and appointed another agent under a new law, it was held that the new law referred to past as well as to future contracts, and service on the new agent in an action on a contract made when the company was previously doing business in the state, was sustained. Connecticut Mut. L. Ins. Co. v. Duerson, 28 Gratt. 630.

d. Declaration.

(1) Statutory Form.—In Virginia it has been provided by statute that if the plaintiff file the policy or a sworn copy thereof with his declaration, it shall not be necessary, in respect to the conditions and provisos of such policy, to set forth in the declaration every such condition and proviso, nor to allege observance thereof or compliance therewith in particulars; but, in respect to such conditions and provisos, it shall be sufficient to refer to the policy or copy and allege, in general terms, the performance of all its conditions and the violation of none of its prohibitions. V. C. 1887, § 3251. By Acts 1895-96, p. 707, the pleadings are to be filed and the proceedings matured as in ordinary actions.

A declaration, from which it is evident that the pleader intended to proceed under this statute, is good, although it largely follows the form of an ordinary declaration in debt. Va. F. & M. Ins. Co. v. Saunders, 84 Va. 210; Travis v. Peabody Ins. Co., 28 W. Va. 583.

The performance of conditions may be alleged in general terms and it is not necessary to aver an award, although the policy provides that no suit shall be brought till after an award. Tilley v. Ins. Co., 86 Va. 811. For form of declaration on an insurance policy, see 1 Bart. Law Pr. (2nd Ed.) 406; 4 Min. Inst. (3d Ed.), 1684.

In West Virginia a brief form for actions on insurance policies is provided by statute. Code W. Va. chap. 125, § 61.

Where the declaration is drawn under such a statute and additional statements are ordered by the court, such statements are to be regarded as informal pleadings. Rheims v. Standard F. Ins. Co., 39 W. Va. 672, 20 S. E. Rep. 670.

In *assumpsit* the common counts, or other counts proper in that action, may be joined with a count in the statutory form. Bentley v. Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. Rep. 584.

In an action of *assumpsit* on a policy, it is necessary for the plaintiff to allege an interest in the property insured. Quarrier v. Peabody Ins. Co., 10 Va. 507.

(2) Demurrer.—In West Virginia the plaintiff may be required to file, in addition to his declaration, a sworn statement of the facts which he expects to prove, and, in an insurance case, the legal sufficiency of the facts thus presented was held to be properly raised by a demurrer. Deitz v. Providence, etc., Ins. Co., 31 W. Va. 851, 8 S. E. Rep. 616.

(3) Amendment.—In an action on a policy for loss by fire claiming a certain sum as damages, or for

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loss to certain property, an amended declaration may be filed claiming larger damages, or on additional property, under the same policy, by the same fire. Bentley v. Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. Rep. 584. As to amendment of declaration where one of the conditions of the policy was omitted, see N. Y. Life Ins. Co. v. Hendren, 24 Gratt. 536.

e. Recovery by Motion.—Under Va. Code 1887, section 3211, a motion may be maintained for a judgment for money on an insurance policy, and the notice takes the place of both the writ and declaration. Grubbs v. Nat., etc., Ins. Co., 94 Va. 589; Morotock Ins. Co. v. Pankey, 91 Va. 259; Union Central Life Ins. Co. v. Pollard, 94 Va. 146. On such motion the defendant, where he has appeared and pleaded, cannot move to dismiss. Morotock Ins. Co. v. Pankey, 91 Va. 259.

f. Replication.

(1) In General.—Where a common-law replication introduces new matter it should conclude with a verification and not to the country. Va. F. & M. Ins. Co. v. Saunders, 84 Va. 210.

(2) Duplicity.—Where the plea alleged misrepresentation in the application as to the value of the insured property, it was held that a replication that the agent of the insurer inspected the property and inserted the valuation in the policy is not double, as being both by way of estoppel and in confession and avoidance. Va. F. & M. Ins. Co. v. Saunders, 86 Va. 969.

g. Judgment—Amount of Recovery.—In an action on a fire insurance policy, where there has been no fraud, the plaintiff is not limited in recovery by the amount of loss specified in the proofs of loss. Bentley v. Standard F. Ins. Co., 40 W. Va. 739, 23 S. E. Rep. 584.

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628 *Herring & als. v. Wickham & Wife & als.

[26 Am. Rep. 405.]

January Term, 1878, Richmond.

Absent, MONCURE, P.

1. **Fraudulent Conveyance — Notice to Grantee.***—If the grantee in a deed be a *bona fide* purchaser for a valuable consideration, his or her title is unassailable, whatever may have been the motives or intentions of the grantor in executing the deed. It is absolutely essential that both parties shall concur in the fraud, to invalidate the deed.
2. **Same—Same—Proof.**—Fraud cannot be presumed; it must be proved by clear and satisfactory evidence.
3. **Valuable Consideration — Marriage.***—Marriage is a valuable consideration, sufficient to support a conveyance of property, even against creditors; and in such a case the wife is deemed a purchaser of the property settled on her, in consideration of the marriage, and is entitled to hold it against all the world.
4. **Ante-Nuptial Settlements — Effect against Creditors.**—However much a man may be indebted, an ante-nuptial settlement, made by him in consideration of marriage, is good against his creditors, unless it appears that the intended wife was cognizant of the fraud. And even though it conveys his whole estate, it is not, simply on that account, void; and when a settlement is made in contemplation of marriage, the law presumes it was an inducement to it, and the courts cannot assume the contrary to be the fact.
5. **Same—Same—Cohabitation before Marriage.**—The fact of the cohabitation of the parties and the birth of children before the marriage will not avoid the conveyance.
6. *Coutts* v. *Greenhow*, 2 Munf. 363, examined and followed.

John H. Wickham, a man of high social standing and education, had been notoriously living in an adulterous intercourse with Maria F. Kersey, an humble, 629 *uneducated and obscure woman, for twenty-five or thirty years, who had several children by him, the youngest of whom was about seventeen years old in 1870. He was about sixty-seven years old, and she was about fifty-five. The children begotten had not been educated, but had been reared as inferiors. Down to about 1864, he was unembarrassed and wealthy, considered a money-lender. About 1864, or 1865, he began to be embarrassed, and in 1867, or 1868, was hopelessly insolvent. His creditors were pressing him; many judgments had been recovered, and many suits for large amounts were pending against him; and then he made a deed of

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***Fraudulent Conveyances — Notice to Grantee.**—In Hickman v. Trout, 83 Va. 478, the principal case is cited for the following rule of law. Fraud must be clearly proved and the burden of proof rests on him who alleges. It may be proved by circumstances, and when the evidence shows a *prima facie* case of fraud, the burden shifts to the upholder of the transaction to establish its fairness. See also, Engleby v. Harvey, 93 Va. 445; Sutherlin v. March, Price & Co., 75 Va. 236; Barton's Ch. Pr. (2d Ed.) 573. In West Virginia, the principal case is cited in White v. Perry, 14 W. Va. 86; Martin v. Smith, 25 W. Va. 589; Boggess v. Richards, 39 W. Va. 569, 20 S. E. Rep. 600.

***Valuable Consideration — Marriage — Creditors.**—In Clay v. Walter & Co., 79 Va. 92, the principal case was reaffirmed on the proposition that whatever the design of the grantor, a settlement on a woman in contemplation and in consideration of a marriage, is valid, unless her knowledge of his intended fraud is clearly and satisfactorily proved, and it was held that service by creditors of the grantor, of written notice on the grantee before the marriage, of the grantor's fraudulent design in making the settlement, cannot affect her constructively with notice of such design, but her actual knowledge of and participation in that fraudulent design must be clearly established by proof. See also, Moore v. Butler, 90 Va. 683; Triplett v. Romine, 33 Gratt. 651; Coutts v. Greenhow, 2 Munf. 363; Eppes v. Randolph, 2 Call 125; Shobe v. Carr, 3 Munf. 10; Huston v. Cantril, 11 Leigh 136; Bentley v. Harris, 2 Gratt. 357; Welles v. Cole, 6 Gratt. 645; Fones v. Rice, 9 Gratt. 568; 1 Min. Inst. (4th Ed.) 319; 6 Am. & Eng. Enc. Law (2d Ed.) 724. See Code, sec. 2459, where it is provided that as against creditors whose debts were contracted at the time the conveyance or settlement was made marriage shall no longer be a valid consideration. Barton's Ch. Pr. (2d Ed.) 549, 550, 561, 575, 578.

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trust conveying all his property, except such as was encumbered by deed of trust beyond its value, to John Page and John Wickham, for the separate use of the said Maria F. Kersey for her life, with power of appointment, and after her death, failing to appoint, to the children begotten by her in equal proportions. The property consisted of land in the state of Missouri, and a number of bonds amounting nominally to $60,000, though they probably would not realize more than $20,000. His property not embraced in the deed consisted of two valuable tracts of land in Hanover county. The consideration of the deed was the contemplated marriage between the said John H. Wickham and Maria F. Kersey; and the marriage was consummated as contemplated by the deed; and the deed was duly admitted to record.

George I. Herring and several others, suing for themselves and all other creditors of said John H. Wickham, holding judgments to the amount of about $28,000, filed their bill against the said Wickham and wife, and children, and the trustees, setting forth the foregoing facts, and attacking the deed as voluntary, and as also made with intent to hinder, delay and defraud the cred-
630 itors of *said John H. Wickham, and so void as to them, and asking that said deed be set aside, and the property conveyed therein subjected to the payment of their debts. The defendants answered the bill; John H. and Maria denying the fraud; and notice of any participation in the fraud was not proved against Maria, the wife. The circuit court of Hanover dismissed the bill, and an appeal was taken to this court.

C. G. Griswold, W. W. Crump and John Dunlop, for the appellants.

John A. Meredith, J. B. Young, H. T. Wickham and Thomas N. Page, for the appellees.

Staples, J., delivered the opinion of the court.

The subject of controversy in this case is an ante-nuptial settlement made by John H. Wickham upon Maria F. Kersey and her children on the 23d of February, 1868. At that time Mr. Wickham was indebted to a very large amount, far beyond his means of payment, and his object in making the settlement, it is claimed, was to defraud his creditors. If Mr. Wickham was alone concerned, there would be little difficulty in declaring the settlement void as to his creditors; but he is not the only one; the parties chiefly interested are the wife and children, for whose benefit the settlement was professedly made. The first section of chapter 114, Code of 1873, which is but a continuation of an old statute, after declaring that conveyances made with intent to hinder, delay, or defraud creditors, shall be void, "further declares that this section shall not affect the title of a purchaser for valuable consideration, unless it appears that he has notice of the fraudulent
631 intent of his immediate *grantor, or of fraud rendering void the title of such grantor." Conveyances for a valuable consideration without notice of the fraud by the person receiving the conveyance are valid at common law, and as is here seen, are expressly excepted out of the operation of the statute. So that if the grantee be a bona fide purchaser for a valuable consideration, his or her title is unassailable, whatever may have been the motives or intentions of the grantor in executing the deed. It is absolutely essential that both parties shall concur in the fraud.

If it be conceded, therefore, that Mr. Wickham's intention in making the settlement was to avoid payment of his debts, the question still arises, Did Maria F. Kersey (now Mrs. Wickham) have notice of that intention? Upon a very careful examination of this record, I think that question must be answered in the negative, or perhaps, to speak more accurately, the evidence is insufficient to establish the notice. It must be remembered that in cases like the present, the courts can not act upon mere suspicion or presumption. Fraud must be proved—proved by clear and satisfactory testimony. This is the well established rule, universally recognized by the courts, and scarcely needs a citation of authority to support it.

There is no evidence, literally none, to show that Mrs. Wickham, at the time of the settlement, was apprised that Mr. Wickham was in embarrassed circumstances, or even that he was indebted to any one. A witness was introduced who stated that he advised Mr. Wickham to go into bankruptcy, and the latter replied he could come through without it. It is not proved that Mrs. Wickham heard this conversation, of if she did that she understood its purport. And this is the only evidence to establish the notice, unless we are to presume from the intimacy of the parties that Mr. Wickham informed her of his indebtedness, or that his purpose in making the settlement
632 *and in entering into the marriage was to secure his property from the claims of creditors. There is, perhaps, no subject upon which men are more reticent even with their families and intimate friends, than that which relates to their business transactions, and especially their pecuniary liabilities. Under all these circumstances it is hardly to be presumed that Mr. Wickham was more communicative in the present case. At all events there is no proof of the fact.

Mr. Wickham's closest neighbors considered him a wealthy man, the wealthiest in the community. Some of them thought him a money-lender. He was the owner of two valuable farms in Hanover, one containing 700 or 800 acres, and the other 1,300 acres, upon which he resided. It is very true they were subject to encumbrances to a large amount, but there is not the least reason to suppose that Mrs. Wickham knew it. The deed of settlement did not embrace

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all of Mr. Wickham's estate, but certain specific property, consisting of bonds upon various persons and an interest in land in Missouri. If Mrs. Wickham believed, as the neighbors believed, that her intended husband was a man of large fortune—if she knew he owned the farms, without knowing of the encumbrances—she might well regard the settlement as just and reasonable, and without injury to any one. It is said by an eminent American author, that, although one American case seems to intimate that a mere knowledge of the insolvency of the intended husband by the intended wife would make a settlement by him on her valid as against her creditors, this appears to be contrary to the English doctrine, and perhaps it is contrary to the true doctrine everywhere. Perhaps a woman may lawfully give her hand in marriage for money which she knows the party cannot pay without withholding from them to
633 whom he had, for a valuable *consideration, previously promised it. 1 Bishop on the Laws of Married Women.

Whether this be or not the true rule, it is certainly well established that the fact of the husband's being indebted at the time, and that the woman knew him to be so, will not invalidate the transaction in favor of creditors. 2 Lomax's Digest, 434. If, therefore, it appeared in this case that Mrs. Wickham was aware at the time of her intended husband's indebtedness, that would not of itself be sufficient to invalidate the settlement, unless she was aware of it to an extent to justify the belief of a design on his part to avoid the payment of his debts.

Assuming, then, that she acted bona fide, is the settlement valid against creditors? This inquiry involves several important propositions now to be considered.

In the first place, that marriage is a valuable consideration, sufficient to support a conveyance of property even against creditors, is firmly established by a long train of decisions, English and American. The wife in such case is deemed to be a purchaser of the property settled on her in consideration of the marriage, and she is entitled to hold it against all the world. Lord Coke gives a forcible illustration of the rule. It being the general doctrine that the word "heirs" is necessary in a deed to pass a fee, if (he says) "a man had given land to a man with his daughter in frank marriage, generally a fee simple had passed without this word 'heirs,' for there is no consideration so much respected in law as the consideration of marriage in respect of alliance and posterity." 1 Bishop on the Law of Married Women, § 755. In Barrow v. Barrow, 2 Dickens R. 504, Lord Chancellor said "he never knew an instance where a settlement in consideration of marriage had been set aside, and he would not make a precedent." In Campion v. Cotton,
634 17 *Ves. R. 264, 267, Sir Samuel Romily and William Bell, counsel for the defendants, said: "There is no decision to be found in which a settlement previous to and in contemplation of marriage has been considered as fraudulent against creditors. That a case strong enough for that purpose might exist cannot be denied, as if the wife was clearly a party and the marriage a more secure mode of defrauding creditors; but no such decision has yet been made. See also Nairn v. Prowse, 6 Ves. R. 752; Tunno v. Trezevant, 2 Des. R. 264. There are modern English decisions which have pronounced such settlements void as to creditors; not, however, because they included all the husband's property, or because he was utterly insolvent, but on the ground that the wife appeared to be a party to the fraud of the husband. Ex parte McBurnie's Trustees, 1 DeG., M. & G. 440; Fraser v. Thompson, 4 DeG. & Jones, 659. The learned counsel quotes an observation of Mr. Justice Nott, of South Carolina, that the English decisions on this subject ought to be received with great caution; that there marriage settlements are usually among the higher or wealthier classes of society, with whom the marriage contract is in the nature of a bargain and sale, usually carried on by parents and guardians to promote family pride and influence.

No country in the world can, perhaps, boast of a purer judiciary than that from which we have derived our laws, institutions, and the most valued portions of our jurisprudence. It is not to be supposed that eminent judges there would lend the sanction of their names to mere family schemes in fraud of creditors upon such considerations as those suggested by the learned judge. The decisions respecting marriage and marriage contracts, I imagine, rest upon higher ground. Lord Robertson, a Scotch judge, in the case of Levett,
635 Ferg. R. 385, 389, *397, uses this language: "Marriage is a contract sui generis, and differing in some respects from all other contracts; so that the rules of law which are applicable in expounding and enforcing other contracts may not apply to this. The contract of marriage is the most important of all human transactions; it is the very basis of the whole fabric of civilized society. The status of marriage is juris gentium, and the foundation of it, like that of all other contracts, rests on the consent of the parties; but it differs from other contracts in this, that the rights, obligations or duties arising from it are not left entirely to be regulated by the agreement of the parties, but are to a certain extent matters of municipal regulation over which the parties have no control by any declaration of their will. It confers the status of legitimacy on children born in wedlock, with all the consequential rights, duties and privileges thence arising. It gives rise to the relations of consanguinity and affinity. In short, it pervades the whole system of civil society. Unlike other contracts, it cannot in general, in any civilized country, be dissolved by mutual consent; and it subsists in full force, even

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though one of the parties should forever be rendered incapable as in the case of incurable insanity, or the like, from performing his part of the marital contract. No wonder that the rights, duties and obligations arising from so important a contract should not be left to the discretion or caprice of the contracting parties, but should be regulated in many important particulars by the law of every civilized country." See on this subject the various decisions cited in Tyler on Coverture and Infancy, pages 804 to 811.

It is upon some such considerations as these, I take it, and not those suggested in this case, the courts everywhere have based their decisions in respect of marriages and contracts in consideration of mar-
636 riage. And accordingly *the American decisions have followed the English, adopting the language and affirming in the broadest terms the doctrines of the judges. Magniac & Co. *v.* Thompson, decided by Mr. Justice Baldwin, and reported in 1 Baldwin R. 344; and again decided upon an appeal to the supreme court of the United States, 7 Peters, p. 367, is a familiar case much relied on in the argument here. Mr. Justice Story delivering the opinion of the whole court, said: "Nothing can be clearer, both upon principle and authority, than the doctrine, that to make an ante-nuptial settlement void as a fraud upon creditors, it is necessary that both parties should concur in or have cognizance of the intended fraud. If the settler alone intended a fraud, and the other party have no notice of it, she is not and cannot be affected by it. Marriage in contemplation of the law is not only a valuable consideration to support such a settlement, but a consideration of the highest value, and from motives of the soundest policy is upheld with a steady resolution. The husband and wife, parties to such a contract, are therefore deemed, in the highest sense, purchasers for a valuable consideration, and so that it is bona fide without notice of fraud brought home to both sides, it becomes unimpeachable by creditors.

In Sterry v. Arden, 1 John. Ch. R., p. 260, 271, Chancellor Kent said: "The marriage was a valuable consideration which fixed the interest in the grantee against all the world, and as much as if she had then paid an adequate pecuniary consideration. It is the constant language of the books and of the courts, that a voluntary deed is made good by a subsequent marriage, and a marriage has always been held to be the highest consideration in law." See Verplank v. Sterry, 12 John. R. 536; where this decision was affirmed. The cases of Smith v. Allen, 5 Allen. R. 454; Jones' Appeal, 62
637 Penn. St. R. *324; Bunnel v. Witherow, 29 Ind. R. 123; Armfield v. Armfield, Freeman Ch. R. 311; Andrews & Bros. v. Jones, 10 Alab. R. 400; are to the same effect. See also 2 Minor's Inst. 690, 708; 1 Amer. Lead. Cases, 54, 55; Bump on Fraudulent Conveyances.

The Virginia cases are equally emphatic upon this subject, none perhaps more so than Huston's adm'r v. Cantril, 11 Leigh. 136, 155. It was there held that a voluntary conveyance made by a man greatly indebted to his daughter, is rendered good and available against creditors of the grantor upon the subsequent marriage of the daughter, who thereupon was to be regarded a purchaser by relation for a valuable consideration. Judge Carr, in speaking of the deeds made to the daughter, observed: "Will it be said that, if at the date of the deeds (Clendenin) the father had sold bona fide and for a valuable consideration, every slave he had, Houston, the creditor, could have disturbed such sale? And what is a settlement of slaves or other property upon a child in consideration of marriage, but a sale for a valuable consideration? Is not marriage the highest consideration, the most favored? I have always seen it so laid down." Upon this question there was no difference of opinion among the judges. Judge Stanard did not concur with the majority, but this dissent was based upon other grounds. In Bentley v. Harris' adm'r, 2 Gratt. 357, the decision in Huston's adm'r v. Cantril, was cited and followed. See also Eppes v. Randolph, 2 Call 103; Welles v. Cole, 6 Gratt. 645; Fones v. Rice, 9 Gratt. 568.

After these emphatic avowals, it is, I think, too late to caution us how we follow the English cases. In the principles declared, the American courts have gone quite as far as those of England.

The learned counsel tell us, that marriage, however valuable as a considera-
tion, cannot sustain a settlement
638 *by a man of his whole estate who is greatly indebted at the time, and that no case can be found, certainly none in this country, to uphold such a settlement. The learned counsel in all their researches have found but one case which holds that a settlement of that character is per se fraudulent and void as to creditors. I allude to the case of Simpson & Davidson v. Admiral Graves and others, decided by the court of appeals of South Carolina, then consisting of three judges, the opinion being delivered by Mr. Justice Nott; Riley's Ch. Appeal Cases, 232. The settlement in that case embraced a landed estate estimated at $400,000, and 300 slaves of the value of $150,000, including not only the entire property of the husband, but that of his father also, amounting in the aggregate to more than a half million of dollars—an estate at that time, as was said by the learned judge, equalled by very few in this country. All this was settled upon the intended wife, who had besides an ample fortune of her own. Mr. Justice Nott might well say: "Even though marriage may be a part of the consideration, fraud may be mingled with it, and that may as well be inferred from internal evidence as from circumstances aliunde." It will be conceded there may be settlements so manifestly unreasonable, so excessive as to shock the moral sense, and carry on their face conclusive

evidence of fraud in all the parties concerned. The South Carolina case is one of them, and no one will find fault with Mr. Justice Nott's decision in that particular. But when he lays down, as a rule of law, "that when the settlement includes the whole of the settler's property, that fact shall be considered of itself as conclusive evidence of fraud upon creditors," he affirms what is not supported by authority and is unsound in principle. I can imagine a case in which such a settlement would not necessarily be fraudulently designed by
639 the husband. But *conceding that it is so, does it follow that the intended wife is a particeps delicti? Suppose she knows nothing, as is generally the case, of the indebtedness of the man she is about to marry—suppose that the deed, as in the present case, does not show that it includes all the settler's estate, and that she has no reason to suppose it is all—how is her title affected? She is a purchaser for valuable consideration, the very highest in law, and by the express terms of the statute and by the common law, she is protected, unless it appear that she had notice of the fraud of the grantor.

A man possessed of a small patrimony, in contemplation of a marriage with a lady accustomed to the luxuries and refinements of life, may settle his entire estate upon her and the issue of the marriage. This might be very unjust to his creditors, and yet no more than a just and reasonable provision for her, such as she would have the right to expect, and her friends to require. What principle of law, what decision, except that of Mr. Justice Nott, pronounces such a settlement per se fraudulent? In some cases the half of a man's fortune would be an extravagant settlement; in others the whole would be very inadequate. It is very difficult to perceive any difference in principle between a settlement of one-half or two-thirds of a man's fortune on his intended wife, to the injury of his creditors, and the settlement of the whole to the injury of his creditors only to a greater extent. It is simply a question of degree. And yet the books are full of cases in which settlements made by men in insolvent circumstances have been sustained. These considerations will serve to show that no such test can be relied on as that suggested by Mr. Justice Nott. Bishop, in his work on the Laws of Married Women, vol. 1, sec. 784, thus states the conclusion to which he has arrived upon a survey of all the authorities: "If a man, wishing to
640 enter *into matrimony with a particular woman, should, being insolvent, convey to her all his property, which was accepted by her with full knowledge of the facts, the mutual intent being not to defraud creditors as a primary object, but to contract marriage, each on such terms as could reasonably be procured from the other, the case would not be within either of the statutes of Elizabeth; neither would it be in violation of any principle of the common law, because the common law, though it abhors every sort of cheating, loves matrimony. Its principles all point to it whenever the circumstances of the case expose them to this attractive force." These observations are quoted, not because they are approved in all their latitude, but because they show the conclusion of a distinguished author upon a thorough examination of the cases. See also Croft v. Townsend's adm'r, 3 Des. R. 223.

There is another difficulty attending this doctrine laid down in the South Carolina case. Suppose we say the settlement is fraudulent whenever it includes the whole of the husband's estate, and yet we are satisfied the wife is innocent of all fraud, what is to be done with the settlement? Is it to be set aside in toto? Is she to be deprived of all benefit under the settlement because the husband has deceived her in attempting to defraud his creditors? What is to become of the provision for children of the marriage? The counsel, I think, will agree that the idea of annulling the settlement in toto in such case could not be entertained. If not, how is it to be reformed? Adverting for a moment to this status (this relation of marriage), upon what basis is the calculation to be made by which the compensation is to be adjusted?

I am not now speaking of the present case, but of a principle or general rule to be adopted by the courts under which an account may be taken to determine in dollars and cents the value of the wife, what
641 ought to *maintain her comfortably, and support and educate her unborn children. These difficulties are immeasurably increased when it is considered that the court is interfering with the vested rights of a purchaser for valuable consideration, and in depriving her of the property for which she has paid the highest consideration; it can never restore her to her former position. No case has been found in which a court has attempted to interfere with a settlement in that way. A little reflection will satisfy any one that when we attempt to establish new tests, when we seek to interfere with these settlements upon any other grounds than those mentioned in the statute, for fraud, both parties concurring, we involve ourselves in endless embarrassments. If injustice is done creditors by the law, as it is now universally recognized, the remedy is in the legislature and not in the courts. The state of North Carolina has a statute authorizing the reformation of marriage settlement upon certain principles there prescribed, which might be adopted in Virginia and other states. Until the legislature interferes, however much a man may be indebted, an ante-nuptial settlement made by him is good against his creditors, unless it appear on the face of the deed, or by evidence aliunde, that the intended wife was recognizant of the fraud. The extravagance of the provision might of itself be sufficient to put her upon inquiry and convict her of notice, because that which is conveyed is utterly disproportionate to the circum-

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stances, conditions and all the surroundings of the parties. In the case before us the deed of settlement does not profess to include all the property of Mr. Wickham. It is very true, as already stated, the property left out is heavily encumbered, but that circumstance could not affect Mrs. Wickham unless it appeared she was aware of the incumbrances. The deed embraces bonds to the nominal amount of $58,000 or $60,000, but it is conceded they will
642 *not realize more than one-third of that amount. The settlement may be grossly unjust to creditors, but it is certainly not so excessive as to warrant the courts in setting it aside on that ground, or on the ground of mutual fraud.

The counsel for the appellants have argued further, that the principles governing an ante-nuptial contract have no just application to a case like the present, where the parties, long previous to the marriage, lived in illicit intercourse. I think the case of Coutts v. Greenhow is a complete answer to this objection. In that case it appeared that the husband made a marriage settlement of his whole estate, except what was covered by a mortgage, upon a woman with whom he had long lived in a state of fornication, and by whom he had several children. The conveyance was to the use of himself and the intended wife, and for their children. Upon a bill by the creditors of the husband, impeaching the settlement for fraud, Chancellor Taylor was of opinion that marriage is a good consideration where there is any personal inducement to it; but where there is not, it should not of itself be deemed a good consideration against creditors, and more especially where the parties lived in open violation of the laws, and to the evil example of the whole community. He declared it would be monstrous to say that Coutts, who was really an old man, far beyond the prime of his life, after so many years spent in a state of fornication, should be allowed to avoid the payment of his debts by entering into a marriage contract with her. See Greenhow v. Coutts, 4 Hen. & Mun. 485. It will be seen that the grounds upon which the chancellor relied in that case are substantially, almost identically, the same as counsel urge in this case. Upon an appeal to this court the decision was unanimously reversed, as reported in 2 Munf. 363.

Judge Cabell said the chancellor, in declaring the settlement void, must have gone on the idea that the cohabitation
643 *of the parties before marriage will take the case out of the general rule. This is the first time, so far as I have observed, that this exception has been contended for, either in this country or in England. Supported neither by reason nor authority, it cannot be admitted. I shall not be the apologist of the conduct of the parties. They have, however, legitimated the innocent offspring of their criminal intercourse, and have made to society all the atonement in their power, and I am unable to perceive any reason in justification of marriage settlements generally, which does not apply in this particular case. If the consideration of the marriage be valid as to the parties to the marriage, it will undoubtedly be so as to the issue of the marriage, for there has never been any attempt to distinguish between them. Nor does our act of assembly make any difference between children born, as in this case, before the marriage, but recognized by the father, and those born after it.

Judge Coalter said: "They (the parents) were bound, as well by the ties of affection as those of morality and justice, not only to provide a comfortable support for the innocent offspring, but to raise them to that state in society in which the laws of the country, upon the marriage of the parents, places them, and, in this point of view, he could not perceive the difference between the situation of these children and a child in England who is born a week after marriage. The child is not, in rerum natura, a child of the marriage; yet he is so by the laws of the country, and would be a purchaser for a valuable consideration under a marriage settlement."

Judge Brooke said: "The children, though base born, are legitimated by the marriage of the parents, and the recognition of them as his own by the husband both before and after the marriage. Upon this view of the subject, I cannot perceive the accuracy
644 of the reasoning *which would put them in a worse situation than those born after the marriage. It cannot be founded on anything in the moral conditions of the parties to invalidate the contract. It has never been contended, that I know of, that a base begotten child could not be provided for by marriage settlement to the exclusion of the creditors by the principles of the common law. No case to that effect has been produced."

Judge Fleming took the same view, and Judge Roane, who heard the argument, but was not present when the opinions were delivered, concurred with the other judges, as is shown by his approval of the decree entered in this court.

I have thus given extracts from the opinions of the judges, because they directly apply to one of the main grounds involved in the present case. If that case be an authority, it is conclusive of this. The counsel for the appellants have felt this difficulty throughout. They have, therefore, not hesitated to attack Coutts and Greenhow as not being a binding authority. One of the counsel maintains that the opinions just quoted are mere obiter dicta, because the deed of settlement was unassailable even as a voluntary deed. It is certainly a novel idea that the decision of an appellate court, based upon a clear, distinct ground, and sustained by elaborate reasoning, is to be treated as an obiter dictum, because, in the opinion of counsel, the decision might have been placed upon some other ground more satisfactory. The

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learned judges who sat in that case saw, or thought they saw, a well-established principle or rule of law controlling their decision, and they did not hesitate to apply that principle as absolutely decisive without hunting for more questionable grounds of adjudication. Whether the deed of settlement would have been held valid as a voluntary deed, was a question barely considered.

645 The creditor having *lost, as was claimed, the security provided for the payment of his debt by his own negligence, some of the judges were inclined to think that upon this ground he might be precluded from asserting any claims to the property embraced in the settlement; but this idea was regarded as wholly immaterial, and a decree was entered declaring "that the deed of settlement, having been bona fide made on valuable consideration, is valid and ought to be sustained, and no part of the estate therein comprised is subject to the debts of the said Reuben Coutts, the grantee."

Much stress is laid upon the fact that the grantor in that case owed but one debt, which was provided for, and all idea of fraud on his part was disproved by the facts in the record. It is sufficient to say that in principle it makes but little difference whether there is one or a dozen debts. The one has equal claims to payment out of the debtor's property as the dozen. The fact that there is but one is a mere circumstance to rebut the presumption of fraud. If in that case the bona fides of the husband was sufficient to protect a settlement of the entire estate, why is it that the bona fides of the intended wife will not have the same effect in the present case? If the grantee acts with good faith, it is precisely the same as if both parties were actuated by honest motives. In the language of Judge Cabell, in Coutts v. Greenhow, the wife and children were purchasers for a valuable consideration, and as such will hold the property settled on them, even against all creditors.

The counsel for the appellant insists further, that the settlement to be valid against creditors must have been an inducement to the marriage, which cannot be predicated of the settlement in this case, as it is certain that the woman was not induced to marry Mr. Wickham by any consideration of that sort. I might ask the learned

646 *counsel if he entertains the opinion that an ante-nuptial settlement can be set aside in any case because the court may think the marriage would have taken place without a settlement. In this country nine-tenths of the settlements are originated after the engagement is formed, and it would be the grossest injustice to say that the parties are induced to assume the relation of husband and wife by considerations of that sort. I know that writers sometimes speak of the settlement as the inducement to the marriage, and the marriage as the inducement to the settlement. This, I take it, is in contradistinction to a settlement after the marriage, or a settlement before marriage, made not in contemplation of marriage, but by way of advancement in consideration of natural love and affection. This distinction is adverted to and explained by Judge Baldwin in Welles v. Cole, 6 Gratt. 645. When the settlement is made in contemplation of marriage, the law presumes it was an inducement to it. For example: If a father makes such a settlement upon his daughter, even before any contract of marriage, if the settlement was known to third persons, it will be presumed it was a probable inducement to the marriage.

In Brown v. Carter, 5 Ves. R. 462, 878, Lord Alvanley said: "It does not appear here that it (the settlement) was regarded as the principal inducement, but it might have been so. The lady had a right, the children have a right, to have it considered that he had the estate which he appeared to have, and I should do gross injustice in taking away that benefit; therefore, I am of opinion, that although it does not appear that the friends of the wife did speculate upon this and take it into consideration, it must be presumed they did act upon it." In Sterry v. Arden, 1 John. Ch. R. 260, the cases are considered by Chancellor Kent, and the doctrine laid down by Lord Alvanley fully approved. In Smith v. Allen, 5

647 Allen R. *454, the supreme court of Massachusetts lays down the rule in the most explicit manner, that although nothing is said by the parties, the law will presume that the property conveyed did constitute some part of the consideration which induced the party who received it, and who was to be benefited by it, to enter into that relation.

In Greenhow v. Coutts, 4 Hen. & Mun. 485, Chancellor Taylor based his decision mainly "upon the ground that the parties having lived in a state of illicit intercourse for years, it could not be presumed that the settlement was an inducement to the marriage." That decision, as already stated, was reversed unanimously by this court, although there, as here, it was highly probable that the woman would have entered into the marriage on any terms the husband might have dictated. The judges attached so little importance to the point, they scarcely adverted to it. They placed their decision on the broad ground that marriage is a valuable consideration, and the wife and children purchasers of the property embraced in the settlement, and this rule is not affected by the fact of the cohabitation of the parties, and the birth of the children before the marriage. The counsel for the appellants have cited no decision, not even the dictum of a judge or commentator, except Chancellor Taylor, repudiating the doctrine of Coutts v. Greenhow, although the same question has been the subject of investigation in other cases. Columbine v. Penhall, 1 Sm. and Giff. 228; Blumer v. Hunter, 8 Equity Cases, Law R. 46; 2 Minor's Institutes, p. 708; 2 Lomax's Digest.

The learned counsel has not hesitated, however, to denounce a policy, as he terms

it, which favors the marriage of persons who have for years lived in open violation of law, and whose children, already grown, have their characters and principles formed by association with the degraded and infamous. To encourage such a marriage
648 *is to encourage adulterous intercourse, and the raising of a vicious and ignorant family to corrupt the morals of the community. It is no part of my duty to vindicate the opinions of the eminent judges who decided Coutts v. Greenhow. I should have thought, however, that marriage under such circumstances was the very best thing for the parties and for the community. The whole theory of our statutes legitimating children born out of wedlock, when recognized by the parent, is founded on that idea. Marriage is, at least, some reparation to the woman suffering under the deepest disgrace, and the innocent and unhappy offspring thrown upon the world as base born—marriage, which raises the woman to the position of a lawful wife, and confers upon the children the status of legitimacy and respectability.

So far as Mrs. Wickham is concerned, there is nothing in this record against her except her unfortunate relation to Mr. Wickham before the marriage. Against the children nothing is said, except that they have not been educated as they ought to have been. Some of them are married and are raising respectable families. If the provision made for them is unjust to creditors, it is one of those wrongs which sometimes result from general rules of law operating with peculiar hardship in particular cases. Speaking for myself alone, I think these rules, though founded in wisdom, are but too often mere agencies for the perpetration of injustice and fraud, and that the whole subject needs the attention of the legislative department.

But we can give no relief, except by an overthrow of principle as deeply imbedded in our system as any in the whole range of American and English jurisprudence.

I regret that this opinion has been so extended, but it could not be otherwise,
649 at least by any effort of mine, *considering the magnitude, delicacy and importance of the question involved.

Upon the whole, I am for affirming the decree of the circuit court.

Christian, Anderson and Burks, J's, concurred in the opinion of Staples, J.

Decree affirmed.

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650 *Lindsey v. Corkery & Milward & als.

January Term, 1878, Richmond.

Absent, MONCURE, P.

1. **Partnership—Bankruptcy.**—When partners as such are declared bankrupt, their property, both partnership and individual, is to be administered under section 36 of the bankrupt act of 1867, in the bankrupt court; and every creditor, whether individual or social, must prosecute his claim in that court.

2. **Same—Same—Partnership Debts.**—Where a partnership is dissolved, and the individual partners are declared bankrupts in different bankrupt courts, in different states, each with his own assignee, and in their schedules make no mention of partnership debts due to them or by them, a creditor of the partnership may proceed in a state court to subject the partnership effects to the payment of the partnership debts.

3. **Same — Same — Same — Preferences.**—In such case, one creditor of a partnership cannot attach the partnership effects so as to obtain a preference over the other partnership creditors. But his bill, though proceeding only for his own debt, may be treated as for the benefit of all the partnership creditors, and an account of the creditor's debts and of the partnership effects may be taken, and the effects distributed among the creditors who establish their debts.

This was a bill in equity in the chancery court of the city of Richmond, filed in June, 1872, by John Lindsey, claiming to be a creditor of the late partnership firm of Corkery & Milward, and seeking to attach a debt due by judgment to said firm by Hill & Maddox. The partnership of Corkery & Milward had been dissolved; Milward had been declared a bankrupt, and had
651 obtained his discharge *in the United States district court for the eastern district of Virginia, and had left the state. Corkery had removed to Louisiana, and had been declared a bankrupt in the United States court held in that state, though it did not appear whether or not he had obtained his discharge.

At the time this bill was filed a suit was pending in the same court, in the name of Corkery & Milward against Hill & Maddox, to subject certain property to the payment of their debt, and certain rents had been subjected to this object. Some of these rents had been received and paid to L. R. Spilman, who was the counsel of said plaintiffs.

The plaintiff made Corkery & Milward, Hill & Maddox, Spilman, and P. A. Davis, the assignee in bankruptcy of Milward, defendants, and asked that the money received by Spilman, and the further rents as collected might be attached and applied to the satisfaction of his debt.

Spilman pleaded, and also answered. In his plea he set out the fact that Corkery had been adjudged a bankrupt in Louisiana, and that Milward had been adjudged a bankrupt in Virginia, and had obtained his discharge, releasing him from all liability for the plaintiff's debt; and that more than two years had elapsed since the plaintiff's cause of action had accrued before the institution of this suit. In his answer, he says that before Corkery left here in 1867, he sold and assigned to Milward his entire interest in the concern of Corkery & Milward, including the debt of Hill & Maddox; and that the assignee in bankruptcy of Milward sold and assigned the same to him (Spil-

The principal case is distinguished in Patton v. Leftwich, 86 Va. 426, and Railroad Co. v. Griffith, 76 Va. 924. See also, Barton's Ch. Pr. (2d Ed.) 665.

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man) for valuable consideration; and that this sale had been approved and confirmed by the United States court. That the money he had received had been received and appropriated under this agree-
652 ment; *and he claimed that the rents still to be received should be applied to his debt; and he denied the right of the plaintiff to interfere with the collection and appropriation of the rents by the defendant.

It appeared that Milward, in making out his schedules in bankruptcy, did not include therein the debt due to Lindsey, nor the debt due to Corkery & Milward by Hill & Maddox. It appeared further, that an order was made in the bankrupt court by which Davis, the assignee, was authorized to sell the choses in action of Milward at private sale; and that he sold and conveyed all the debts and choses in action of Milward to L. R. Spilman, with the right to prosecute the same in the name of the assignee, at Spilman's own costs, and for his own benefit.

In November, 1873, Spilman demurred to the bill for want of equity. And Davis having died, William L. Alderdice, who had been appointed in his place, filed his answer, insisting that whatever interest Milward had in the debt of Hill & Maddox belonged to him as the assignee of Milward. And E. E. Morton, of New Orleans, assignee of Corkery, filed his answer, insisting that whatever interest Corkery had in the debt of Hill & Maddox belonged to him.

The cause came on to be heard on the 6th of November, 1873, when the court made a decree abating the attachment and dismissing the bill; but without prejudice to the assertion of any right, or the prosecution of any remedy or redress which the plaintiff may be entitled to in any bankrupt court of the country. And thereupon Lindsey applied to this court for an appeal; which was allowed.

Crump and John Johns, Jr., for the appellant.

John Hunter and L. R. Spilman, for the appellees.

653 *Burks, J. It is familiar doctrine, that in partnerships each partner has the right to have the partnership effects applied to the discharge of all the partnership debts before any one of the partners, or his personal representatives, or his individual creditors, can claim any right or title thereto. This right of appropriation is of such fixed character that it is usually denominated a lien, and sometimes a quasi lien, or something approaching to a lien. It is an equity between the partners, springing from the nature of the contract of partnership, which inures, however, and becomes available to the partnership creditors under certain circumstances, and especially on the dissolution of the partnership by the bankruptcy of the partners, or any of them. Story on Part. §§ 97, 360, 361; opinion of Allen, J., in Morriss' adm'r *v.* Morriss' adm'r, 4 Gratt. 293, 320, et seq.

It is by virtue of this lien that priority of payment out of the social assets is accorded to the joint creditors in bankruptcy proceedings. It is not, to be sure, a specific lien, as a mortgage, deed of trust, pledge, or the like, but it is nevertheless a clear, distinct, well-defined equitable right, of the nature of a charge and having all the essential qualities of a lien quoad the administration of the social assets. It is neither lost nor destroyed nor impaired by the bankruptcy of the firm, or any of the partners, whether the adjudication be jointly as to all or severally as to each.

But when there has been an adjudication of bankruptcy under the bankrupt act of 1867, the question arises, how and in what forum this lien is to be enforced? When the members of the firm are adjudged bankrupt in conformity to the provisions of the 36th section of the act, there would seem to be no doubt as to the remedy or the forum in which it is to be pursued. The assignee appointed under that section is in-
654 vested *with the legal title to the joint estate of the partners, and also to the separate estate of each partner, and provision is made for proof of the debts against each estate, and the marshalling of the assets. There is but one representative of all the estates, one proceeding to administer them, and that proceeding in the bankruptcy court. Into that court, therefore, must the joint creditor go, prove his debt, and receive his dividends. He can assert his claim in no other forum.

But in the case under consideration, there has been no such proceeding as is contemplated by the 36th section of the act. The proceeding of each partner was wholly voluntary, each several, separate and distinct from that of the other, neither having reference to the partnership, the partnership property, or partnership transactions. Each was commenced at a different time, in a different court, in a different state, and was separately conducted; in each the petitioning partner was individually adjudged bankrupt and an assignee of his estate appointed. In short, the proceedings in the two cases were substantially separate and distinct suits in different jurisdictions. I doubt very much whether there is any warrant in the bankrupt law for such proceedings; or, if they have any validity, I question more the jurisdiction of either of the bankruptcy courts to deal with the social effects and the rights of the social creditors. To give such jurisdiction, it would seem to be necessary that the proceedings should conform to the requirements of the 36th section of the act. We have no decision of the supreme court of the United States construing this section, and the decisions of the district courts, besides being of no authority, serve but to confuse. See Bump on Bankruptcy, 10th ed., et seq.

In Amsimok v. Bean, 22 Wall. U. S. R. 395, the supreme court of the United
655 States held that the assignee *of a partner individually adjudged bankrupt, could not recover the amount of a

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claim which, when recovered, would belong to the firm, and that such recovery could only be had by the partnership, or "by an assignee duly appointed to administer the joint estate.

This decision would seem to imply, that to administer the joint estate of a bankrupt firm in bankruptcy proceedings there must be an assignee of such estate, and I find no provision in the bankrupt law for the appointment of such assignee, except under the 36th section of the act. But if there can be under our bankrupt act a valid separate adjudication of bankruptcy of each member of a firm, and that adjudication draws into the bankruptcy court the administration of the social assets, such administration is only collateral and ancillary to the principal administration. It is not, under all circumstances, a necessity, and may be dispensed with at the option of the parties in interest. As before stated, the partnership creditors, by virtue of the equity of the partners inter se, have a prior lien on the partnership property for the payment of their debts, and this priority is respected alike in bankruptcy as in courts of equity, and a like priority, upon the equitable principle of marshalling, is in bankruptcy accorded to the separate creditors in the administration of the bankrupt's separate estate; the surplus, if any, of either fund after administration being carried to the account of the other. The most that the several assignees get, in the supposed case, under the assignments in bankruptcy, is the separate estate of the bankrupt and his individual interest in the partnership property, that interest being his distributive share in the surplus remaining after the payment of the partnership debts.

It is this estate and interest which each assignee has to administer, and it is the principal administration. The *joint estate need be administered by the assignees only when it is supposed there may be something left for division and distribution among the assignees after the joint debts are paid. If it is certain or probable that there will be no surplus, and the joint creditors waive all claim upon the separate estates in case of deficiency of the joint estate to pay the joint debts, the assignees and separate creditors may forego any administration of the joint estate in the bankruptcy court, and leave it to the joint creditors, to be administered elsewhere.

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It appears by the record that the appellee, Corkery, was adjudged a bankrupt by the district court of the United States for the district of Louisiana, on the 1st day of June, 1868. This is admitted in the plea of the appellee, Spilman. His petition was doubtless filed on the 30th day of May, 1868, the day which the deed of assignment on its face relates. The deed bears date 16th day of June, 1868. The appellee, Milward, (the other partner) was adjudged bankrupt on the 25th day of September, 1868, by the district court of the United States for the district of Virginia. The appellant's bill was filed on the 27th day of June, 1872, and the decree appealed from pronounced on the 6th day of November, 1873.

The record contains a very meagre sketch of the proceedings in either of the bankruptcy suits. No copies of the bankrupts' petitions, schedules or inventories are filed. The only part of the record furnished in Corkery's case is a copy of the register's deed of assignment to the assignee. In that deed no allusion is made to any interest he has as partner in the firm of Corkery & Milward. It appears, however, from the deed, that he was adjudged bankrupt individually and as a member of the firm of Hurd & Corkery. Although copies of the petition and schedules are not made a part of the record, looking to the deed and its recitals, it is fair to infer that no surrender *was made of his interest in the partnership effects of Corkery & Milward. In Milward's case it is admitted by his assignee, in his answer to the appellant's bill, that "said Milward, in making out his schedules in bankruptcy, did not include therein the debt due the complainant, nor the debt due to the said firm by Hill & Maddox, nor take any notice in said schedules and in the proceedings in bankruptcy in his case of any of the transactions of said firm of Corkery & Milward."

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The only estate of Milward administered by his assignee, so far as the record discloses, is some "choses in action of said bankrupt" sold by the assignee "at private sale" under the order of the register in bankruptcy. According to the certificate of the clerk of the district court, the only proof of debt filed in the case was that of Belcher & Ellis, of Philadelphia. Whether this was a partnership or individual debt, and what its amount, does not appear.

So that is would seem, that since the commencement of these bankruptcy proceedings, more than four years before the filing of the appellant's bill in this cause, and five years before the date of the decree appealed from, no notice has been taken in either of the bankruptcy cases of the partnership effects of the bankrupts, and no proceeding had, or attempted, either by the bankrupts, the assignees, or the creditors, joint or separate, to have these effects administered in the bankruptcy court. Milward received his discharge in December, 1868, and it is supposed that the proceedings in his case are at end, if such cases ever end, and the presumption would be that Corkery's case, commenced several months before Milward's had also terminated; but the appellee, Spilman, in his plea, avers "that proceedings are still pending and undetermined in said district court of the United States *for the district of Louisiana, upon the petition of said William F. Corkery."

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It is just such delays as this that drew from Mr. Justice Miller of the supreme court the following observations: "It is obviously

one of the purposes of the bankrupt law, that there should be a speedy disposition of the bankrupt's assets. This is only second in importance to securing equality of distribution. The act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, without regard to usual modes of trial attended by some necessary delay. Appeals in some instances must be taken within ten days, and provisions are made to facilitate sales of property, compromises of doubtful claims, and generally for the early discharge of the bankrupt and the speedy settlement of his estate. It is a wise policy, and if those who administer the law could be induced to act upon its spirit, would do much to make the statute more acceptable than it is. But instead of this, the inferior courts are filled with suits by or against assignees, each of whom, as soon as appointed, retains an attorney, if property enough comes to his hands to pay one, and then instead of speedy sales, reasonable compromises, and efforts to adjust differences, the estate is wasted in profitless litigation and the fees of the officers who execute the law." Bailey v. Glover, 21 Wall. U. S. R. 342, 346, 347.

It must be presumed after this great lapse of time, from the non-action of the parties and other circumstances in this case, that if it ever was the intention that the social assets of the bankrupts should be administered in the bankruptcy court, the intention has long since been abandoned, and the assets relinquished to the social creditors to be administered elsewhere. By this no injustice is done to any one. The creditors are certainly entitled to have such of the joint property as they can find *659 *applied to the payment of their debts. They have not submitted themselves to the jurisdiction of the Federal court by proving their debts in the bankruptcy proceedings, nor has the property been drawn to that jurisdiction. If it has been, the jurisdiction has not been exercised, and must be taken to have been waived or abandoned. A like presumption was acted upon by the court of appeals of Kentucky in a case not so strong as this, of contested jurisdiction under the bankrupt law. Bank of Louisville v. Bank of Newark, 14 American Law Reg. N. S. 281, S. C.; 10 Bush, 365. Moreover, the assignees have made no objection, if any they had or could successfully make, to the jurisdiction of the chancery court, but on the contrary they have severally submitted to the jurisdiction by filing answers to the appellant's bill and praying decrees in their own behalf. This concludes the question of juridiction as to them. Doe v. Childress, 21 Wall. U. S. R. 643; Scott v. Kelly, 22 Wall. U. S. R. 57; Mays v. Fritton, 20 Wall. U. S. R. 414. The rule laid down by Waite, C. J., as to submitting to the jurisdiction of the bankruptcy court, applies, mutatis mutandis, to the state court. Wiswall & al. v. Campbell & al., 93 U. S. R. 3 Otto, 347, 351.

If the decree of the chancellor is affirmed by this court, the appellant and other joint creditors of the firm will be forced to prosecute their remedies in the bankruptcy court, whether in Virginia or in Louisiana it would be preplexing to determine, or else surrender their just claims. It is doubtful whether that court would or could now take jurisdiction. I think the chancery court of the city of Richmond has jurisdiction to give relief under the appellant's bill, and erred in dismissing it.

In the view just taken, it becomes unnecessary in this case to determine whether the rule under the English bankrupt system, ably discussed and favorably considered * by Chancellor Kent in Murray v. Murray, 5 John. Ch. 60, of administering social assets under a separate commission of bankruptcy against one or more members of a firm, applies to proceedings under the bankrupt act of 1867. Certainly the rule is one of great convenience, and has much in it to commend it to favorable consideration. But if it is operative under our system, I do not perceive the necessity of the regulation prescribed by the 36th section of the act. *660

The reversal of the chancellor's decree makes it necessary to consider what decree should be rendered in its stead. It results from the principles already declared and views expressed, that all the social creditors of Corkery & Milward have an equal right to participate in the administration and application of the social assets. By the bankruptcy of the several partners the social effects stand appropriated to all the social creditors alike. If the administration had taken place in the bankruptcy court, the distribution would have been pari passu. The like distribution must be made in the equity forum, where the prevailing rule is that equality is equity. It follows that the appellant could acquire no prior or superior lien, by attachment or otherwise. His bill, although not in form a general creditor's bill, inures to the benefit of all the social creditors who may choose to come in under an order of account on the usual terms and exhibit and establish their respective claims. The attachment, therefore, should be abated. The abatement can do no harm, as the fund attached, which is the bone of contention, is already in the custody of the court, except such part as the appellee, Spilman, holds. He is amenable to the jurisdiction of the court, and if liable he can at any time be required to pay into court under its order.

The only effects mentioned in the appellant's bill as partnership effects, and sought to be subjected as such, *consist of a judgment recovered in the names of Corkery & Milward against Hill, & Maddox in course of collection in the chancery suit of Corkery & Milward *v.* Hill, Maddox & others, a portion of which has already been collected and is in the hands of the appellee, Spilman. The whole amount of the judgment, including the portion collected and the portion uncollected, Spilman claims as belonging to him. In *661

his answer to the appellant's bill, he asserts his title as follows:

"Further answering, this defendant says, that before the said William F. Corkery left here, in 1867, for New Orleans, he sold, transferred and assigned to James Milward, Jr., his entire interest in the concern of Corkery & Milward, including the debt due them by the said T. Clay Maddox and Martha Hill in the bill mentioned; that the former assignee of said James Milward sold, transferred and assigned the same to this defendant for valuable consideration, and the said district court of the United States for the eastern district of Virginia has approved, ratified and confirmed said sale and assignment, as will appear from a copy of the order of confirmation made by said court, filed herewith, and prayed to be taken as a part of this answer. As to the said sum of $510, alleged to have been received by this defendant, it was received and appropriated in accordance with and in execution of said contract of sale and transfer, and this defendant denies the right of said complainant to recover it from him; and as to the remainder of said debt, which is yet uncollected, this defendant denies the right of said complainant to interfere with the collection of the same by him or the appropriation of the same by this defendant in any way he may see fit."

An abstract of the judgment against Hill & Maddox is in the record. The judgment purports to have been recovered in the hustings court of the city of Richmond *on the 6th day of May, 1867, in the names of Corkery & Milward, as partners. The judgment, therefore, was, when recovered, a partnership debt. The answer admits that, and the respondent bases his claim upon the alleged fact, that before the bankruptcy of either partner Corkery had sold, transferred and assigned to Milward his (Corkery's) entire interest in the concern of Corkery & Milward, including this judgment. No evidence whatsoever of such sale, assignment and transfer was furnished, nor was it proved that the judgment was ever actually sold by Davis, the former assignee of Milward's estate, under whom Spilman claims.

As has been seen, the subsequent assignee (Alderdice), in his answer to the appellant's bill, in express terms admits that the judgment (described as a "debt") due by Hill & Maddox, was not included in the schedules filed with Milward's petition in bankruptcy. I presume he spoke from the record. On the 4th day of October, 1869, in the matter of Milward, bankrupt, H. G. Bond, register in bankruptcy, made an order by which, upon the application of Davis, the assignee, and upon the reading and considering the petition therein, as recited, it was "ordered that the assignee aforesaid be and hereby is directed to sell choses in action of said bankrupt by private sale." No copy of the petition referred to is in the record. The "choses in action" to be sold are not specifically enumerated, and it is supposed that the petition was equally as general, and contained no other description of the "choses in action" than that mentioned in the order, or at least that it did not go beyond the "choses in action" described in the schedule, and the judgment was not listed in the schedule as Alderdice states in his answer. Moreover, the order is in the most general terms, "to sell the choses in action of the bankrupt." Under this order Spilman claims to have purchased, and *took an assignment from the assignee. The assignment, like the order, is in general terms—"I hereby assign, sell and convey to Luther R. Spilman all the debts and choses in action of James Milward, Jr., a bankrupt," &c. It purports to be dated "16th day of June, A. D. 1869." This date, I have no doubt, is a mistake, and is probably intended for the 16th day of October, instead of 16th day of June; for the revenue stamps attached to the assignment were cancelled by Mr. Spilman's name written and date added, "October 16th, 1869." I have no doubt the date of the cancellation is the true date of the assignment. The sale seems to have been confirmed by Judge Underwood on the 1st day of July, 1872, four days after the appellant filed his bill in this cause. The sale, I should think, needed some judicial sanction, at least after if not before it was made, for I do not know what warrant under the law the register had to order it.

From this evidence it does not appear that the judgment was ever actually sold by the assignee and purchased by Spilman. It was the "choses in action of the bankrupt" only that were sold, and this judgment was not one of that description. Mr. Spilman may have believed that in buying the "choses in action of the bankrupt" he became entitled to this judgment, but he was mistaken, and the rule of caveat emptor applies to his case.

After the assignment of Milward's choses in action to Spilman by the assignee, the bill in chancery was filed to enforce the judgment of Corkery & Milward against Hill & Maddox. It was agreed at the bar, that this bill was filed on the — day of December, 1869. The bill was filed by Spilman & Blackwell, as attorneys. It is filed in the names of "William F. Corkery and James H. Milward, late partners under the firm and style of Corkery & Milward," and also in the name of J. J. *Wheat, who had a judgment against Hill & Maddox. No notice is taken in the bill, or anywhere in the record of the proceedings in that suit, so far as those proceedings are made to appear, of any title or claim of Mr. Spilman to this judgment, or any part of it. On the contrary, so far as the record discloses, it appears to be the suit of Corkery & Milward, late partners, with Mr. Spilman as their counsel, to enforce the collection of a partnership debt. By one decree it is ordered, "that L. R. Spilman have leave to check for twenty-five dollars, the amount of his fees for filing this bill, the writ and

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the amount paid by him for advertising notice to creditors in the Richmond Enquirer; that Corkery & Milward, or their counsel, L. R. Spilman, have leave to check for $165.06, the remainder of said fund."

By another decree it is ordered that "the receiver pay over to Corkery & Milward, or to their counsel, L. R. Spilman, said sum of $127.50, in part satisfaction of their claim reported by Commissioner Hudnall, and that he continue to pay in like manner to said Corkery & Milward, or to their said counsel, the rents hereafter to be received from time to time as they shall come into his hands, until they are satisfied their said debt and interest in full.

After all this, I do not think that Mr. Spilman can complain, if he shall be held to account to the creditors of Corkery & Milward for the money received by him under these decrees.

His plea to the jurisdiction, if the alleged pendency of proceedings in Corkery's bankruptcy case in Louisiana may be considered such a plea, is not well pleaded, and if it were, it has been sufficiently answered by what has already been said.

His plea of the act of limitations of two years under the bankrupt act, section
665 2, revised statute, section 5057, *has no application to a case like this. The limitation applies only to suits at law or in equity, by or against an assignee, or by or against any person claiming an adverse interest touching the property and rights of property of the bankrupt transferable to or vested in such assignee. The controversy in this case is not a suit between him and the assignees, but a suit between him and the social creditors of the bankrupts; and, moreover, the circumstances of this case clothe him with a trust, against the enforcement of which in a court of equity he cannot be permitted to rely upon the statutory bar.

I think the appellant has established the debt claimed in his bill, and he would now be entitled to a decree for the amount of it, if it had been duly ascertained that there were no other joint debts against the firm of Corkery & Milward outstanding and unpaid. Before any decree, however, should be made subjecting the social assets, there should be an inquiry and account ordered of the assets and of the debts chargeable thereon, including the amount collected by the appellee, Spilman, abating reasonable costs and charges for collection, and upon report made and approved, there should be a ratable distribution of the assets among such of the social creditors as under the order of account shall have exhibited and by proof established their respective demands.

Upon the whole matter, I am of opinion to reverse the decree of the chancellor, and remand the cause for further proceedings to be had therein in conformity to this opinion.

Christian and Anderson, J's, concurred in the opinion of Burks, J.

Staples, J., concurred in the main in the opinion of Burks, J. He thought, how-
666 ever, that it was premature *to express any opinion as to the lien of the attachment, or in respect to the title of Spilman. These questions should be left open for adjudication in the chancery court.

Spilman applied to the court for a rehearing of the decree.

Burks, J., delivered the opinion of the court.

We have considered the motion of the appellee, L. R. Spilman, for a rehearing of the decree entered by this court at the former hearing of this cause, and are of opinion that the said decree should be reheard as to the part thereof relating to the claim of said Spilman to the judgment of Corkery & Milward against Hill & Maddox in the appellant's bill mentioned. We have been favored with notes of counsel on both sides on the motion to rehear, and we deem further argument of counsel unnecessary. As the chancery court, at the hearing, seems not to have passed upon any of the questions in the cause, except the question of jurisdiction, and as from the copies of records and other papers filed with the petition for rehearing, it would seem to be premature for this court in the present condition of the cause to pass finally upon the rights of said Spilman, we have concluded to modify the decree so far as it relates to his claim. But we adhere to the opinion expressed at the former hearing as to the jurisdiction of the chancery court.

The modification will be best effected by setting aside the decree, and in lieu thereof entering another nunc pro tunc, which will be done, and the cause remanded for further proceedings in order to final decree between the parties in conformity with the principles therein declared.

667 *The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the motion of the appellee, L. R. Spilman, for a rehearing of the decree entered by this court in this cause on the 11th day of January, 1878, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said decree should be reheard as to such part thereof and such part only as relates to the claim of said Spilman to the judgment of Corkery & Milward against Hill & Maddox; and the court proceeding now to rehear the same, for the reasons stated in writing and filed as aforesaid, it is decreed and ordered that the said decree be set aside, and in lieu thereof that the following decree be entered nunc pro tunc: "This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion for reasons stated in writing and filed with record, that the partnership property and effects, including the choses in action of the late firm of the appellees, Corkery & Milward, are liable for the pay-

ment pari passu of the partnership debts and liabilities of the said firm, and that no creditor of said firm is entitled to priority of payment out of said property and effects, or could acquire the right to such priority by attachment or otherwise.

The court is further of opinion, that the chancery court of the city of Richmond has jurisdiction of the subject matter of the appellant's bill, and that while the said decree of the chancery court, in so far as it orders that the attachment issued in this cause be abated, is not erroneous; yet that so much of said decree as adjudges, orders and decrees that the bill of the plaintiff (the appellant here) be dismissed, and that
668 the plaintiff (the *appellant here) pay to the defendants (the appellees here) their cost in this suit incurred and expended, is erroneous. Instead of dismissing the appellant's bill at the hearing of the cause, the said chancery court should have ordered an account of the partnership effects and assets of the firm of Corkery & Milward and of the debts chargeable therein, and should have directed an inquiry to ascertain whether the judgment of said firm against Hill & Maddox in the appellant's bill mentioned is the individual property of said Spilman, or a part of the assets of said firm of Corkery & Milward; and upon report made and approved, should have proceeded to decree payment ratably out of said assets, if any, their respective debts to such partnership creditors of said firm, including the appellant, as under the order of account had exhibited and proved their respective demands. It is therefore decreed and ordered, that so much of the said decree of the chancery court of the city of Richmond as is hereinbefore declared to be erroneous be reversed and annullled, and the residue thereof affirmed; and that the appellee, L. R. Spilman, pay to the appellants, as the party substantially prevailing here, his costs by him expended in the prosecution of the appeal aforesaid here. And this cause is remanded to the said chancery court of the city of Richmond for further proceedings to be had therein in conformity to this decree and the opinion and principles herein expressed and declared; which is ordered to be certified to the said chancery court.

Decree reversed.

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669 *Thornton v. Fairfax & als.

January Term, 1878, Richmond.

Absent, MONCURE, P.

In a suit for the sale of land to satisfy liens upon it, there was an order for an account of the liens and their priorities, and in 1860 the account was returned arranging the debts in twenty-four classes, of which the 2d, 3d and 13th were debts reported to be due to S. In 1866, the report was confirmed, and there was a decree for the sale of the land, one-tenth cash and the balance at one and two years. The sale was made to J and confirmed, and J directed to pay the money to the receiver. In 1870, T filed his petition in the cause, claiming that the debts mentioned in said 2d, 3d and 13th classes were his, acquired in 1864, and asking that the receiver might be required to report how much of the purchase money he had received, and what he had done with it; and if it had not been paid, for a resale of the land. The case was referred to the commissioner, and J appeared before him, claiming that said debts were his, and contesting the claim of T. S did not claim them—HELD:

1. **Receivers—Who May Require a Report.**—That it was competent for T, though not a party to the suit, but who had acquired subsequently the liens of one who was a party, by petition or motion to require a report from the receiver showing the amount of the purchase money in his hands, and to have it applied to the satisfaction of the liens according to their priorities, and to direct a resale of the land for the balance of the purchase money due, pursuant to the decree of sale.
2. **Same—Same—Procedure.**—It was not necessary that he should have proceeded by bill for that purpose, or to have made the purchaser a party defendant to his petition, or to have required him to answer.

670 *3. **Supplemental Bills.**—If S had disputed the claim of T, then it would have been proper for T to have asserted his claim by supplemental bill, or by an original bill in the nature of a supplemental bill.

4. **Resales—Notice to Purchaser.***—Before there could be a decree for a resale of the property it was proper and necessary that the purchaser should have notice of the proceeding. The approved practice has been to proceed by the service of a rule upon the purchaser, to show cause why the lands should not be resold.
5. **Same—Same.**—Though no rule was served on the purchaser in this case, he had notice of the proceeding, and came forward to show cause in his own chosen way. There was no need, therefore, for a rule.
6. **Same—Rights of Purchaser.**—The purchaser might have moved the court for leave to answer the petition of T; or he might have filed a supplemental bill, or an original bill in the nature of a supplemental bill, and put the matters in issue on which he relied.

In the year 1860, Reginald Fairfax filed his bill in equity in the circuit court of Alexandria county, to subject to sale for the balance of the purchase money a tract of land which he had sold in 1852 to Benjamin Thornton, then of the state of Virginia, but at the time of filing the bill living in England. The whole price contracted to be paid for the land was $43,315, a part of which was paid in cash, and for the sum

*__Judicial Sales—Rule against Purchaser.__—In Robertson v. Smith, 94 Va. 254, the principal case is cited for the proposition that where a purchaser or bidder at a judicial sale fails to complete his purchase, or to comply with the terms of sale, he may be proceeded against by rule, and compelled to do so. See also, Clarkson v. Read, 15 Gratt. 288; Jones v. Tatum, 19 Gratt. 720; McClintic v. Wise, 25 Gratt. 448; Long v. Weller, 29 Gratt. 347; Williams v. Blakey, 76 Va. 254; Hickson v. Rucker, 77 Va. 135; Barton's Ch. Pr. (2d Ed.) 223, 1198.

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of $36,315 he gave his bonds to be paid in eight annual instalments, all secured by a deed of trust on the land. The bill stated that Thornton had given a number of deeds of trust on the land, among them two to secure debts to Sweeney, Rittenhouse & Co., and Sweeney, Rittenhouse, Fant & Co., of Washington, and one to secure a debt due the Bank of the Old Dominion; and that judgments had been recovered against him to a large amount. He made the trust creditors above named, the trustees, as well as Benjamin Thornton, defendants; and
671 prayed *that an account of the debts and their priorities, constituting liens on the land, might be taken, that the land might be sold under the direction of the court, and his debt paid.

In June, 1860, the court made a decree in the cause, directing a commissioner to take an account of the debts constituting liens upon the land and their priorities; and in August of that year, Commissioner Moore returned his report. The debts were divided into twenty-four classes, and amounted, principal and interest, up to the time of the report, to $124,770.21. The first class was two of the bonds due to Fairfax, of principal $9,078.75, and interest $1,867.19. The second class was one other bond given to Fairfax—of principal $4,539.37, interest $933.59—which, having been assigned to Sweeny, Rittenhouse, Fant & Co., was postponed by agreement to the other two bonds. The third class was of three debts due the Bank of the Old Dominion, the principal of which amounted to $9,232.03, and the interest to $1,243.93. The thirteenth class was a debt due to Sweeny, Rittenhouse & Co. by judgment—of principal $20,000, and of interest $2,656.66. The debts named in the second, third and thirteenth classes are the only subject of controversy in this case.

The cause came on to be heard in June, 1866, when Fairfax having died, the cause was revived in the name of his executor, an exception which had been taken to the report of Commissioner Moore was overruled, and the report confirmed, and three commissioners named (one of them William H. Dulaney) were appointed to sell the land in the bill and proceedings mentioned, upon the terms of one-tenth of the purchase money in cash, and for the residue three bonds, payable, with interest from the day of sale, in one, two and three years,
672 the *title to be retained until the deferred instalments were fully paid.

At the November term of the court, the report of the commissioners of the sale of the land to John Thornton for $47,474.40, and that he had complied with the terms of the sale, was confirmed, and the purchaser was directed to pay over to the receiver of the court the amount of the deferred payments as they respectively came due, subject to the order of the court. And the commissioner was directed to make a further report of liens upon the land.

In June, 1870, Joseph D. Thorp, of Leeds, in England, filed his peition in the cause. After stating the proceedings in the cause, he said, that since the decree of November, 1866, no order had been made in the premises and no report made by the receiver. He referred to the debts stated in Nos. 2, 3 and 13 of the commissioner's report, and claimed that he was the owner and assignee of said debts with their liens, and had been since the 22d of February, 1864; that they had not been paid; that the amount of the purchase money of the land, viz: $47,474.70, if applied to the payment of the debts in the order of their several priorities as established, as sufficient to pay, besides others having priority, the liens aforesaid numbered 2 and 3, secured by deed of trust, and a greater portion of the judgment lien numbered 13.

The petitioner further shows that the bonds for the purchase money had long since become due; that the receiver ought to have in his hands, if the said bonds be paid, the sum of $42,727.23, besides the accrued interest on said bonds, or a part thereof sufficient to pay the said liens numbered 2 and 3, as well as a part of said lien numbered 13; that the said money ought to be applied to the discharge of said liens in the order of their several priorities. He is informed that Orlando W. Hunt was
673 *and is the receiver of the court, and as such is entitled to the moneys arising from said bonds as they fell due; and that if the money has not been paid to the receiver by the purchaser, the said land ought to be resold for the benefit of the petitioner and other claimants, whose claims have not been paid. He therefore prays that Hunt, the receiver, may forthwith report what money he has in his hands arising from the payment of said bonds, when the same was paid, and whether or not he has invested the said money, and if invested, how, and what profits have accrued thereon. And he prays that what moneys the receiver may report to be in his hands may be applied to the discharge of the liens in the established order of priority; that if the said purchaser has not paid to the said receiver the said deferred payments in full, the land in the proceedings mentioned may be sold. And as William H. Dulaney and B. H. Shackleford, two of the former commissioners, were dead, that other commissioners might be appointed to make the sale.

At the same term of the court a decree was made referring the cause to the commissioner for an account, but as the decree is not in the record it cannot be stated more specifically. The commissioner made his report in May, 1872, and he returned with it a mass of evidence, consisting of depositions, interrogatories answered, and documents. From these, as well as the report, it appeared that Joseph Thornton claimed to be the owner of the debts named in Nos. 2, 3 and 13 of the commissioner's first report; and these were apparently the only subjects of contest before the commissioner. Both Thorp and Joseph Thornton examined a number of witnesses, and Thornton filed interrogatories to Thorp, which Thorp answered. From this evidence it appeared

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that these claims had been transferred, with the securities attached to them, to Thornton; but it appeared further that Joseph
674 *Thornton had drawn two bills of exchange on England: one for £1,406.7.1 sterling—$7,031.77; and the other for £4,519.9.6 sterling—$22,589.04; and that he had sent to his brother, Benjamin Thornton, the evidences of debt with the liens attached, with authority to raise the money for the payment of the bills upon the security of these debts and liens, and that Benjamin Thornton had borrowed the money from Thorp, transferring the said debts and liens to him, and with the money had paid the bills. Two objections were made to this arrangement by Joseph Thornton. The one, that Benjamin Thornton had agreed that any surplus over-paying Thorp for the money borrowed should be held as a security for a liability of Benjamin Thornton to Thorp on account of a contract in relation to some timber shipped from America to France. This, Joseph Thornton refused to ratify. The other objection was on the ground of usury. It appears that Thorp was to receive a large compensation for the loan of the money, but there are no usury laws in England.

The commissioner reported in favor of the claim to Thorp to the said debts, and that the purchase money of the land was not sufficient to discharge lien No. 13 by about $14,000.

The cause was transferred to the circuit court of the city of Alexandria, and at the November term, 1872, the account of the commissioner was recommitted to Commissioner Moore with instructions to ascertain what amount Joseph Thornton had paid on his purchase of the land, specifying the manner in which he had paid the same, and what amount was paid in satisfaction of liens to which the purchase money was applicable, so as to show the exact balance due on said purchase and unpaid, including interest as of the 1st of January, 1873; and on the 19th of April, 1873, the com-
675 missioner made his *report, setting out the payments made, and to whom, and showing that all the liens prior to No. 13, except No. 2 and 3, had been discharged, and that there was still purchase money unpaid—of principal, $34,290.24, and interest to the 1st of January, 1873, $6,686.59—$40, 976.83.

The commissioner had made a previous report in May, 1872, in which he stated that Dulaney, as commissioner, and Joseph Thornton and wife had by deed dated the 17th of August, 1869, conveyed the land in the bill and proceedings mentioned to William H. Davis; and that Davis, in December, 1870, had conveyed it to Charles E. Rittenhouse.

The cause came on to be heard on the 22d of November, 1873, when there being no exceptions to the commissioner's reports of May 6th, 1872, and April 19th, 1873, they were confirmed; and it appearing that Joseph Thornton was indebted to Thorp for moneys lent and advanced, in the sum of $29,629.81, principal money, with interest on $7,031.77, part thereof, from March 24th, 1864, and upon $22,589.04, the residue thereof, from the 22d of February, 1864, and that said Thorp was the holder by valid assignment from Joseph Thornton, of the several liens upon the real estate in the bill and proceedings mentioned, which refer to the liens numbered 2, 3 and 13, and that they were still unpaid. And it further appearing that Joseph Thornton was still indebted on account of his purchase of the land in the sum of $34,290.24, with interest from the 1st of October, 1869, and that said land was responsible for the payment thereof, it was decreed that unless the said unpaid balance of purchase money was paid within sixty days from the rising of the court, the said land should be sold at public auction by the commissioners named; and if the sale became necessary, that the commis-
676 sioners should, out of *the purchase money, pay to Thorp, or his attorney, the sum of $29,620.81, with interest; and the residue of the money hold subject to the future order of the court. And commissioners named were appointed to sell the land on terms stated in the decree. Joseph Thornton thereupon applied to this court for an appeal; which was allowed.

C. W. Wattles, for the appellant.

John D. McPherson, G. F. Appleby and F. L. Smith, Jr., for the appellee.

Anderson, J., delivered the opinion of the court.

Joseph Dickinson Thorp, at the June term, 1870, of the circuit court of Fairfax county, filed his petition in a cause depending in said court, wherein Reginald Fairfax was plaintiff and Benjamin Thornton and others were defendants, claiming to have acquired certain liens upon the lands of Benjamin Thornton, which had been affirmed by a decree in said cause, and for the satisfaction of which, together with other liens thereon, the said lands were decreed to be sold. At the sale Joseph Thornton became the purchaser at the price of $47,474.70, and complied with the terms of the sale by making the cash payment and executing bonds for the deferred payments. The decree for the sale was pronounced at the June term, 1866, and the sale was made on the 17th day of July following, which was confirmed by a subsequent decree of the court, and the purchaser required to pay his bonds for the deferred payments as they fell due to the receiver of the court. The petitioner asks that the receiver be required to report what amount of the purchase money, if any, had been paid to him,
677 that the same *be applied to the satisfaction of the lien which he had acquired and which had been passed upon by the court, that a resale of the lands for so much of the purchase money as remained unpaid be directed, and that other commissioners be appointed to make the sale in the place of two of them, who had died since the sale.

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It was competent for the petitioner, though not a party to the suit, but who had acquired, subsequent to the bringing of the suit, the liens of those who were parties, to ask the court by petition, or by motion to require a report from the receiver, showing the amount of the purchase money, if any, that was in his hands, and to apply it in satisfaction of the liens, according to their priorities, as had been adjudicated, and to direct a resale of the land for the balance of the purchase money due pursuant to the decree of sale. It was only asking the court to execute its decree. Nor was it necessary that he should have proceeded by bill for that purpose, or to have made the purchaser a party defendant to his petition, or to have required him to answer. He was a quasi party to the suit, and subject to the jurisdiction of the court, (Clarkson v. Read & als., 15 Gratt. 288), and must be held to have known the terms of the decree under which he purchased, which required a resale of the land if the purchase money was not paid. The validity and priority of the liens had already been adjudicated, and Thorp only asked that the decree should be carried into execution, and set out in his petition only what was necessary to show that he had an interest which entitled him to move in the matter.

It was of no interest to the purchaser as such, whether the petitioner or the parties litigant were entitled to the liens, and there was no contest between them. The question whether the lands should be resold was unaffected by the question, if there 678 had been such, whether *the liens belonged to the parties litigant, or to Joseph Thorp, who claimed to have acquired them. If the proceeding of Thorp was to assert a claim against parties to the suit, whose interests he claimed to have acquired subsequent to the institution of the suit, and which claim was disputed by them, then it would have been proper for him to have asserted his claim by supplemental bill, or by an original bill in the nature of a supplemental bill. But they did not contest his right, and the matters relied upon by Joseph Thornton in resisting the resale were extraneous to the issues of the pending suit, and were matters which it devolved on him to show.

But before there could be a decree of resale it was proper and necessary that the purchaser should have notice of the proceeding. The practice which has received the sanction of this court is to proceed by the service of a rule on the purchaser to show cause why the lands should not be resold. And upon the filing of Thorp's petition and the report of the receiver, showing that the purchase money had not all been made, the court might have directed the rule. That does not appear to have been done, but the purchaser had notice of the proceeding, and came forward to show cause in his own chosen way. There was no need, therefore, for a rule. He appeared by counsel; he claimed to be the holder of the securities himself, and the right to set them off against his bonds for the balance of purchase money, and contested the petitioner's right to them. He took depositions and cross-examined the petitioner's witnesses; he appeared before the master, by counsel, and excepted to his report; he appeared in court, by counsel, in support of his exception, and had the report recommitted. In a word, by his counsel in court and out of court, in every way he thought advisable, he asserted his claim and resisted Thorp's. He might 679 have moved the court *for leave to answer Thorp's petition, if he desired to do so; or he might have filed a supplemental bill, or an original bill in the nature of a supplemental bill, and put the matters in issue on which he relied and which rested with him, and made Thorp and Rittenhouse, Fant & Co., and others defendants, and compelled them to answer on oath, and in that mode contested Thorp's claim and asserted his own, if he wished to have the benefit of his own answer or of theirs. But he preferred to assert his claim and to show cause against a resale in a different mode. He made no objection to the mode by which the court proceeded, but acquiesced in it and adopted it as the mode of asserting his claim and resisting a resale, and he is estopped now to object to it.

It appears from the record that the liens or securities in question did belong at one time to Joseph Thornton. They were assigned and transferred to him in 1861 by Sweeney, Rittenhouse, Fant & Co., who then held them. In the fall of 1862 he became again indebted to said firm on account of gold transactions, and delivered to them the aforesaid securities as collateral security for any balance he might own therein, which they held until the 5th of December, 1863, and then, in payment of the balance he was owing them, he drew a bill of exchange, bearing date December 5th, 1863, at sixty days' sight, in favor of said firm, on Benj. Thornton, Holt Hall, near Market Harbors, Leicestershire, England, for £4,519 9s. 6d. (in American currency, $33,544.44,) which he delivered to them with a part of the above securities attached as collaterals; and also on the same day he drew another bill at ninety days' sight on the said Benjamin Thornton in favor of said firm, which he delivered to them, for £1,406 7s. 1d.—being $10,438.27 in American currency—for the debt they had acquired by assignment from the Bank of the Old Do- 680 minion, which was secured *by a deed of trust upon the lands in question, which they required him to pay, and which they attached to the said last mentioned bill with the deed of trust securing it. All the securities claimed by Thorp as liens upon the land, and reported as such by the commissioners, and confirmed by the court, were attached to one or the other of said bills of exchange. Each bill and the securities attached were placed in an envelope and forwarded by Rittenhouse, Fant & Co. to Lockwood & Co., New York. These bills were each of them accepted by the

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drawee, Benjamin Thornton, payable at Messrs. Barclays & Co., bankers, London; were endorsed by Rittenhouse, Fant & Co: "Pay to Lockwood & Co., or order," and were endorsed by Lockwood & Co.: "Pay to Messrs. Baring Brothers & Co., or order," and were endorsed by Baring Brothers & Co.: "Received payment, London," of date, the one 22nd February, 1864, and the other 24th March, 1864.

The money with which the bills were paid was advanced by the said Thorp, at the request of the said Joseph Thornton and Benjamin Thornton; and the bills, together with the securities attached to them as collaterals, were delivered to him pursuant to the instructions given by Joseph Thornton to his brother Benjamin, for securing the repayment to him of the said sums of money which he had advanced in payment of the said bills, with interest. These collaterals constitute the liens upon the lands in question, which are reported by the commissioner as valid liens upon the said lands.

The court is of opinion, that they were acquired by said Thorp by assignment of Joseph Thornton, or by Rittenhouse & Co., with the assent of said Joseph Thornton, as valid securities for the moneys he had advanced for the said Joseph Thornton, and by his request in payment of the bills of exchange which he had drawn on
681 his *brother, Benjamin Thornton, and which he had accepted for the accommodation of the drawer; that they are valid liens upon the lands in question, for the satisfaction of which, together with other liens, they were decreed to be sold, and that the said Joseph Thornton is clearly not entitled to set them off against his bonds for the purchase money; but that the said Thorp is entitled to be substituted to the rights and remedies of the original holders of said securities against said lands, or the proceeds of the sale thereof.

The court is of opinion, that the contract of loan was an English contract. It was contracted in England, with a resident of England and a subject of the Crown; the money was advanced in England and was payable there, and must be controlled by the laws of England; and usury having been abolished in England by 17 and 18 Victoria, ch. 90, the contract cannot be held to be usurious. The appellee only claims the money he advanced, with six per cent. interest.

The court is further of opinion, that although the stipulation in the contract that if the securities should overpay the money advanced by Thorp, with interest thereon, the said Thorp should be entitled to retain them until other claims he held against Benjamin Thornton were satisfied, was bad; the said Benjamin having no authority from his brother Joseph to pledge the securities for such purpose; that the deposit was nevertheless good for the money Thorp advanced at the request of said Joseph Thornton to pay the bills, which were in fact drawn for his accommodation, he having no funds in the drawee's hands. And for the same reason, that the bills were for his accommodation, it was not necessary that they should have been protested and notice thereof given to him to fix his liability. And this being a proceeding to enforce the collateral securities, it was not in-
682 cumbent on the *creditor primarily to pursue his remedy at law on the bills, but his remedy for that purpose was peculiarly in a court of equity, which only could enforce his securities. And he might have pursued his remedy in both forums at the same time, though he could have only one satisfaction.

The court is also of opinion that Davis was not a necessary party. He was a pendente purchaser, if a purchaser at all. Commissioner Dulaney, who united in the deed to him, had no authority to convey the title; and the commissioners are expressly required by the decree to retain the title until the purchaser shall have paid all the purchase money, a large amount of which is still due and unpaid. He is charged with knowledge of want of authority in the commissioner to convey. Hess & al. v. Rader & wife, 26 Gratt. 746, and Erwin's adm'r v. Lloyd, decided at this term. The status of Rittenhouse, who claims to have been assignee of Davis, is no better. He is a party to the suit and member of the firm of Rittenhouse, Fant & Co., and charged with notice of the existence and binding force of the said liens held by Thorp.

The court perceives no error in the decree of the circuit court, and is of opinion to affirm the same.

Decree affirmed.

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683 *Commonwealth by, &c. v. Ford & als.

January Term, 1878, Richmond.

1. **Judgment in Name of Commonwealth—Proceedings.**—A judgment in the name of the Commonwealth, for W, treasurer of C county, founded on a notice in the name of the Commonwealth proceeding by W, late treasurer of C, against F, the collector of township M, and his sureties, upon his official bond, is a judgment in favor of the Commonwealth.
2. **Same—Suit upon.**—On such a judgment the Commonwealth at the relation of T, auditor of accounts, may maintain a suit against F and his sureties.
3. **Same—Same.**—The judgment having been recovered in C county, the suit may be brought in that county. Except in cases where it is otherwise specially provided, the Commonwealth may prosecute her suits in any of the courts in which other parties may prosecute suits of like character. And this case is not embraced in the statute, Code of 1873, ch. 166.
4. **Homestead Exemption — Sureties.***—The 3d exception in the proviso, to the 1st section of

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***Homestead Exemption—Effect as to the Commonwealth.**—In Whiteacre v. Rector, 29 Gratt, 741, the principal case is cited for the proposition that a homestead exemption cannot be claimed against a fine due the commonwealth, imposed for a

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article XI of the constitution of the state, in relation to homestead exemptions, which is "For liabilities incurred by any public officer, or officer of a court, or other fiduciary, or any attorney at law for money collected," embraces the liabilities of a collector of taxes and also of his sureties in his official bond. And therefore the said sureties are not entitled to their homestead exemption as against the Commonwealth in a proceeding against them and their principal to recover the amount of taxes for which the collector had failed to account.

5. **Same—Same.**†—The property of the sureties being covered by their homestead exemption deeds, the Commonwealth may go into equity to enforce her judgment against them.

In March, 1876, the Commonwealth, suing at the relation and instance of William F. Taylor, auditor of public *accounts, filed her bill in the circuit court of Charlotte county, in which it was stated that at the May term, 1874, of said court the Commonwealth suing at the relation of William Cardwell, late treasurer (since dead), recovered a judgment on the law side of the court against one Peyton R. Ford, collector of Madison township, in Charlotte county, and A. B. Paris, A. D. Ford, J. O. Snell, C. M. Pugh, and F. G. North, securities on his official bond, for the sum of $1,354.29, with interest from the 2d of June, 1874, and $12.50 costs; that execution was sued out on this judgment, and returned no effects; that four of the defendants had personal estate and one of them real estate; and that Paris had left the state, leaving all his property encumbered by prior liens; that the said defendants, however, claim that their said estates are not liable for the said debt, judgment and execution, because of section 1, article XI of the constitution of the state, giving $2,000 homestead exemption to debtors, and they have filed their deeds claiming the benefit of said provision.

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The plaintiff claimed that the said judgment and fi. fa. constitute valid liens upon the property of these debtors, and making Peyton R. Ford and his said sureties defendants, prayed that they might be required to discover what estate they have, and what they had at the date of the execution aforesaid, both real and personal, and that the same might be subjected to the payment of the judgment aforesaid, &c.

Peyton R. Ford answered the bill. He insisted that the judgment against him was for Cardwell, and that he had made payments to Cardwell's administrator nearly equal to the balance due upon the judgment at Cardwell's death. He insists that under the statute a collector of revenue is not authorized to settle with the auditor; that the collector is required to settle with the *treasurer of the county, from whom the collector receives the revenue, and to whom he gives his receipt; and it is made the duty of the treasurer to proceed against him when he is in default, to recover by execution or otherwise, and pay over in thirty days to the auditor. And, of course, if the treasurer dies before he finally settles with the auditor, it is the duty of his personal representative to do so; and of necessity the personal representative has the right to make the collector settle with him, since his decedent is charged with all taxes placed in the hands of collectors, and is required to account for the same.

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The sureties demurred to the bill for want of equity. They also answered, relying upon the payment made by their principal to the administrator of Cardwell, and insisting that if there was anything due upon the judgment it was due to Cardwell's administrator, and not to the auditor of public accounts, and that the administrator alone had the legal power to enforce the collection of the same by law. They also claimed their homestead exemption in the property set apart by them, and insisted that as sureties of the collector they did not come within any of the exceptions stated in the constitution.

The evidence in the case is stated by Judge Burks in his opinion.

The cause came on to be heard on the 25th of September, 1877, when the court made a decree by which the demurrer to the bill was overruled; but it was held that the constitutional provision in relation to homestead exemptions applied to the state; and that the third exception to the XIth article of the constitution was personal to the defaulting officers, &c., and does not apply to their sureties. And therefore that the said sureties were entitled to their homestead exemption against the Commonwealth *of Virginia. And thereupon the Commonwealth suing, &c., applied to this court for an appeal; which was allowed.

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The Attorney General and W. W. Henry, for the appellant.

Jones & Bouldin, for the appellees.

Burks, J. The main question for adjudication in this case is, whether the sureties of a public officer, who has made default in accounting for taxes of the state placed in his hands for collection, and against whom and the sureties on his official bond a judgment has been recovered by the Commonwealth for such default, are entitled as against said judgment to claim the exemption allowed by article XI of the constitution and the act of the general assembly giving effect thereto. The act adopts the language of the constitution, and need not be further noticed. It may be found in chapter 183 of the Code of 1873.

The first section of the article is in these words:

violation of the criminal laws. See 2 Barton's Ch. Pr. (2d Ed.) 966. In Burton v. Mill, 78 Va. 468, it was held that the homestead exemption does not protect against a demand for damages for breach of promise to marry, which is not a debt contracted, but a *quasi* tort. See also, Gill v. State, 39 W. Va. 483, 20 S. E. Rep. 569.

†**Enforcement of Judgment Liens — Equity Jurisdiction.**—See Price v. Thrash, 30 Gratt. 515, and *note*.

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"§ 1. Every householder or head of a family shall be entitled, in addition to the articles now exempt from levy or distress from rent, to hold exempt from levy, seizure, garnisheeing, or sale under any execution, order or other process, issued on any demand for any debt heretofore or hereafter contracted, his real and personal estate, or either, including money and debts due him, whether heretofore or hereafter acquired or contracted, to the value not exceeding two thousand dollars, to be selected by him; provided that such exemption shall not extend to any execution, order, or other process issued on any demand in the following cases:

"1st. For the purchase price of said property, or any part thereof.

687 *"2d. For services rendered by a laboring person or a mechanic.

"3d. For liabilities incurred by any public officer, or officer of a court, or any fiduciary, or any attorney at law, for money collected.

"4th. For a lawful claim for any taxes, levies, or assessments accruing after the first day of June, eighteen hundred and sixty-six.

"5th. For rent hereafter accruing.

"6th. For the legal or taxable fees of any public officer, or officers of a court, hereafter accruing."

The language of this section is certainly very broad and comprehensive, and the constitution, in express terms, requires that all the provisions of the article shall be construed liberally, to the end that all the intents thereof may be fully and perfectly carried out. (§ 7.)

One of the intents, manifested in the plainest terms, was to apply the exemption right to debts contracted before the adoption of the constitution. This particular intent was defeated because the clause designed to give it effect, was to that extent in violation of the constitution of the United States. It was so held by this court in the "Homestead Cases," 22 Gratt. 266.

Was it intended to embrace the state within these sweeping provisions? It is a general rule of great antiquity, founded in the highest public policy, that general statutes do not bind the sovereign unless the intent be manifested by express words or by necessary implication; and while it is said that the sovereign is impliedly bound by statutes passed for the public good, the preservation of public rights and the suppression of public wrongs, the relief and maintenance of the poor, the general advancement of learning, religion and justice, or for the prevention of fraud, yet I apprehend that where such statutes are

688 general, the implication, *unless irresistable, does not extend to divest the sovereign of any right, privilege, title or interest. Brown's Legal Maxims, 76, 77; United States v. Herron, 20 Wall. U. S. R. 251, 263; Saunders v. Commonwealth, 10 Gratt. 494, 496; Levasser v. Washburn, 11 Gratt. 572, 577; Commonwealth v. Cook, 8 Bush. Ky. 220.

This rule of construction applies as well to a written constitution, framed by delegates of the people in convention, as to an act passed by an ordinary legislature; and if there were no exceptions engrafted upon the section under consideration, standing alone, under the rule, notwithstanding the broad language employed, and the general intent manifested to secure a benefit to the more needy portion of the community, the state would not be construed to be within its operation; for such a construction would divest important public rights and interests, and the state is not embraced either by express words or by necessary implication.

But we are not at liberty to apply the rule to the purview or body of the section without regard to the proviso attached to it. The whole section must be construed together, so as to give full effect, if possible, to every part of it.

"The proviso," says Chief Justice Marshall, "is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or in some measure to modify the enacting clause." Wayman v. Southard, 10 Wheat. R. 1, 30.

Substantially the same definition is given by Mr. Justice Baldwin in 15 Peters R. 423. "The office of the proviso," says he, "generally is either to except something from the enacting clause, to restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended to be brought within its purview."

689 *The proviso to section 1, article XI, contains six distinct clauses, each of which is plainly an exception to or limitation or qualification of something contained in the body of the section. The purview or enacting part confers the power or grants the right to claim exemption from levy, &c., on any execution, order, or other process, issued on any demand for any debt (heretofore or) hereafter contracted. The proviso declares that such exemption shall not extend to any demand in the five cases enumerated, the fourth of which is "for a lawful claim for any taxes, levies, or assessments accruing after the first day of June, eighteen hundred and sixty-six." This clause (the fourth) excepts from the operation of the general grant a lawful claim for any taxes. This exception by its very terms necessarily includes the Commonwealth, and therefore necessarily implies that under the words "any demand for any debt" in the enacting part of the section, it was intended to embrace the Commonwealth as well as her citizens; otherwise there would have been no necessity for the exception so far as the Commonwealth is concerned.

It was argued with much force by the attorney-general that taxes assessed by the commonwealth for the support of government and for the public needs, retained the character of taxes from the time of assessment until paid into the public treasury; that they were no less taxes in the hands of the tax-collector than they were in the hands of the tax-payer, and that the judgment in

this case against the collector and his sureties was a claim for taxes within the meaning of the 4th section. I am not prepared to say that this is not a sound argument. The demand of the state was for the amount due for taxes placed in the officer's hands for collection. Such was the tenor of the notice on which the motion was made, 690 and *such the character of the judgment rendered. Why, then, is not the judgment "a lawful claim for taxes?"

If, however, this demand of the state is not within the operation of the 4th exception (and I incline to think it is), I am still of opinion that it is within the third exception, which excludes the right to claim the exemption as against any demand for liabilities incurred by any public officer. The phrase "liabilities incurred by any public officer," refers to the demand to which the exception applies rather than to the delinquent. The demand is not described as a demand against the officer, but it is "any demand" for the liabilities incurred, and therefore embraces a demand against any and all persons who share the liabilities. As soon as there is a breach of the condition of the officer's bond, he and his sureties, by one and the same act, become liable to the party injured. The liability incurred by the officer is at the same time incurred by the surety. The same principle applies to the other classes mentioned in the exception.

The exclusion established by this clause and all the other clauses of the proviso, is not intended to punish the parties excluded, but manifestly to secure a benefit to others. The first clause is intended to protect the vendor of property by not allowing the withdrawal of such property from liability for "the purchase price;" the second, to favor the laboring person or mechanic; the third, to preserve the rights of creditors and claimants against officers and others named; the fourth, to ensure to the state, counties and principalities accountably for taxes, liens and assessments; the fifth, to protect landlords; and the sixth, to secure to officers their fees; and it is to be kept in mind that to these clauses we are required by the seventh section of the article to give the same liberal construction that we give to other parts of the article.

691 *It was held by this court in Saunders v. Commonwealth, supra, that the surety of a public officer was not barred of his right to a discharge in bankruptcy, under the bankrupt act of 1841, by reason of the defalcation of his principal; that the exception under said act against a defaulting officer was personal, and was intended to withhold from him a benefit given to others, because he was a defaulter, and that the policy of the exception did not extend to the innocent surety. It is contended by the learned counsel of the appellees that the like construction should be given to the third clause of the proviso under consideration. We find no fault with that decision, but we think it does not apply to this case.

The clause referred to (the third), as before stated, was not, in our judgment, intended to punish the defaulting officer or fiduciary, as in the case of the bankrupt, but rather to preserve the security of his creditors, and require a fulfilment of his obligations to them, and in that view and to that end should receive a liberal construction. Moreover, a very slight examination of that portion of the bankrupt act, to which the decision refers, will show that the exception as to the defaulting officer was manifestly intended to be personal as to him.

The language of the act, describing persons who might become voluntary bankrupts, is "all persons whatsoever residing in any state, district, or territory of the United States, owing debts which shall not have been created in consequence of a defalcation as a public officer," &c. Owen on Bankruptcy, Appendix, p. 49.

This exception could not be extended to the surety without doing violence to the language employed. The person excepted is the public officer owing debts created by his defalcation as such officer.

It was further argued by the learned counsel for the appellees that the construction contended for by him has 692 *received legislative sanction in the act approved February 2d, 1875, (Acts of 1874-75, p. 53), requiring a waiver of the benefit of homestead exemption in the bonds of officers and fiduciaries. It is a sufficient answer to say that there has been conflict of opinion as to the proper construction to be given to the clause of the constitution under consideration, and it was therefore doubtless deemed wise and prudent by the general assembly, out of abundant caution, if for no other reason, that the waiver should be provided for. It could do no harm at least, and, in certain contingencies, might prevent much mischief.

Our reasoning has led us to the conclusion that the sureties in this case are not entitled to their homestead exemption against the appellant's judgment, that the circuit court of Charlotte county erred in its decree, holding that they were so entitled, and that said decree should therefore be reversed and annulled.

Reaching this conclusion, the cause might be remanded without saying more, but for certain objections urged by the counsel for the appellees to the jurisdiction of the court to proceed with the cause.

The bill in this case was filed in the name of the Commonwealth, at the relation of William F. Taylor, auditor of public accounts. The appellees demurred to the bill, and also excepted in their answer to the prosecution of the suit by the auditor as without authority. If the judgment sought to be enforced by the bill is a judgment on behalf of the Commonwealth, there can be no doubt the auditor had the right to file such a bill as was filed to enforce payment thereof to the Commonwealth. Code of 1873, ch. 40.

If I did not misapprehend the argument

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of the counsel for the appellees, they claim that the judgment was not a judgment on behalf of the Commonwealth, but in
693 fact a *judgment on behalf of William Cardwell, late treasurer of Charlotte county, and therefore it could not be enforced by the auditor as a judgment of the Commonwealth.

The judgment was recovered on motion in the circuit court of Charlotte. The record shows that the notice of the motion was given in the name of the "Commonwealth of Virginia, proceeding by William Cardwell, late treasurer of Charlotte." This notice and motion were in strict conformity to section 23, chapter 46, Code of 1873, which, as far as necessary to be quoted, is in these words: "If said taxes and levies are not paid and the insolvent lists returned, certified by the judge of the county, to the treasurer, by the first day of March, it shall be the duty of the treasurer to proceed against the collector and his sureties upon his bond, by motion, if it be for taxes, in the name of the Commonwealth of Virginia," &c. The section further provides that the motion shall be heard by the county or circuit court of the county upon ten days' notice in writing, &c.

The first entry of the motion on the records of the circuit court gives the style of the case thus: "Commonwealth for William Cardwell, treasurer of Charlotte county, against P. R. Ford, collector," &c., (naming the other defendants). The style of the case in the judgment entered is, "Commonwealth of Virginia for, &c., against P. R. Ford, collector," &c., (naming the defendants as before). Then follows the judgment in these words: "This day came again the parties by their attorneys, and the defendants say they will not further defend this motion; therefore it is considered by the court that the plaintiff recover against the said defendants the sum of $1,354.29, without damages, with interest from 2d day of June, 1874, till paid, and the costs."

694 *This is a judgment on behalf of the plaintiff; the Commonwealth is the plaintiff, and the judgment was rendered by a court having jurisdiction.

It is further objected that if the judgment is a judgment on behalf of the Commonwealth, the circuit court of Charlotte had no jurisdiction of the bill to enforce it. This position is not tenable. Except in cases where it is otherwise specially provided, the Commonwealth may prosecute her suits in any of the courts in which other parties may prosecute suits of like character. If the judgment in this case were a judgment on behalf of William Cardwell, as contended, his personal representative could have filed a bill to enforce it in the circuit court of Charlotte. The judgment being on behalf of the Commonwealth, the suit to enforce it was properly brought in the same court. Code of 1873, ch. 166. The restriction imposed by the fourth clause of the 1st section of this chapter applies only to actions at law or suits in equity instituted on behalf of the Commonwealth in the name of the attorney-general, or when it may be necessary or proper to make certain public officers or public corporations defendants. This will be rendered apparent by reference to the act approved March 22, 1873, (Acts of 1872-73, ch. 215, p. 195, Code of 1873, ch. 166,) and comparing the 4th clause of section 1, as therein contained, with the corresponding clause and section of the Code of 1860. It will be seen that the words "or otherwise" are omitted in the said act of March 22, 1873. The restriction in the 14th clause, section 1, chapter 166, Code of 1873, does not apply to a suit in equity, such as this is, in the name of the Commonwealth, at the relation of the auditor of public accounts.

It is further and finally objected, that the demurrer to the bill should have been sustained and the bill dismissed,
695 *on the ground that the appellant's remedy was at law and not in equity. Under chapter 40, Code of 1873, the Commonwealth could doubtless have proceeded, as therein prescribed, by execution to seize and sell the property, real and personal, of the defendants in the judgment; but, under the circumstances of this case, we do not regard this a plain, complete and adequate remedy. 2 Rob. Prac. (old ed.) 1; 1 Story's Eq. Juris. § 33. All of the property was encumbered with homestead deeds, the claims under which involved questions of law which were new, and about which there was conflict of opinion in the circuit courts. To sell the property without first settling these questions and removing the obstructions to a fair sale, would have been prejudicial to the Commonwealth. It is very probable, indeed, that the property would have been sacrificed, and thus the debt of the Commonwealth might not have been paid.

The failure of the officer to comply with the 22d section of chapter 40, Code of 1873, did not affect the right of the Commonwealth to pursue her remedy in a court of equity. Moreover, the right to sell the real estate of the defendants under execution did not deprive her of the right, if she elected to exercise it, to resort to a court of equity to subject such real estate to the lien of her judgment. Code of 1873, ch. 182, § 9.

It would be premature for this court, at this stage of the case, to pass upon the claim of the appellees to credit on the judgment for payments alleged to have been made.

The decree of the circuit court must be reversed, and the cause remanded with instructions to order proper inquiries and accounts, and for further proceedings, in order to final decree.

The other judges concurred in the opinion of Burks, J.

696 *The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of coun-

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sel, is of opinion, for reasons stated in writing and filed with the record, that the appellees, respectively, are not entitled under the constitution and laws of this state to hold any of their property or estate, real or personal, exempt from liability for the payment of the judgment on behalf of the Commonwealth in the bill in this cause mentioned, and that the several homestead deeds of the appellees, respectively, set out in the record of this cause, are void as to said judgment, and that the said decree is wholly erroneous. It is therefore decreed and ordered, that the said decree be reversed and annulled, and that the appellees pay to the appellant the costs of the appellant expended in the prosecution of the appeal aforesaid here; and this court, in the present condition of the proofs in the cause, not undertaking to decide and not deciding what credits, if any, the appellees are entitled to for payments alleged to have been made on said judgment, this cause is remanded to the said circuit court of Charlotte county, with instructions to order proper inquiries to be made and accounts to be taken touching said alleged payments, and for further proceedings to be had, in order to final decree in conformity with the opinion and principles herein expressed and declared; which is ordered to be certified to the said circuit court of Charlotte county.

Decree reversed.

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697 *Bowers' Adm'r v. Bowers & als.

January Term, 1878, Richmond.

Absent, MONCURE, P.

Commissioners in Chancery.*—An attorney employed in a cause is not a competent commissioner to take an account ordered in the cause.

This was a suit in equity in the county court of Mecklenburg, brought by the devisees and legatees of Sanford Bowers, deceased, against Paschal H. Bowers, administrator de bonis non of Sanford Bowers, and executor of James Bowers, deceased, and others, devisees of said James Bowers, to have a settlement of the account of administration, and a division of several tracts of land which plaintiffs claimed were owned in common by Sanford and James Bowers. A decree for an account was made in the case, and the commissioner was directed to take an account of the personal estate of Sanford Bowers, which went into the possession of James Bowers, including the crops and produce on hand at the death of Sanford Bowers, and which was sold by James Bowers, and an account of the said personal estate which was not consumable by its use, and the value thereof, &c., and also an account of the property, real and personal, owned jointly by James Bowers and Sanford Bowers at the death of Sanford Bowers.

Under this decree Commissioner W. Baskerville settled the account of P. H. 698 Bowers, executor of James *Bowers. This account was returned to the court, and after the correction of a small item was confirmed.

In the further progress of the cause the defendants objected to W. Baskerville as commissioner to take the further accounts in the cause; but the county court overruled the objection. And when the report was returned and the cause was removed to the circuit court, the exception to the commissioner was again made, but was again overruled, and a decree made holding that the lands, as claimed by the plaintiffs, were owned jointly by Sanford and James Bowers. From this decree the administrator de bonis non of James Bowers applied to this court for an appeal. The only question

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Interested Party Acting Judicially—Validity.—In Dillard v. Krise, 86 Va. 410, it was held, citing that principal case, that a commissioner, who is a creditor and a party to a suit to subject a debtor's land to pay his true debts, is incompetent to take an account ordered therein, and in Davis v. Beazley, 75 Va. 491, it was held, that a grantee in a deed as a beneficiary under it, is not allowed, as an officer, to take an acknowledgment of the deed by the grantor with a view to its registration, and the clerk of the county court cannot take his own acknowledgment of a deed executed by him so as to render it valid against a subsequent purchaser for value from him. But in Smith v. Mayo, 83 Va. 910, it was held, that in entering a confession of judgment, under Code 1873, ch. 167, sec. 42, the clerk acts purely as a ministerial officer, and he may enter his own confession of judgment in favor of his own creditor and it will be valid.

***Commissioners in Chancery—Report—Evidence.**—In Saunders v. Prunty, 89 Va. 923, the principal case is cited for the proposition that it is not the duty of the commissioner to return the evidence upon which his report is based in the absence of any direction so to do. See also, Bowden v. Parrish, 86 Va. 69; Robinson v. Allen, 85 Va. 731.

Commissioner's Reports—Weight Given.—In Stuart, Palmer & Co. v. Hendricks, 80 Va. 601, the following quotation from the principal case is approved, "When a question of fact is referred to a commissioner, depending upon the testimony of witnesses conflicting in their statements and differing in their recollection, the court must, of necessity, adopt his report, unless in a case of palpable error or mistake." Many subsequent cases approve this rule. Porter v. Young, 85 Va. 54; Magarity v. Shipman, 82 Va. 784; Robinson v. Allen, 85 Va. 727; Jones v. Degge, 84 Va. 690; Stimpson v. Bishop, 82 Va. 190; Moore v. Butler, 90 Va. 685; Magarity v. Succop, 90 Va. 563. In Armentrout v. Shafer, 89 Va. 569, it was held, that neither the principal case nor any of the subsequent cases were authority for the conclusiveness of the commissioner's report in a case where a decedent's estate having been referred to a commissioner for settlement, the commissioner rejects a claim on which a judgment had been obtained against the estate, there being no evidence that such claim has ever been paid. See especially, Shipman v. Fletcher, 91 Va. 473, where the whole question of the weight to be given commissioner's report is discussed, and where the principal case is reviewed at length. See also, Clinch River Mineral Co. v. Harrison, 91 Va. 132.

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considered by this court was as to the competency of Mr. Baskerville to take the accounts, and on this question the facts are stated by Judge Staples in his opinion.

Jones & Bouldin, for the appellant.

William J. Robertson and William P. Burwell, for the appellees.

Staples, J., delivered the opinion of the court.

The county court of Mecklenburg, by its decree of the July term, 1870, directed among others, "an account to be taken by one of its commissioners" of the real and personal estate owned jointly by James Bowers and Sanford Bowers, at the death of Sanford Bowers. At the date of that decree, Mr. William Baskerville, Jr., was one of the commissioners of the court, and as such settled one of the accounts specified in the decree. With respect to the matter of that account, it is proper to say there was no serious contention between the parties. But when he came to take the 699 account of the joint estate *of Sanford and James Bowers, which was the real subject of controversy, the defendant objected to Mr. Baskerville's acting as commissioner, upon the ground that "he had been the active counsel of complainants in the suit; the bill, the amended bill and answer of one of the defendants in sympathy with the complainants, being wholly in his hand-writing, and he being marked as counsel in said bill, and there being two other commissioners in chancery of the court, who were then acting as such." In support of this objection, the defendants filed the affidavits of their counsel, Messrs. Finch and Cogbill, in which it was stated that both of these gentlemen had had frequent conversations with Mr. Baskerville in regard to the final issue of the cause, and in nearly every one of them he had expressed himself as "confident of success; that he had taken more interest in this suit than in any other case that ever came into his office since his connection with it;" and that these observations were not made jocularly, but seriously and gravely, as men talk who mean what they say.

On the other hand, Mr. Baskerville's affidavit was taken, in which he states that he was only a nominal partner in the late law firm of Chambers, Goode & Baskerville, receiving for his services a fixed salary, in no way dependent upon the income of the firm; that he wrote the bill, amended bill and answer under the dictation of the senior member of the firm; that his agency in the suit was limited to getting up the names of the parties, and the visiting one of the witnesses, C. D. Gregory, with a view of reporting his testimony to his senior partners, and to looking up the records. He further states that the remarks made by him to the opposing counsel were of a playful character, without any intelligent knowledge of the facts or the law points involved, and that he had no fixed opinion as to 700 the ultimate result *of the trial, so as in any way to bias him in discharging his duty faithfully and impartially as a commissioner.

The statement of Colonel Goode, another member of the same firm, is substantially the same as that of Mr. Baskerville, and need not be repeated here.

Upon these exceptions and affidavits the whole matter was referred to the county court; and that court being of opinion there was no good reason why said commissioner should not take said accounts, overruled said exceptions. And thereupon Mr. Baskerville proceeded to take the account and the deposition of witnesses, and having completed the same, returned them to court. The defendants then renewed their exception to the commissioner, and they filed other exceptions going to the merits of the account, not necessary now to be mentioned.

The cause having been removed to the circuit court of Mecklenburg, and coming on to be heard at the May term, 1874, that court overruled all the exceptions, confirmed the report, and entered a decree in favor of the complainants. From that decree the defendants appealed to this court. In their petition for an appeal, and in their argument here, they have reiterated their exceptions to the commissioner. This court must, therefore, meet and decide the question at the threshold.

That the office of commissioner in chancery is one of the most important known in the administration of justice will be universally conceded. His duties are of a grave and responsible nature; he is the assistant to the chancellor. There is no question of law or equity, or of disputed fact, which he may not have to decide, or respecting which he may not be called upon to report his opinion to the court. According to the practice of many courts he never reports the evidence, but only his conclusion. Adam's Equity, 385, note; 2 701 Barb. Ch. Prac., 549. He *is confronted with the witnesses; he sees their deportment, their manner of testifying, their capacity for recalling and accurately detailing past occurrences, whereas the court, which only sees the testimony on paper, is denied the opportunity of applying these obvious tests of accuracy and fidelity. When, therefore, a question of fact is referred to a commissioner, depending upon the testimony of witnesses conflicting in their statements and differing in their recollection, the court must, of necessity, adopt his report, unless in a case of palpable error or mistake. Izard v. Bodine, 1 Stock. Ch. R. 310, 662.

Every lawyer familiar with the chancery practice perfectly understands how much depends upon the manner in which the depositions are taken. Not unfrequently the change of a phrase, or even a word, gives an effect to the answer of the witness never contemplated by him. Therefore it is that depositions have been suppressed when the answers are written by the attor-

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ney of the party offering the deposition. 2 Tucker's Com.

In the nature of things the commissioner must often examine the witnesses in the absence of counsel, and it is easy to see how frequent are the opportunities afforded him of perverting the meaning of the witness, if so inclined; and whether he is so inclined or not, the danger of his doing it, if he is interested. In the manner of taking the accounts, in the minute and complicated calculations to be made, and in the conclusions arrived at, a commissioner may easily perpetrate the grossest injustice without detection, unless by counsel and courts thoroughly conversant with such subjects. These considerations and numerous others which might be mentioned, show how essential it is that the commissioner should not only be absolutely impartial, but even free from the suspicion of partiality. That the attorney of one of the parties to a

702 suit cannot be a competent *commissioner in that suit, would seem to be too clear for argument. However elevated the counsel may be, his feelings, and even his judgment, will be insensibly influenced by his position, his association and conversation with his client, his witnesses and his friends. No one expects the counsel to be disinterested. It is not desirable he should be so. His allegiance and his duty are to his client. He must give to the latter the best of his ability and his service. And therefore it is, in all the cases involving this question, it has ever been held that an attorney is incompetent to act as judge, juror, commissioner in chancery, or in any judicial capacity whatever, in a cause in which he is the counsel of one of the parties. In Ex parte Collins, 2 Va. Cases, 222, the general court was of opinion that the duties of clerk of a superior court and of counsel and attorney in the same court are incompatible with each other, and that they interfere so much, one with the other, that there is danger lest they might not both be executed with impartiality and honestly. The cases of Brown v. Byrne, Walker's Ch. R. Mich. 453; Stebbins v. Brown, 65 Barb. R. 272; White v. Haffater, 27 Illi. R. 349; Wilkinson v. Vorce, 41 Barb. R. 373; Spinks v. Davis, 32 Miss. R. 152; Commonwealth v. Gibbs, 4 Gray R. 146; Anonymous, Tay & Cowp., page 5, are directly in point.

Is there anything in the present case which takes it out of the operation of these rules? We have affidavits on one side and affidavits on the other. How are we to decide between them? Which is to be accepted as correct? This very contention demonstrates the wisdom of the rule which excludes counsel from acting in such cases.

No person acquainted with Mr. Baskerville will hesitate to accord to him a character above reproach or suspicion. And there

703 is no reason to doubt that he *acted in what he believed to be the conscientious and honest discharge of his duty. But we cannot act upon any consideration of that sort. We must apply to him the same rules applied to all others. The incompetency of an attorney in such cases does not depend upon his having fixed opinions, or upon the payment of contingent fees. It is his office, his duties, his obligation and relation to his client that disqualify him from acting in any judicial capacity whatever in the cause in which that client is concerned. No other rule would protect the officer from the influence of temptation, irresistible to many men, and dangerous to all; and no other rule will shield the administration of justice from suspicion of infirmity, derogatory to the courts and demoralizing to the community. For these reasons, and not because we have any suspicion that the commissioner was guilty of any partiality in taking the account, we are of opinion that both the county and circuit courts erred in not sustaining the defendant's exception to Mr. Baskerville as a competent commissioner in this case; and that neither the account nor the depositions taken by him can be considered by the court in determining this case.

The counsel for the complainants seem to think, however, that after discarding both depositions and account, there is still enough in the record to sustain the decree. We cannot concur in this view. It would, perhaps, be premature to express any opinion upon the merits. It is certain that the exhibits filed are not sufficient without the evidence of the witnesses to establish the purchase with joint funds, as alleged in the bill. We are therefore of opinion, that the decree of the circuit court must be reversed; all the depositions and the account taken by Mr. Baskerville suppressed, and the case remanded to the circuit court for further proceedings under the decree of July, 1872.

704 *The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the circuit court erred in overruling the appellants' first exception to Commissioner Baskerville's report, that exception being based upon the ground that the said commissioner "had been the active counsel of the complainants in the suit; the bill, amended bill and answer of P. H. Bowers being wholly in the handwriting of said commissioner, and he being marked as counsel on said bill, &c.; and there being two other commissioners in chancery of the county court who were, and still are, acting as such." The court therefore, without passing upon the merits of the case, doth adjudge, order and decree, that the decree of the circuit court be reversed and annulled, and that the appellees pay, &c.

And this court, proceeding to render such decree as the circuit court ought to have rendered, doth adjudge, order and decree, that said report of Commissioner Baskerville be set aside, and all the depositions taken by him be suppressed, and the case be recommitted to one of the commissioners of said circuit court, to take, state and settle the accounts in conformity with the decree of the July term, 1871, of the county court of Mecklenburg. And the cause is re-

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manded to the said circuit court to be further proceeded with in accordance with the views herein expressed.

Decree reversed.

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705 *Hogan v. Guigon, Judge.

Moll v. Same.

January Term, 1878, Richmond.

1. **Statutes—Repeal.***—§ 106 of ch. 206 of the Acts of 1874-75, is not repealed by the acts of March 30, 1877, in relation to the sale of wine, &c., and therefore the judge of the hustings court of the city of Richmond has authority to revoke a license given for keeping a bar for the sale of wine, &c.
2. **Same—Repeal by Implication.**—A statute will not be repealed by implication, unless the latter statute is so inconsistent with the first that they cannot stand together, or the latter statute embraces the whole subject matter of the first. See opinion of BURKS, J.
3. **Writ of Prohibition.**†—For the doctrine in relation to the writ of prohibition and its use, see the opinion of BURKS, J., and cases cited in note.

These cases were heard together and involve the same question. Mortimer Hogan had a license as a bar-room liquor dealer at his house No. 3210 Lester street, in the city of Richmond, and Moll had a similar license to keep such a bar at his house, near the second market-house. Their returns under the Moffet register law was such as that the judge of the hustings court of the city directed them to be summoned to show cause why their licenses should not be revoked and annulled. These parties thereupon applied to this court for a writ of prohibition, to prohibit the judge from further proceeding in the premises to revoke their licenses. The judge filed his answers to the rule which had been made upon him in the cases, stating the grounds on which he acted; but it is unnecessary to state them.

706 *John B. Young, for the petitioners.

The Attorney General, for the judge.

Burks, J., delivered the opinion of the court.

The petitioners in these cases are bar-room liquor dealers within the corporate limits of the city of Richmond, duly licensed as such by the hustings court of said city, according to the provisions of the act of the general assembly, entitled "an act imposing a tax and prescribing the mode of collecting the same on the privilege of selling wine, ardent spirits or malt liquors within the limits of the commonwealth for the support of government, and to pay the interest on the public debt," approved March 30, 1877. (See Acts of 1876-77, ch. 253, p. 245, et seq.)

The respondent, the Honorable A. B. Guigon, the judge of the said hustings court, upon rules made against the petitioners, duly executed more than ten days before the return day, was proceeding to revoke their licenses when they applied to this court for writs of prohibition to restrain him. The question is, whether this proceeding of the judge is in excess of his jurisdiction. This is the extent of our inquiry. We dismiss at the threshold all consideration of the sufficiency or insufficiency of the alleged cause of revocation. If he has jurisdiction of the proceeding which he instituted, however erroneous or mistaken his judgment may be, the remedy by prohibition does not lie. The writ of prohibition can never be made to do the office of a writ of error. It is a preventive, not a corrective remedy. It is intended to confine inferior courts within the just limits of their jurisdiction, not to correct errors in proceedings of which they have no cognizance.

707 *In Ellyson & als., ex parte, 20 Gratt. 10, 23, the question was, whether a county or corporation court had jurisdiction and authority to decide, in the case of a contested election, that there had been no valid election, and thereby to create a vacancy to be filled in the manner provided by law. Judge Joynes, delivering the opinion of the court, said: "If a county or corporation court has such jurisdiction in any case of a contested election, the petitioners have no right to a writ of prohibition. We cannot inquire whether the corporation court of Richmond had or had not such jurisdiction in a particular case. That would be to convert a writ of prohibition, which proceeds on excess of jurisdiction, into a writ of error, which proceeds upon an error in the exercise of jurisdiction."

So, in the cases before us, we are not called upon to decide whether the proceeding of the respondent, on the evidence before him, would be a proper exercise of the power with which he is invested, but whether he has any such power at all. If he has the power, we might be of opinion

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***Statutes—Repeal by Implication.**—In Ryan v. Com., 80 Va. 385, the principal case is cited for the proposition that unless a statute by its language, expressly or by necessary implication, demands such construction, it will not be construed as repealing a previous statute. See also, Haynes v. Com., 31 Gratt. 96, and *note*; Davies & Co. v. Creighton, 33 Gratt. 696, and *note*; Fulkerson v. Bristol, 95 Va. 5. In Justice v. Com., 81 Va. 209, it was held, that though repeal by implication is not favored, yet when two acts on the same subject are irreconcilable, the latter act prevails.

†**Writ of Prohibition.**—In Shell, Judge, v. Cousins, 77 Va. 328, the principal case was cited for the proposition that a writ of prohibition lies only in the case of transcending jurisdiction, and the supreme court will ever discourage the employment of the writ as a process to correct the errors of inferior tribunals, and thus usurp the function of a writ of error. See also, Nelms v. Vaughan, 84 Va. 698; Grigg v. Dalsheimer, 88 Va. 510; Burroughs v. Taylor, 90 Va. 56; Moss v. Barham, 94 Va. 14; Ellyson, *ex parte*, 20 Gratt. 10; Supervisors of Bedford v. Wingfield, 27 Gratt. 334; Barton's Ch. Pr. (2d Ed.) 1229; Haldeman v. Davis, 28 W. Va. 327.

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that the proposed exercise of it by him would be error, but we could not correct the error by writ of prohibition.

It is very certain that the power is not conferred by the act under which the licenses were granted. If it exists at all, it is by virtue of some other statute.

Section 106, chapter 206, of the acts of 1874-75, is in these words: "Upon the motion of the attorney for the commonwealth for the county, city or town, or of any other person, after ten days' notice to any person or firm licensed to sell liquors or any other thing, the granting of whose license was based upon the certificate of a court, the court which granted the certificate may revoke the license."

If this section is still in force, it cannot be doubted that the hustings court of the city of Richmond is invested
708 *with the jurisdiction claimed for it in these cases. The terms are ample for the purpose. In these cases, the licenses were based on the certificate of the hustings court made as required by the second section of the act aforesaid of March 30th, 1877, and the proceeding to revoke is by the court which granted the licenses, and after ten days' notice duly given.

As early as the year 1831, the general assembly initiated the rule, which became the settled policy of the state, of requiring all persons obtaining license to retail ardent spirits, to get from the court granting the license a certificate as to character, and also as to convenience of the place of sale, and giving to the courts the power to revoke the license. Numerous acts of this description have been passed from time to time. In some of the earlier, the power of revocation was limited by the terms, "upon good cause shown." In others, the court was empowered to revoke "if it saw cause to do so"; and finally all words of limitation were dropped, and the power was committed to the discretion of the court in the terms of the section aforesaid of the act approved March 16, 1875, (Acts 1874-75, p. 244), which corresponds with like sections in the Acts of 1870-71, 1871-72.* It is believed there has been no time since the year 1831 when the county or corporation courts, or both, were not clothed with this power, and we think they still have it, unless the section hereinbefore set out, (section 106 of the act approved March 16, 1875,) has been repealed. It certainly has not been expressly repealed. If repealed at all it has been by implication.

Has it been so repealed?

709 *It is difficult to conceive of any good reason why the settled policy of the state on this subject should have been changed at all, and it is most remarkable, if such a radical change has been made, that the evidence of it rests on no surer foundation than that of presumption.

The repeal of a statute by implication is not favored by the courts, for ordinarily where a repeal is intended by the legislature it is declared in express terms. The presumption is always against the intention to repeal where express terms are not used. Hence the rule, as laid down by Chief Justice Marshall, that a repeal by implication ought not to be presumed unless from the repugnance of the provisions the inference be necessary and unavoidable, (Harford v. United States, 8 Cranch, 109); and the like rule by Judge Story, who, in considering whether a later statute repeals a former one, says that the inquiry is, whether it (the former statute) is repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new laws and those of the old; and even then the old law is repealed by implication only pro tanto to the extent of the repugnancy. Wood *v.* United States, 16 Peters, 342, 363.

To justify the presumption of intention to repeal one statute by another, the two statutes must be irreconcilable. McCool v. Smith, 1 Black. U. S. R. 459, 470, and cases there cited; Sedgwick on Stat. and Con. Law, 98, and notes; Pott. Dwarr. on Stat. and Con. 154, and notes.

There is no incompatibility between the section referred to and the act of March 30, 1877. Full effect may be given to each without diminishing the force of
710 either. *The two may well stand together, and if they may, they must so stand. Indeed, there is nothing to warrant the conclusion that any repeal of this section was intended. It is not to be supposed that so important a provision of the law, in force in some form or other for more than forty years, would be repealed in any other way than by the most direct terms.

The general clause concluding the act of March 30th, 1877, that "all acts and parts of acts inconsistent with this act are hereby repealed," is usual where the act of which it forms a part covers the subject matter of other acts or parts of other acts, and the intention is not to repeal the latter wholly, but only so far as they are inconsistent with the last act. It indicates a partial repeal only and an intention to preserve portions of former acts relative to the same subject matter. Such a clause, says Mr. Justice Strong, is an express limitation of the extent to which it was intended former acts should cease to be operative: namely, only so far as they are inconsistent with the new act. It is quite inadmissible to engraft upon this express declaration of legislative intent an implication of more extensive repeal. Henderson's Tobacco, 11 Wall. U. S. R. 652, 656. See, to the same effect,

*See Acts 1830-31, ch. 59, § 1, p. 130; Acts 1831-32, ch. 24, § 1, p. 24; Acts 1839-40, ch. 1, § 5, p. 6; Code of 1849, ch. 38, §§ 14, 19; Acts 1859-69, ch. 2, §§ 32, 37; Code of 1860, ch. 38, §§ 32, 37; Acts 1870-71, ch. 72, § 166, p. 118; Acts 1871-72, ch. 159, § 164, p. 201; Code of 1873, ch. 34, § 21, p. 325; Acts 1874, ch. 240, § 105, p. 313; Acts 1874-75, ch. 206, §§ 89, 106, p. 215.

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Elrod v. Gillilard, Howell & Co., 27 Ga. R. 467, 468, 469; Lewis, governor, v. Stout & others, 22 Wis. R. 234, 236; English v. Oliver, collector, 28 Ark. R. 317, 326.

There may be acts plainly intended to embrace and include the whole legislation on the subjects to which they refer, and to be substituted wholly for former acts on the same subjects. In such cases, the provisions of the former laws on the same subject, although not expressly embraced in the subsequent acts, are repealed by implication. Such were the cases of Fox's adm'rs v. Commonwealth, 16 Gratt. 1; and United States v. Tynen, 11 Wall. U. S. R. 88.

711 *The cases before us, however, do not fall within the rule of these decisions. The object of the act of March 30, 1877, as its title indicates, was not only to impose a tax on the privilege of selling wine, ardent spirits or malt liquors, but also to prescribe the mode of collecting the tax. Besides a specific tax, the act imposes a further tax on sales, an account of which is kept by means of what is called the "Moffett register," an agency or instrumentality never before employed in the collection of the revenue in this state. The provisions of the act are mostly new, and relate chiefly to the establishment and regulation of this new agency, and were never intended to supersede existing laws except so far as such laws are plainly inconsistent with the provisions of the new act. The act of March 16, 1875, of which section 106, alleged to be repealed by the act of March 30, 1877, forms a part, is a general law "prescribing general provisions in relation to commissioners of the revenue, and the assessment of taxes on persons, property, income, licenses, &c." (See the title to the act.) This act has never been repealed, but continues for the most part in force. This is recognized by subsequent amendments of several sections after the passage of the act of March 30, 1877. See the amendments in acts of 1876-77, pp. 300, 301, 302.

The appeal allowed by the second section of the last named act, the forfeiture of license imposed by the tenth section, and the provisions of the seventeenth section, requiring the act to be given in charge to the grand jury, and the commissioner of the revenue and the treasurer of the county or corporation to be sent before the grand jury, are perfectly consistent with the supervision given by the 106th section of the former act, and with the continued exercise of the power thereby conferred. The appeal allowed is confined to the county courts. No appeal is allowed from

712 the action of the corporation *courts. Whether, if on appeal from the county court to the circuit court, the judgment of the county court be reversed and a license granted by the circuit court, the proceeding to revoke such license should be in the latter court, is a question which does not arise in the cases before us, and therefore need not be decided.

The absolute forfeiture imposed by the tenth section, on conviction for a second violation of the provisions of the fifth section, is the mandate of the law, while the exercise of the power of revocation in other cases is an additional safe-guard left to the sound discretion of the court.

Substantially the same certificate as to character and convenience of place is required by the first section of the act as under former acts, and the report required to be made by the commissioner of the revenue to the court under section eight, rather favors the idea that it was intended to aid the court in the proper exercise of the power of revoking the license. For we do not concur in the view presented by the learned counsel for the petitioners, that the report is intended merely as a basis for presentments and indictments by the grand jury. The report is not required to be sent to the grand jury, but whatever the report may be, or whether any be made or not, it is made the duty not only of the county and corporation courts, but also of the circuit court to give the act in charge to the grand jury at every regular grand jury term of their respective courts, and also to send before the jury the commissioner of the revenue and the treasurer of the county or corporation.

Upon the whole matter, we are of opinion that the respondent, as judge of the hustings court of the city of Richmond, is invested by law with the jurisdiction claimed by him in his answers to the rules in these cases, that he has not exceeded his

713 jurisdiction in the proceedings *complained of in the petitions, and that the rules awarded against him should be discharged at the costs of the petitioners respectively.*

The judgment was as follows:

This day came again the parties by their counsel, and the court having maturely considered the petition filed by the said Mortimer Hogan and the affidavits therewith, the rule awarded on said petition against the said A. B. Guigon, the answer of said Guigon to said rule, the exhibits with said petition and answer, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said A. B. Guigon, as judge of the hustings court of the city of Richmond, is invested by law with jurisdiction to revoke the license of the said Mortimer Hogan in said petition mentioned; that the said A. B. Guigon, as judge of the said hustings court, has not exceeded his juris-

*NOTE BY THE JUDGE.—The following list of cases in prohibition, decided by the general court and the court of appeals, is given for convenience of reference: *Miller* v. *Marshall*, 1 Va. Cas. 158; *Hutson* v. *Lowry*, 2 Va. Cas. 42; *Jackson* v. *Maxwell*, 5 Rand. 636; *Mayo* v. *James*, 12 Gratt. 17; *Warwick & Berkdale* v. *Mayo*, 15 Gratt. 528; *West* v. *Ferguson & others*, 16 Gratt. 270; *Ellyson & others, ex parte*, 20 Gratt. 10; *Supervisors* v. *Gorrell*, 20 Gratt. 484; *French* v. *Noell*, 22 Gratt. 454; *Burch* v. *Hardwicke*, 23 Gratt. 51; *Supervisors* v. *Wingfield, Judge*, 27 Gratt. 329.

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diction in the proceedings complained of in said petition, and that the rule aforesaid awarded against him should be discharged. It is therefore considered and ordered, that the said rule be discharged, and that the petitioner, the said Mortimer Hogan, pay to the respondent, the said A. B. Guigon, his costs by him about his defence in this behalf expended.

Writ of prohibition denied.

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714 *Whiteacre, Sheriff, v. Rector & Wife.

[26 Am. Rep. 420.]

January Term, 1878, Richmond.

Homestead Exemption.—A homestead exemption cannot be claimed against a fine due the commonwealth, imposed for a violation of the criminal laws.

The case is fully stated by Judge Christian in his opinion.

The Attorney General, for the appellant.

There was no counsel for the appellees.

Christian, J., delivered the opinion of the court.

The single question we have to determine in this case is, whether the homestead exemption can be claimed against a fine due to the commonwealth, imposed for a violation of its criminal laws.

The record shows that Lewis Rector was tried and convicted upon two indictments in the county court of Fauquier for misdemeanor. In the one case he was sentenced to thirty days' imprisonment in the county jail, and to pay a fine of one hundred and twenty-five dollars; in the other, to fifteen days' imprisonment and to a fine of fifteen dollars.

Executions for these fines were placed in the hands of the sheriff of Fauquier, and by him levied upon certain personal property of Rector. And thereupon a bill of injunction was filed by Rector and wife on 715 behalf of *themselves and their children, in which they claimed that the property levied on had been set apart by said Rector as his homestead, and prayed for an injunction to prevent the sale of said property. The injuction was awarded, and upon the hearing was perpetuated by the circuit court of Fauquier county. From this decree perpetuating the injunction, the sheriff, on behalf of the commonwealth, applied for and obtained an appeal from one of the judges of this court.

Upon the record thus presented we have to determine the question, whether the homestead declared and claimed by Rector can be claimed against the commonwealth for fines imposed for a violation of its penal laws.

This question depends solely upon the construction to be given to the 1st section of article XI of the constitution of this state, which is in these words:

"§ 1. Every householder, or head of a family, shall be entitled, in addition to the articles now exempt from levy or distress for rent, to hold exempt from levy, seizure, garnisheeing, or sale under any execution, order or other process, issued on any demand for any debt heretofore or hereafter contracted, his real and personal property, or either, including money or debts due him, whether heretofore or hereafter acquired or contracted, to the value of not exceeding two thousand dollars, to be selected by him," &c.

Now, it will be observed that the exemption under this section is from sale under execution or other process "issued on any demand for any debt contracted." A fine imposed by statute for the violation of a law cannot, in any just sense, be designated as a debt contracted. The ordinary meaning of the word "debt" is a sum of money due to another by contract; and a "debt contracted" necessarily means that a debtor has come under a voluntary obligation 716 to a creditor. The relation of *debtor and creditor applies, as of course, that the one has given credit to the other in a contract. It would be a solecism and absurd to say that a fine imposed as a punishment for a penal offence was a debt contracted. Contracted how? Contracted with whom? "A debt contracted" implies the voluntary action of debtor and creditor founded on a valuable consideration. This cannot be predicated upon a fine imposed by way of punishment. The very essence of a contract is taken away when the amount is assessed as a penalty for violated law claimed by the state as a punishment for crime.

But the state, I conceive, is not within the purview of the constitutional provisions concerning homestead exemptions, as expressed in the 1st section, article XI, because not named therein; and but for the exceptions contained in the proviso to said section, the commonwealth could not be construed to come within its operation. It is old and familiar law, and is applicable to the state as well as the crown, a common law, that where a statute is general, and any prerogative, right, title or interest is diverted or taken from the king, in such case, the king shall not be bound unless the statute is made by express words or necessary implication to extend to him. Bac. Abridg. Prerogative E, p. 92. This principle of the common law, as applied to the state, has been recently recognized by this court in the case of Ford v. The Commonwealth, decided at the present term, where it was held that the homestead exemption cannot be set up by the sureties of a public officer to defeat a claim of the commonwealth for taxes collected and not accounted for. I refer to the elaborate opinion of my brother Burks, and the cases referred to by him as authority in this case, to show that the homestead exemption cannot be claimed

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See Com. v. Ford, 29 Gratt. 683, and *note*.

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against a demand of the commonwealth for taxes. Especially, I think, can this
717 not be done where *such demand is in the nature of a penalty for a violation of law.

Surely it would be contrary to the theory and design of the homestead laws, which are said to be founded upon considerations of sound public policy and for the public welfare, if they were so construed as to interfere with the administration of public justice, and take away the potent means of punishing crime. The public welfare is best promoted by the enforcement of the laws, and one of the most potent means of their enforcement is by fines imposed for their violation. It never could have been within the purview of the constitution, in enacting a homestead law, to deprive the state of the means of punishing offenders against its laws, by permitting such offenders to claim exemption against punishment for a violation of the penal laws of the commonwealth.

This is a case of first impression in this court. I have carefully examined the decisions of other states where homestead laws prevail, but can find no case in which the precise question before us has been determined. But I find that it has uniformly been held in all the states where the provision in their constitutions and laws is similar to this, exempting property from sale under execution, &c., "for any debt contracted," that the exemption does not apply to judgments and executions for torts, that the exemption applies only to executions in cases ex contractu, and not to cases ex delicto. The best reasoned cases are those of New York and Pennsylvania. See Shonton v. Kilmer, 8 How. N. Y. Pr. R. 527; Lathrop v. Singer, 39 Barb. R. 396; Lane v. Baber, 2 Grant's Cases, 424. See also Davis v. Henson, 29 Ga. R. 345.

It was held in all of these cases that the homestead exemptions could not be claimed against executions in actions for torts.
718 *Now, if according to these authorities the homestead exemption cannot be claimed as against executions on judgments for torts, a fortiori it cannot be claimed as against a fine imposed for a penal offence.

I am, therefore, of opinion to reverse the decree of the circuit court of Fauquier, perpetuating the injunction of sale; and am of opinion that the property levied on by the sheriff is liable to be sold under the execution for fines imposed by the commonwealth, although claimed under the exemption of homestead declared and put on record by the appellee Rector.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the decree of the circuit court of Fauquier, perpetuating the injunction in this cause, is erroneous. It is therefore decreed and ordered that the said decree be reversed and annulled, and that the appellant recover against the appellees his costs by him expended in the prosecution of his appeal here, together with his costs by him expended in the said circuit court.

And this court, now proceeding to enter such decree as the said circuit court ought to have rendered, it is decreed and ordered that the said injunction awarded on the — day of ——, 18—, be dissolved, and the bill of the appellees be dismissed. All of which is ordered to be certified to said circuit court.

Decree reversed.

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719 *Reed & als. v. Union Bank of Winchester & als.

January Term, 1878, Richmond.

Homestead Exemption—Waiver.*—The act, Code of 1873, ch. 183, § 3, which authorizes the waiver of the homestead exemption, is not in conflict with the XIth article of the constitution of the state; and if a party, executing his bond or note, waives his homestead exemption as to the bond or note, neither he nor his wife can set up said homestead exemption as against the said bond or note.

This was a suit in equity in the corporation court of Winchester, brought in November, 1876, by the Union Bank of Winchester, suing for itself and such other lien creditors of M. Tilden Reed as will come in, &c. The bill set out three judgments recovered by the plaintiffs against Reed; that an execution on one of them had been returned "no effects;" that Reed had no personal property, but that he owned a house and a lot in the city of Winchester. Several persons having liens on the property are made defendants, and the prayer of the bill is for an account of the liens and their priorities, and for a sale of the property.

Reed answered the bill, but the only matter necessary to be stated is, that he claimed his homestead exemption in the house and lot, and he exhibited with his answer his deed for declaration of homestead, dated in November, 1876, and recorded on the 29th of the same month. And on the 19th of February, 1877, Mrs. Susan A. Reed filed her petition in the cause, setting up the same claim of homestead. It appears, how-
720 ever, that in the notes on which *the plaintiff's judgments were founded the drawer and the endorser each waived the benefit of his homestead exemption.

The cause came on to be heard on the 18th of April, 1877, when the court held that Reed had waived his homestead exemption; and a commissioner having taken an account of the liens and their priorities, and it appearing that the rents of the property

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***Homestead Exemption——Waiver.**—The rule laid down in the principal case, in regard to the constitutionality of the statute authorizing the waiver of the homestead exemption, and the effect of a waiver, is approved in Linkenhoker v. Detrick, 81 Va. 44; Scott v. Cheatham, 78 Va. 87; Huffman v. Leffell, 32 Gratt. 41; White v. Owen, 30 Gratt. 43; Speidel v. Schlosser, 13 W. Va. 693; Moran v. Clark, 30 W. Va. 365, 4 S. E. Rep. 307.

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would not pay the debts in five years, it was decreed that unless Reed should pay the debts reported by the commissioner within sixty days, commissioners named should proceed to sell the house and lot upon terms stated in the decree; and M. T. Reed and Mrs. Reed thereupon applied to this court for an appeal; which was allowed.

The only question in this court related to the homestead exemption, and as to that the facts are stated by Judge Christian in his opinion.

A. B. McGruder and O. R. Pendleton, for the appellants.

Williams & Williams and Barton & Boyd, for the appellees.

Christian, J., delivered the opinion of the court.

The appellant, M. T. Reed, was the maker of a number of negotiable notes, part of which were discounted by the Union Bank of Winchester, and others by the Shenandoah National Bank of Winchester. Each of these notes contains the following stipulations: "And we, the drawer and endorser, each hereby waive the benefit of our homestead exemption as to this debt."

Upon these notes judgments were obtained, and a bill was filed by the judgment 721 creditors to subject the real *estate of said Reed to the payment of these judgments. In this suit Mrs. Susan A. Reed, wife of the defendant, M. T. Reed, filed her petition, in which she claims that the real estate which the judgment creditors are seeking to subject to the payment of their debts had been set apart and declared as his homestead; and she exhibits with her petition his declaration of homestead, embracing the same real estate, and which was put on record on the 29th day of November, 1876. The corporation court of Winchester held that this declaration of homestead, executed afterwards, could not prevail against judgments upon notes, in each of which respectively the benefit of the homestead exemption had been waived; and accordingly decreed a sale of the land thus set apart as a homestead to satisfy the judgments recovered on said notes. From this decree an appeal was allowed by one of the judges of this court.

The single question we have to determine is, whether a householder or head of a family has a right, under the homestead exemption laws declared by the constitution and statute, to waive the benefit of such exemption for a valuable consideration. This right is expressly given by statute, and if this statute is not in contravention of any provision of the constitution, the right clearly exists. The 3d section of chapter 183 of Code of 1873, provides that in all cases where a debtor or contractor shall declare in the body of the bond, note, or other evidence of the debt or contract that he waives, as to such debt or contract, the exemption from liability of the property which he may be entitled to hold exempt under the provisions of this act, the said property, whether previously set apart or not, shall then be liable to be subjected for such debt or contract, under legal progress, in like manner and to the same extent as other estate of said debtor and contractor. * * * The following or equivalent 722 *words shall be sufficient to operate as a waiver provided for in the previous section: "I (or we) hereby waive the benefit of my (or our) homestead exemption as to this debt, (obligation or contract as the case may be)."

If this provision of the statute is constitutional, the waiver can be enforced. Indeed in this case the validity of the waiver under the statute is conceded. It is disputed upon the sole ground that the statute is in contravention of the constitution of the state.

Upon the most familiar principles, repeatedly declared by the decisions of the supreme court of the United States, and by the supreme courts of all the states, and by none more emphatically than by this court, every statute is presumed to be constitutional. It cannot be declared by the courts to be otherwise, unless it is made clearly so to appear. The whole law-making power of the state is vested in the legislature, which is omnipotent unless restricted by the express or implied provisions of the state or national constitution. Potter's Dwarris on Statutes, 62.

As it was well expressed by Judge Denio, in People v. Draper, 15 N. Y. 532, 543, "plenary power in the legislature is the rule. A prohibition to exercise a particular power is the exception. In inquiring, therefore, whether a given statute is constitutional, it is for those who question its validity to show that it is forbidden."

Those who maintain the unconstitutionality of the statute under consideration, appeal to the provisions of sections 1st, 3d, 5th and 7th of article XI of the constitution, as forbidding the right of waiver. Let us carefully note these provisions and determine their true interpretation. By section first it is provided that every householder or head of a family shall be entitled to hold, exempt from levy, &c., property to the value of not exceeding $2,000, to be selected by him; by section 723 *third it is further provided, that nothing in the article should be construed to interfere with the sale of property, or any portion thereof, by virtue of any mortgage, deed of trust, pledge or other security thereon; and by section fifth, that the general assembly should, at its first session under the constitution, prescribe in what manner and on what conditions the said householder or head of a family should thereafter set apart and hold for himself and family a homestead out of the property thereby exempted; and might, in its discretion, determine in what manner and on what conditions he might thereafter hold for the benefit of himself and family such personal property as he might have, and coming within the exemption thereby made;

but that said section should not be construed as authorizing the general assembly to defeat or impair the benefits intended to be secured by this article. By section seventh, it was provided that the provisions of the article should be construed liberally, to the end that all the intents thereof might be fully and properly carried out.

These constitute all the provisions of the constitution having reference to the question under consideration. It is plain that there is in none of these provisions, nor in all combined, any express prohibition of a waiver of the homestead exemption by a householder or head of a family, or any interdiction of the powers of the legislature to provide for such waiver, or the mode in which it may be exercised. There being no express prohibition the question is, is there any restriction, by necessary implication, upon the power of the legislature to pass the act in question? I think not. I think the constitution grants the exemption as a privilege to the householder or head of a family. It declares that "he shall be entitled to hold" property to be selected by him. "He shall be entitled to hold" plainly means that he may if he chooses
724 *have the right to hold such property as he may choose to select and set apart as his homestead, not exceeding in value $2,000; and when he so chooses to exercise such right to hold it, and chooses so to select it and set it apart, that property over which such right is so exercised, and which is so set apart, shall be exempt from execution, sale, &c. And this right may be exercised at any time before sale. But if he never does exercise this right, such property is liable to sale for a satisfaction of his debts. It will be observed that no specific property is set apart by the constitution as exempt, but it is only such as he may select and set apart. If he fails to do this, he fails to avail himself of the right he was "entitled to hold" in such property; and his right of exemption, if not exercised before sale, is gone. The privilege given by the constitution is a personal privilege to be exercised by him, or not, as he may choose. The constitution does not declare, as does the poor debtors' laws, that certain property "shall be exempt" from levy, &c.; but that the householder or head of a family shall be entitled to hold property to be selected by him to the value of $2,000. In the former case the law executes itself. It is a part of the public policy of the government to exempt that particular property absolutely from forced sale, and its provisions cannot be waived. But there is no such constitutional declaration that property to the amount of $2,000 "shall be exempt." On the contrary, the very language used plainly shows that it may be exempt only when the privilege given to the householder or head of a family has been exercised, and the property selected and set apart by him.

But the view is very earnestly pressed in the argument of the able counsel for the appellants, that the homestead exemption was declared by the constitution in favor of the family, and that it would de-
725 feat the very object *and intent of the homestead exemption if the head of the family was allowed to waive the benefit of exemption, or otherwise dispose of property in which his family had the right of homestead. The plain answer to this suggestion is, that the constitution does not declare, as many of the constitutions of other states do, that the "homestead shall be exempt," or that it shall be for the sole use of the family. If it had been the intention of the framers of the constitution, or of the legislature in carrying out its provisions, to have so declared, it would have been easy to have so declared in unmistakable terms. It must be presumed that both the framers of the constitution and the legislature were familiar with the provisions of the constitutions, the statute law and decisions of the courts under them in the other states of the Union, and, if they had so intended, would have adopted the language of those constitutions, under which it had been held there could be no waiver of the homestead exemption. I have examined many of them, and find that in Illinois, New York, Vermont, Minnesota, Michigan, North Carolina, California, Arkansas and Georgia, their constitutions or statute laws provide either that the homestead "shall be exempt," or that there "shall be no waiver," or that the homestead shall be "for the sole use of the family." The authorities cited by the learned counsel for the appellant can furnish us but little aid in the construction of our constitution, because they are decisions under constitutions totally different from ours, and having provisions similar to those above indicated.

It is a significant fact that with these provisions of the constitutions and statutes of other states before them, the framers of the constitution, and the legislature carrying out its provisions, rejected all these terms and adopted the language, "shall be entitled to hold" property set apart
726 *and "selected by himself," and "hold the same for the benefit of himself and family."

It is plain that, by such language, especially in the light of that used by the constitutions of other states, and the decisions under them, it never was intended to declare that a man's dominion over his own property should be taken away without his consent.

Nor do I see the force of the argument so earnestly insisted upon, that the benefits intended to be secured to the family by the homestead exemption would be taken away if the head of the family were permitted to waive the benefit of exemption. As already seen, the property is held for the "benefit of himself and family;" but if it were to be held for the benefit of the family alone, I think the power to waive the benefit of the homestead would be a positive advan-

tage in most cases to the family. Generally what is of benefit to the head of a family is of benefit to the family. The dominion of a man over his own property is one of the most sacred rights, one in which his family as well as himself are deeply interested; and one with which, as was said by Judge Staples in Hartorff v. Welford, judge, 27 Gratt. 361, the legislative power cannot interfere. The jus disponendi is one of the most valuable incidents of property. Without it property is of little or no value. The value which this right gives to property is a benefit to the family as well as to the head of the family. In the impoverished condition of this state, the great majority of householders and heads of families do not own over $2,000 worth of property. If this could not be the basis of credit—if the head of the family is prevented, by the fact that he cannot waive his homestead, from obtaining credit, his family must of course suffer by it. So far from being a benefit to his family, it would seem to me a positive disadvantage to allow him to hold $2,000 *worth of property upon which he could never raise a dollar for the support of his family or the education of his children. The true interests and the real benefit to the family is, I think, to utilize the property exempted and make it the basis of credit.

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I see nothing either in the letter or spirit of the constitution which forbids a waiver of the homestead exemption, and am therefore for affirming the decree of the corporation court of the city of Winchester.

Decree affirmed.

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728 *Hawley v. Twyman, Trustee, & als.

January Term, 1878, Richmond.

1. **Wife's Equitable Separate Estate—Conveyance.**—F and his wife E join in a deed conveying land held by a trustee for the separate use of E to H; F acknowledges the deed, but though E signs it, she does not acknowledge it. H has no equitable title to the land which can be enforced against E.
2. **Same—Same.**—T, the trustee of E, by F contracts with A to sell the land to him; but E does not join in this contract, and there is no special provision in the deed of trust for E authorizing her to contract or convey. She is not bound by the contract.

This was a suit in equity in the circuit court of Culpeper, brought in May, 1874, by Lucy E. Hawley, by her husband and next friend, Charles M. Hawley, to enjoin a judgment in ejectment which had been recovered against Charles M. Hawley by Travis J. Twyman, trustee of Eliza W. Flint. Twyman and Mrs. Flint demurred to the bill, and also answered; and the court, upon their motion, dissolved the injunction. And thereupon Hawley applied to this court for an appeal; which was allowed. The case is stated by Judge Anderson in his opinion.

J. W. Green, for the appellant.
Field & Gray, for the appellees.

Anderson, J. This is a bill in chancery, in the name of Lucy E. Hawley, who sues by her husband and next friend, Charles M. Hawley, against Eliza W. Flint, *Travis J. Twyman and others, to enjoin the execution of a judgment in ejectment, which was rendered in favor of the said Twyman, trustee for said Eliza Flint, for a tract of land in the county of Culpeper, to which the plaintiff claims she is equitably entitled; and for a conveyance of the legal title by the said Twyman, trustee of the said Eliza W. Flint, in whom it vests, to her trustee, whom she wishes the court to appoint for her in the place of Fayette Mauzy, now deceased, in trust for the sole and separate use of her the said plaintiff and her heirs, free from the claim and control of her husband, &c. In support of her equity, she exhibits an instrument purporting to be a deed from Thomas O. Flint and Eliza W. Flint, his wife, conveying the said tract of land to said Fayette Mauzy in trust for the purposes declared in said deed. Said deed purports to have been signed and sealed by said Thomas O. Flint and Eliza W. Flint, and appears to have been acknowledged by the former, but not by the latter. In fact, the bill states that it was not acknowledged by the said Eliza in the manner provided for the privy acknowledgment of a married woman.

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The defendant, Travis J. Twyman, trustee for Eliza W. Flint, demurred generally to the bill, and also answered.

The court is of opinion that, upon the authority of McChesney & als. v. Brown's heirs, 25 Gratt. 393, the bill does not upon its face make a case in which the plaintiff would be entitled to any relief. In that case, Judge Moncure, speaking for the whole court, says: "In regard to personal estate, and the rents and profits of separate real estate, this power of disposition, if it be unrestrained, may be exercised in the same way by deed, will, or otherwise, as if the owner were a feme sole. But in regard to the corpus of separate real estate, it can be disposed of only in such mode, if any, as may be prescribed by the *instrument creating the estate; or, unless prohibited by such instrument, in the mode prescribed by law for the alienation of real estate by married women." There is no allegation in the bill that any mode was prescribed by which the separate estate of Eliza W. Flint in the land claimed by the plaintiff, by the instrument creating said estate might be disposed of; and it appearing from the face of the bill that the deed of conveyance upon which she rests her claim was not acknowledged by the said Eliza W. Flint, who at the time of the execution of said deed was a married woman, in the mode prescribed, upon privy examination, the demurrer to the bill was well taken, and ought to have been sustained by the court, and the plaintiff's bill dismissed, unless she could have amended the same by leave of the court, upon matters introduced into the cause by Twyman in his answer,

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so as to have made out a case upon the new matter, which would have entitled her to the relief she sought.

The new matter brought into the cause by Twyman, in his answer, purported to be a contract between Twyman, trustee for E. W. Flint, by Thomas O. Flint and C. M. Hawley, for the sale and purchase of the land in question. In the case above cited, it was further held by this court that a feme covert has no power to convey real estate in which she has a separate estate, "nor to contract in regard to it," except in strict pursuance of the powers conferred by the deed which vests in her the separate estate, or by the powers conferred by law in regard to the conveyance of real estate by a feme covert, and therefore that all her acts, and all instruments signed by her in reference to a transfer of her property, not in the mode prescribed by the instrument under which she holds the estate, or in the mode prescribed by law for the transfer of married women's estates, are utterly null and
731 void. And again, if she has no *power to convey the property otherwise than as aforesaid, she has "no power to mature a contract for such a conveyance which a court of equity could enforce." Upon this authority, it could not have availed the plaintiff to have amended her bill, to set up the contract exhibited by the defendant with his answer, and to have prayed a specific performance of the same by Eliza Flint, who was a married woman at the time said contract was made. It being void as to her during the coverture, because it was not acknowledged by her in the mode prescribed by law, it could not be binding on her after the relation of coverture had ceased by the death of her husband. The court is of opinion, therefore, that there was no error in the decree of the circuit court dissolving the injunction. Decree affirmed with costs.

The other judges concurred in the opinion of Anderson, J.

Decree affirmed.

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732 *Neilson & als. v. Bowman & als.

January Term, 1878, Richmond.

1. **Contracts—Validity.**—A contract of agency made between parties all of whom are *sui juris* capable of contracting, where there is no fiduciary relation between the parties, and no fraud or mistake, however speculative or even unequal it may be, is legal and valid.
2. **Same—Agency—Fiduciary Relations.**—But after the agency has commenced and a fiduciary relation has been established, a modification of the contract at the instance of the agent and for his benefit, unless attended by the utmost good faith upon his part, will be invalid; and any misrepresentation by the agent as to the subject of the agency, to induce the principals to modify the contract in his favor, or any undertaking by the agent with a person with whom he is dealing in respect to the subject of the agency to get from him the most favorable terms for his principals, is bad faith.
3. **Same—Valid and Void.**—Though the second contract is illegal and void, the first is valid, and the agency will be adjusted according to its terms.
4. **Witnesses—Competency—Objections in Appellate Court.***—Where a party to a cause is examined in his own behalf, and cross-examined at length by the other party without objection to his competency, the objection cannot be made in the appellate court.
5. **Same—Objections—Waiver.**—But where an objection to the competency of a party as a witness is written at the commencement of the deposition, the objection is not waived by the cross-examination.

This was a suit in equity brought in 1873, in the circuit court of Warwick county, and afterwards transferred to the circuit court of Elizabeth City county by Mary A. Neilson, widow of Hall Neilson, deceased, and her children, against Samuel M. Bowman and others, to set aside two contracts which the plaintiffs had made with
733 *said Bowman. The first was made in November, 1865, whereby they employed the said Bowman as their agent to attend to and sell their real estate in and near Richmond upon terms stated in the contract. This contract was under the hands and seals of the parties. The second does not appear to have been reduced to writing; but it was made in 1869, and was intended for the benefit of Bowman. The grounds on which they based their claim to set aside the contracts and hold Bowman to account was fraud in making the contracts and his transactions under them. The facts and proceedings in the cause are stated in the opinion of the court delivered by Moncure, P.

The cause came on to be heard on the 24th of October, 1874, when the court held that the charge of fraud was not sustained, and dismissed the bill with costs. And the plaintiffs obtained an appeal to this court.

Baker & Walke and Jones & Bouldin, for the appellants.

Ould & Carrington, for the appellees.

Moncure, P., delivered the opinion of the court.

The court is of opinion, that the agreement of November, 1865, filed with the original bill in this case as exhibit "A," was a legal and valid agreement when entered into by the parties thereto.

Hall Neilson, formerly a resident and merchant of the city of Richmond, removed to the city of Washington in the year 1852, and continued to reside there until his death, in the year 1860. He left a widow, Mary Archer, a daughter by a former marriage, Edmonia, and three children by his last marriage, Mary Tuly, Thomas H., and

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*Witness—Competency—Time to Object.—In Warwick v. Warwick, 31 Gratt. 70, the principal case is cited as authority for the proposition that because the competency of a witness is not excepted to until four questions had been propounded to him in his examination in chief, the right to make such exceptions was not waived.

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Fanny Neilson. After his death his
734 family, consisting *of his widow and his children by her, removed to the city of Philadelphia. Hall Neilson was supposed to be entitled at his death to certain real estate in and near Richmond, and after the late war between the United States and the Confederate States, to-wit: in 1865, his widow determined to go to Richmond and inquire into and attend to the matter. Her son, Thomas H. Neilson, it seems, was then living in Albany, where he was studying law, so that she could not get him to go with her, if he was old enough for the purpose. He was over twenty-one years of age. She therefore made an arrangement with the appellee, General Samuel M. Bowman, then, and probably still, a resident of the state of New York, who had been a friend of her husband, and was still a friend of his family, to go with her and aid her in obtaining the information she desired in regard to the said estate in and near Richmond. They accordingly went to Richmond and made inquiry and obtained information as aforesaid. After their return to their homes, the agreement aforesaid was entered into between the said widow and the said children by her of the first part, and the said Bowman of the second part. It recites that, "whereas said parties of the first part have purchased of Edmonia Neilson all her right, &c., both as creditor and heir at law, in the estate of the said Hall Neilson, deceased, and are now desirous of closing out the business of the estate as soon as possible; and whereas so much of said estate as lies in the state of Virginia is situated, &c., in the city of Richmond and the county adjacent, and consists of city lots, lands, water privileges, &c., all of doubtful and uncertain value, and more or less beclouded by adverse claims, tax titles, &c.; and whereas said party of the second part is willing to undertake the sole management and control of said portion of said estate." The said agreement
735 *then proceeds thus: "Now, it is agreed as follows, to-wit: that the said party of the second part will, and hereby so agrees, undertake the management and control of all the property and interests of every kind and description in the state of Virginia belonging to the said estate of the said Hall Neilson, deceased; that he will advance and pay all taxes now due and unpaid on the same; that he will, as soon as possible, get said property in condition for sale and cause it to be sold, and keep an accurate account of the proceeds thereof and pay over the same as follows:

"First. Five thousand dollars to Edmonia Neilson, so as to take up and cancel the obligations of the said parties of the first part, given by them for her interest as heir in the estate aforesaid.

"Second. Five thousand dollars each to Mary Tuly Neilson Jackson, Thomas Hall Neilson and Fanny Neilson, respectively, or in that proportion, if the proceeds shall amount to less than the sum of $15,000, after paying the above named sum to said Edmonia Neilson. And it is further agreed by and between all the parties hereto that said party of the second part shall have for his personal services in the premises, and for advances made and to be made for the benefit of such estate, all the benefits, proceeds and residue of such estate, after paying the sums aforesaid; but he is not to be held liable to pay said sums faster than he can realize from sales of the property aforesaid.

"It is contemplated by all the parties hereto that said party of the second part will give the business his personal and prompt attention; that he will cause suits to be instituted in partition for the purpose of closing up the estate, and in case of sales by order or decree of court, that he will bid in the property and hold it in his own name, if he shall deem it for the best
736 interests of the *party of the first part to do so, and that in all such proceedings he is to have the friendly co-operation and aid of the said parties of the first part. And Augustus Jackson having intermarried with the said Mary Tuly Neilson, and concurring in this agreement, joins in its execution."

The said agreement was then signed and sealed by all the parties thereto, including the said Augustus Jackson.

The agreement was speculative in its nature, and upon a subject about which none of the parties (all of whom were non-residents of the State) had much, if any, information. It was supposed to embrace some valuable land, which turned out afterwards not to be a part of it. The party of the second part, General Bowman, appears to have been a good lawyer and well informed man of business. The parties of the first part, the widow and heirs of Hall Neilson, were all ladies except one, who was in a distant state pursuing his legal education. These ladies had the utmost confidence in General Bowman; did, without hesitation, whatever he required them to do in regard to the subject of the agreement, and seemed to be ready to do whatever else he might have required in that regard. The result of the agreement might have inured very greatly to the advantage of General Bowman, and to the corresponding disadvantage of Hall Neilson's heirs, while it could not have occasioned any material loss to him. On the other hand, the three heirs of Hall Neilson, who were children of his widow, could, by possibility derive from the subject no more than five thousand dollars each at some future day, and would derive not so much, if the proceeds of the subject out of which the payments to them was to be made should turn out to be insufficient to pay the full amounts. Still the parties to the agreement were all sui juris and legally
737 competent to contract with each *other. There was no fiduciary relation between them when they entered into the said agreement; and it was not obtained by any fraud on the part of General Bowman, nor made under any mistake on the part of the widow and heirs of Hall Neilson, the parties

of the first part. The agreement, therefore, however speculative, or even unequal it may have been, was legal and valid when entered into by the parties thereto.

But the court is further of opinion, that the subsequent agreement between the same parties, entered into in December, 1869, or January, 1870, to change the said original agreement, so as to increase the compensation to which the said Bowman was to be entitled under the same for his attention to the business therein mentioned, and to diminish the amounts thereby stipulated to be paid to Mary Tuly Neilson Jackson, Thomas H. Neilson, and Fanny Neilson, respectively, out of the proceeds of the sale of the estate therein mentioned, was an illegal and invalid agreement.

Although no fiduciary relation existed between the said Bowman and the said parties of the first part of the said original agreement, or any of them, at the time it was entered into; yet such a relation was thereby created and thereafter existed, and continued to exist when the said subsequent agreement was entered into between the said parties to the same.

The fiduciary relation so created and existing was that of principal and agent, and trustee and cestui que trust. That such a relation was so created and so existed between the said parties, is plainly apparent on the face of the said original agreement, the terms of which have already been set out in this opinion, and need not be here again repeated. In 1868, at the request of the agent, two deeds were executed by his principal, conveying to him the property which was the subject of the
738 *agency, to enable the agent to dispose of it more readily and conveniently. There was no declaration of trust on the face of either of these deeds; but the trusts on which they were made were well understood and agreed between the parties, and the relation of trustee and cestui que trust clearly existed between them under the said deeds.

The duties of an agent or trustee arising from such a relation, and the onus which rests upon him to show that he is entitled to the benefit of any agreement made by him with his principal or cestui que trust, are strongly set forth in the elementary books and adjudged cases on the subject. Some of these will now be noiced.

In 1 Story's Equity Jurisprudence, §§ 307-323 inclusive, edition of 1866, by Redfield, the subject of constructive fraud arising from some confidential or fiduciary relation between parties, is fully considered, and a great many cases are referred to in the notes to those sections. After treating of various instances of such a relation, the learned author of that work, in section 315, proceeds thus: "In the next place, the relation of principal and agent. This is affected by the same considerations as the preceding, founded upon the same enlightened policy. In all cases of this sort, the principal contracts for the aid and benefit of the skill and judgment of the agent; and the habitual confidence reposed in the latter makes all his acts and statements possess a commanding influence over the former. Indeed, in such cases the agent too often so entirely misleads the judgment of his principal that, while he is seeking his own peculiar advantage, he seems but consulting the advantage and interests of his principal." After making a quotation from Cicero, the author thus further proceeds: "It is therefore for the common security of all mankind that gifts procured by agents, and pur-
739 chases made by them *from their principals, should be scrutinized with a close and vigilant suspicion. And, indeed, considering the abuses which may attend any dealings of this sort between principals and agents, a doubt has been expressed whether it would not have been wiser for the law in all cases to have prohibited them, since there must always be a conflict between duty and interest on such occasions. Be this as it may, it is very certain that agents are not permitted to become secret vendors or purchasers of property which they are authorized to buy or sell for their principal; or, by abusing their confidence, to acquire unreasonable gifts or advantages; or, indeed, to deal validity with their principals in any case, except where there is the most entire good faith, and a full disclosure of all facts and circumstances, and an absence of all undue influence, advantage, or imposition."

And in section 321, the same author proceeds thus: "In the next place with regard to the relation of trustee and cestui que trust. In this class of cases, the same principles govern, as in cases of guardian and ward, with at least as much enlarged liberality of application, and upon grounds quite as comprehensive. Indeed, the cases are usually treated as if they were identical. A trustee is never permitted to partake of the bounty of the party for whom he acts, except under circumstances which would make the same valid, if it were a case of guardianship. A trustee cannot purchase of his cestui que trust, unless under like circumstances; or, to use the expressive language of an eminent judge, a trustee may purchase of his cestui que trust, provided there is a distinct and clear contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances, and it is clear that the cestui que trust intended that the trustee should buy, and there is no fraud, no concealment, and no advantage taken by the trustee of information acquired by him as
740 *trustee. But it is difficult to make out such a case where the exception is taken, especially when there is any inadequacy of price, or any inequality in the bargain. And, therefor, if a trustee, though strictly honest, should buy for himself an estate of his cestui que trust, and then should sell it for more, according to the rules of a court of equity, from general policy and not from any peculiar imputation of fraud, he would be held still to remain a

trustee to all intents and purposes, and not to be permitted to sell to or for himself."

In the cases of Fox v. Machreth and Pitt v. Machreth, and the copious notes to those cases reported in Leading Cases of Equity, vol. 1, part 1, edition of 1876, pp. (top) 188-264, marginal 115-177, will be found a statement of all the principles of law and equity arising from the fiduciary relations before referred to; and it is unnecessary, and would be very tedious, to attempt to repeat them in detail in this opinion.

There is, no doubt, much conflict in the vast multitude of cases on the subject, and it is impossible to reconcile them all. But without making the vain attempt to do so, it is sufficient to say we are of opinion that, according to the well settled principles of law and equity on the subject, the subsequent agreement before referred to, made to modify and change the original agreement aforesaid, was illegal and invalid.

There are two grounds, if no other, upon each of which we think the subsequent agreement was illegal and invalid.

First. The agent, Bowman, failed to inform his principals of all the facts within his knowledge, material to enable them to determine discreetly whether they would agree to the proposed modification and change of the original agreement. It was certainly the duty of the agent to give such information to his principals. It is
741 *certain that he did not do so; and it is very certain that if he had done so, they would not have agreed to the proposed modification and change. The inevitable result of all this is, that the new or subsequent agreement was illegal and invalid.

Mrs. Neilson, in her deposition, says that the reasons urged by General Bowman for the purpose of inducing a modification of the contract of 1865 were, that some of the property represented by Mr. Ladd (to whom he had been referred by her for information on the subject) to belong to the Neilson estate, did not belong to it; that the property had not turned out as valuable as he supposed it would, and that he would lose money and be subjected to loss unless that contract was modified.

It is not pretended that any fraud or misrepresentation was practiced on General Bowman by the other parties to the original contract, or any of them, to induce him to enter into it. They knew little or nothing about the property when that contract was made. General Bowman had examined it and made inquiries about it. The contract was proposed and drawn by himself, and accepted by the other parties. It was a contract of speculation in its nature, whereby he might, according to the result, make little or nothing, or a great deal; while the other parties could not realize more than a certain sum, and might not realize so much, or even anything. Had the result been favorable to the agent beyond his highest expectations, he would have been entitled to the full benefit of it, and the other parties could not, and doubtless would not, have complained. Supposing the result to have been different, and that the property had yielded enough to pay the utmost amount to which the other parties could have been entitled under the contract, but not a cent of surplus for General Bowman, he would have had no just or legal cause of complaint. The fact
742 *that some lots which were supposed to constitute a part of the property when the contract was made, were not in fact a part of it, and that thus the advantage of the said contract to him was not so great as it would otherwise have been, can make no difference. His appeal to the other parties for a change of the contract was, therefore, addressed solely to their generosity. They were grateful to him for his kindness to them, and generously agreed to make the proposed change, in order that he might be saved from an apprehended loss.

Under such circumstances, uberrima fides ought to have been practiced by the agent. He should have made the fairest and fullest disclosure to his principals, to put them in possession of all the knowledge necessary to enable them to understand his situation in the matter. Especially he ought to have laid before them the contract which he had already made for the sale of the entire subject of his agency to E. S. Hamlin. Had he done so, it would at once have appeared to them what he would make by his agency, supposing the contract with Hamlin to be faithfully performed. Instead of doing so, he gave them little or no information on the subject. The counsel for the principals contend that according to the evidence in the record, the amount of the purchase money of the property sold by the agent, Bowman, to Hamlin, was $39,000, subject to little, if any, deduction, while the counsel for the agent contends that the amount would be much less. If it be anything like that amount, or even $20,000 or $25,000, it would afford a large amount of compensation and profit to the agent under his original agreement; and certain it is, that information of that fact would have prevented the principals from agreeing to any modification or change of that agreement.
743 *One of the items in the account in which the consideration of the sale by Bowman to Hamlin is estimated at $39,000, as aforesaid, is the sum of $15,000 for two tracts of land in Warwick county, near Newport News, conveyed by Hamlin to Mrs. E. A. Bowman, wife of General Bowman, by deed dated November 10th, 1869. In that deed the consideration expressed is that sum, which shows that it was the estimated value of the land in the transaction between Bowman and Hamlin in regard to the sale by the former to the latter of the Neilson property. It is true that Mrs. Neilson testifies that Bowman, in a conversation with her, said he would have to take for his advances a little farm in Virginia, worth some four or five thousand dollars, which was, no doubt, the land near Newport News, before referred to. It is also true that William F.

Giddings, a lawyer residing at Newport News and a witness for the plaintiffs, testifies that he would have considered six thousand dollars as the fair value of the land at the time of its conveyance by Hamlin to Mrs. Bowman, and more than it would then have sold for in cash; and other witnesses testify that its value was even less. On the other hand, it is true that in January, 1873, Bowman sold and conveyed the same land, including fifty acres, and it seems another small parcel of land, to Alexander B. Green, for $17,500. And it is also true that Bowman (who lived on the land near Newport News called the Fitchett farm, conveyed to him or rather to his wife by Hamlin, as aforesaid, from about the time of such conveyance until about the time of the said sale to Green) stated in the presence of the witness, Giddings, in the fall of 1871, that he made clear by the transaction with Hamlin the Fitchett farm and ten thousand dollars besides.

It was a breach of trust in Bowman to have the Fitchett farm conveyed to his
744 wife by Hamlin, and it *remained a part of the trust subject after such conveyance, and until it was sold to Green. So that the purchase money to be paid by Green constituted a part of the Neilson trust fund for the purposes of the trust. According to the terms of the original agreement the agent, Bowman, was entitled to nothing out of the proceeds of the sale of the subject of the agency (except, perhaps, the necessary expenses of the agency) until the heirs of Hall Neilson should have received the amounts stipulated to be paid to them respectively out of the said proceeds of sale.

Secondly. By the said original agreement the agent, Bowman expressly stipulated that he would, "as soon as possible, get said property in condition for sale, and cause it to be sold, and keep an accurate account of the proceeds thereof, and pay over the same as follows:" and then follows the directions for the payments agreed to be made, first, to Edmonia Neilson, and secondly, to the children of Mrs. Neilson, respectively, as aforesaid, and an agreement by and between all the parties that the said Bowman shall have for his personal services in the premises, and for advances made and to be made for the benefit of such estate, all the residue thereof, after paying the sums aforesaid, &c.

By agreement made the 14th day of November, 1869, between said Bowman and Hamlin (marked "Exhibit D," and filed with the bill), said Bowman sold to said Hamlin all his interest in the property known as the Spring Hill property, lying, &c., which said Bowman purchased at commissioner's sale, March, 1868, the interest of said Bowman being two-thirds thereof; also the property lying in James river known as the "Neilson property," &c.; and the said Bowman agreed to convey said property,
by good warranty deed, on the
745 *said Hamlin performing or being ready to perform his agreements thereinafter mentioned.

The said Hamlin, on his part, agreed, within ten days from date, to convey to said Bowman and his heirs, by good warranty deed, a farm then owned by him on James river, in the county of Warwick, known as the Fitchett farm, and containing, &c., 250 acres of land; also that he would procure to be conveyed by like deed to said Bowman, as soon as title could be obtained by order of court, &c., a strip of land supposed to be fifty-five acres, running through the said Fitchett farm.

On the delivery of the said deed for the Fitchett place by said Hamlin, said Bowman was to deliver the deed for the lands therein agreed to be conveyed to said Hamlin; and said Hamlin was to execute a note and mortgage on the Neilson property for $12,000, bearing interest at six per cent., at such long time as said Bowman could negotiate for with Neilson's heirs; also note and mortgage on the Spring Hill property for $11,000, and interest at six per cent., and payable $8,000 in annual payments of $2,000 each, with interest, and the balance in five years from date; also said Hamlin agreed to pay said Bowman on demand in personal property which he owned at Newport News, $1,000.

The said agreement was made before there was any change or modification of the original agreement aforesaid; though, no doubt, after said Bowman had formed an intention to apply for such change, and the stipulation therein contained, that said Bowman would negotiate with Neilson's heirs for such long credit as he could obtain from them for the $12,000 of the purchase money of the property sold to Hamlin, which he expected and intended to be paid to the said heirs, or rather three of them, was certainly a stipulation to violate his duty
as agent; which duty required him to
746 do the best he could *for his principals. They were, as he well knew, in need of the money which they were entitled to receive under the agreement as soon as it could be made by their agent, who expressly promised in the said original agreement " that he would, as soon as possible, get said property in condition for sale, and cause it to be sold, and keep an accurate account of the proceeds thereof, and pay over the same" to the heirs of Neilson, to the extent of the amounts agreed to be paid to them respectively, before anything could be retained by him on account of his compensation as agent or anything else. And yet he promises, in his agreement with Hamlin, to endeavor to obtain from the heirs of Neilson their consent to give to Hamlin a long credit on a note and mortgage on the Neilson property for $12,000, bearing interest at six per cent., which he agreed to accept from Hamlin in part of the purchase money of said property, and which he expected and intended to assign to the said heirs (except Edmonia Neilson), in payment of that would be due to them out of the said purchase money. Instead of that, his plain duty as agent of the said heirs was to obtain for them as soon as possible the

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portion of the said money to which they would become entitled. But he preferred to consult his own interest and the interest of Hamlin to that of his principals in this matter. And in doing so, he violated a plain rule of law and equity which applies to persons standing in the fiduciary relations to each other which existed between him and his principals as aforesaid.

Other reasons might be assigned, but surely enough has already been said to show that the subsequent agreement was illegal and invalid.

The court is further of opinion, that the said subsequent agreement being illegal and invalid, the said original agreement remains in full force and effect as if 747 *the subsequent agreement had never been entered into. The latter agreement is altogether illegal and invalid, and therefore cannot have the effect of invalidating the former agreement.

The court is therefore of opinion, that the rights of the parties to this suit must be adjusted and administered according to the said original agreement, unaffected by the said subsequent agreement or anything done under it, except as hereinafter mentioned. According to the said original agreement, the said agent, Bowman, became indebted to each of his said principals, Mary Tuly Neilson Jackson, Thomas Hall Neilson, and Fanny Neilson, in the principal sum of five thousand dollars, which should bear interest from the 10th day of November, 1869, until paid, that being the day from which Hamlin was to pay interest on the bonds given by him to said Bowman for the balance of the purchase money of the property sold by the latter to the former as aforesaid, after deducting fifteen thousand dollars, the price of the land near Newport News conveyed by Hamlin to Mrs. Bowman, by deed dated on the said 10th day of November, 1869, and one thousand dollars, the price of the personal property on said land received by said Bowman from said Hamlin as aforesaid. The said three sums of five thousand dollars, amounting together to the sum of fifteen thousand dollars, are subject to no abatement on account of any inadequacy of the proceeds of sale of the property in the state of Virginia, belonging to the estate of said Hall Neilson and sold by said Bowman; as the said proceeds, after paying five thousand dollars to Edmonia Neilson, as provided for in the said original agreement, greatly exceed the said sum of fifteen thousand dollars.

But the said sum of fifteen thousand dollars is subject to a credit for the sum of twelve thousand dollars, amount of the notes of the said Hamlin, dated No- 748 vember 10th, *1869, and bearing interest at six per centum, secured by deed of trust on the Spring Hill property, which notes were endorsed by the said Bowman to Mary Tuly Neilson Jackson, Thomas H. Neilson, and Fanny Neilson Wells, and to the benefit of which said notes and of the liability of the endorser thereon, and of the deed of trust executed for their security, the said Mary Tuly Neilson Jackson, Thomas Hall Neilson, and Fanny Neilson (now Fanny Neilson Wells, are entitled on account and in part of the said three sums of five thousand dollars due to them, respectively, under the said original agreement, making together the principal sum of fifteen thousand dollars, with interest from the 10th day of November, 1869, as aforesaid. After applying the said credit, the balance of the principal remaining due of the said sum of fifteen thousand dollars is three thousand dollars, which should bear interest from the said 10th day of November, 1869.

The said Bowman, or the trust fund with which he is chargeable, or which came to his hands as agent as aforesaid, is further indebted to the same parties in the sum of twelve hundred and fifty dollars, with interest thereon from the 30th day of November, 1871, till payment, that being the sum paid, on or about that day, to Major Page, attorney of the said Bowman, out of interest then due on the said notes of Hamlin, endorsed by Bowman, to the said parties, and being one-half of the principal of the last moiety of the sum of five thousand dollars payable to Edmonia Neilson under the original agreement aforesaid, out of the estate of Hall Neilson in the hands of said Bowman as aforesaid.

There is, therefore, now due to the said parties, over and above what is due to them on the said notes of said Hamlin for twelve thousand dollars, secured by deed of trust and endorsed to them by said Bow- 749 man as aforesaid, *the sum of four thousand two hundred and fifty dollars, with interest on three thousand dollars, part thereof, from the 10th day of November, 1869, till payment, and on twelve hundred and fifty dollars, the residue thereof, from the 30th day of November, 1871, till payment; for which the said Bowman is personally liable, he having actually received more money arising from the trust estate created by the said original agreement and applicable under the same to the payment of said principal and interest so due, than is sufficient for that purpose, and for which the trust estate created by the original agreement is liable; and especially the two notes of said Hamlin to said Bowman, one for $2,000 due January 1st, 1874, with interest, and the other for $3,000, due January 1st, 1875, with interest, enjoined by an order made in this cause by the judge of the circuit court of Warwick county on the 25th day of February, 1873; and also the bonds of the defendant, A. B. Green, to said Bowman, given for the purchase of certain lands in Warwick county, enjoined by another order made in this cause by the judge of the circuit court of Elizabeth City county (to which the cause had been removed), on the 21st day of June, 1873. The said two injunctions ought to remain in force to secure the payment and until full payment of the said sum of four thousand two hundred and fifty dollars, with interest as aforesaid, still due to the said Mary Tuly Neilson Jackson, Thomas H.

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Neilson and Fanny Neilson Wells, as aforesaid.

The court is therefore of opinion that the decree appealed from in this case is erroneous, and ought to be reversed with costs, and the cause remanded to the court below to be further proceeded in to a final decree, in conformity with the foregoing opinion.

In the foregoing opinion we have not noticed an objection, taken for the first time in the appellate court in the 750 *printed argument of the learned counsel for the appellees, that the appellants, Mary A. Neilson and Thomas H. Neilson were incompetent witnesses, and that their depositions ought to be disregarded by the appellate court, even though no such objection was taken in the court below; and the case of Statham & als. v. Ferguson's adm'r & als., 25 Gratt. 28, was cited in support of that view. Hord's adm'r v. Colbert & als., decided by this court in January, 1877, 28 Gratt. 49, is a complete answer to that objection. It was there held that the plaintiff having cross-examined C. on all the issues in the cause, that was a waiver of the objection to his competency, and it cannot afterwards be made, even in the court below. In this case the appellee Bowman, who, by his counsel, now for the first time, in the appellate court, objects to the competency of the witnesses, Mary A. and Thomas H. Neilson, made no such objection at any time in the court below, but on the contrary he gave to each of them a long and close cross-examination. He thereby waived his right to object to the competency of the said witnesses, according to the decision of this court last referred to.

In the case in 25 Gratt. 28, supra, when the plaintiff was introduced as a witness in the case in the court below, and before her examination was commenced, an exception was taken and written at the head of the deposition in these words: "Defendants, by counsel, except to the taking of the deposition of Mrs. Mary Ann Ferguson, the plaintiff in this cause, and to the reading of the same, on the ground that she is incompetent to testify on her own behalf, being a party to the contract, the validity of which is in controversy in this suit." It does not appear from the report of the case whether she was cross-examined by the defendants or not. But even if she was, any inference from that fact of an intention to waive objection to her competency as a witness was conclusively repelled by 751 *the express exception to such competency written at the head of her deposition as aforesaid.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the agreement dated the — day of November, 1865, between the widow and heirs-at-law of Hall Neilson, deceased, viz: Mary A. Neilson, Mary Tuly Neilson Jackson, Thomas Hall Neilson and Fannie Neilson, parties of the first part, and Samuel M. Bowman, of New York, party of the second part, executed also by Augustus Jackson, husband of the said Mary Tuly Neilson Jackson, and filed with the original bill in this case as exhibit "A," was a legal and valid agreement when entered into by the parties thereto.

But the court is further of opinion, that the subsequent agreement between the same parties, entered into in December, 1869, or January, 1870, to change the said original agreement, so as to increase the compensation to which the said Bowman was to be entitled under the same for his attention to the business therein mentioned, and to diminish the amounts thereby stipulated to be paid to said Mary Tuly Neilson Jackson, Thomas H. Neilson and Fanny Neilson respectively, out of the proceeds of the sale of the estate therein mentioned, was an illegal and invalid agreement.

And the court is further of opinion, that the said subsequent agreement being illegal and invalid, the said original agreement remains in full force and effect as if the subsequent agreement had never been entered into. The latter agreement is altogether illegal and invalid, and therefore cannot have the effect of invalidating the former agreement.

752 *The court is therefore of opinion, that the rights of the said parties must be adjusted and administered according to the said original agreement, unaffected by the said subsequent agreement, or anything done under it, except as hereinafter mentioned.

According to the said original agreement, the said Bowman became indebted to each of his said principals, Mary Tuly Neilson Jackson, Thomas Hall Neilson, and Fanny Neilson, in the principal sum of five thousand dollars, which should bear interest from the 10th day of November, 1869, until paid, that being the day from which E. S. Hamlin was to pay interest on the bonds given by him to said Bowman for the balance of the purchase money of the property sold by the latter to the former as mentioned in the record, after deducting fifteen thousand dollars, the price of the land near Newport News conveyed by said Hamlin to Mrs. Bowman by deed dated the said 10th day of November, 1869, and one thousand dollars, the price of the personal property on said land received by said Bowman from said Hamlin. The said three sums of five thousand dollars, amounting together to the sum of fifteen thousand dollars, and subject to no abatement on account of any inadequacy of the proceeds of sale of the property in the state of Virginia, belonging to the estate of said Hall Neilson and sold by said Bowman, as the said proceeds, after paying five thousand dollars to Edmonia Neilson, as provided for in the said original agreement, greatly exceed the said sum of fifteen thousand dollars.

But the said sum of fifteen thousand dollars is subject to a credit for the sum of twelve thousand dollars, amount of the notes of said Hamlin, dated November 10th,

1869, and bearing interest at six per centum, secured by deed of trust on the Spring Hill property, which notes were endorsed by the said Bowman to said
753 *Mary Tuly Neilson Jackson, Thomas H. Neilson, and Fanny Neilson, then the wife of C. J. S. Wells, and to the benefit of which said notes and of the liability of the endorser thereon, and of the deed of trust executed for their security, the said endorsees are entitled, on account and in part of the said three sums of five thousand dollars due to them, respectively, under the said original agreement, making together the principal sum of fifteen thousand dollars, with interest from the 10th day of November, 1869, as aforesaid. After applying the said credit, the balance of the principal remaining due of the said sum of fifteen thousand dollars is three thousand dollars, which should bear interest from the said 10th day of November, 1869.

The said Bowman and the trust fund with which he is chargeable, or which came to his hands as agent as aforesaid, are further indebted to the same parties in the sum of twelve hundred and fifty dollars, with interest thereon from the 30th day of November, 1871, till payment, that being the sum paid, on or about that day, to Major Page, attorney of the said Bowman, out of the interest then due on the said notes of Hamlin, endorsed by Bowman, to the said parties, and being one-half of the principal of the last moiety of the sum of five thousand dollars payable to Edmonia Neilson, under the original agreement aforesaid, out of the estate of Hall Neilson in the hands of said Bowman as aforesaid.

There is, therefore, now due to the said parties, over and above what is due to them on the said notes of said Hamlin for twelve thousand dollars secured by deed of trust and endorsed to them by said Bowman as aforesaid, four thousand two hundred and fifty dollars, with interest on three thousand dollars, part thereof, from the 10th day of November, 1869, till payment, and on twelve hundred and fifty dollars, the residue
754 thereof *from the 30th day of November, 1871, till payment; for which the said Bowman is personally liable, he having actually received more money arising from the trust estate created by the said original agreement, and applicable under said agreement to the payment of said principal and interest so due, than is sufficient for that purpose, and for which the residue of the said trust estate, the proceeds of which have not yet been actually received by him, is also liable; and especially the two notes of said Hamlin to said Bowman, one for $2,000, due January 1st, 1874, with interest, and the other for $3,000, due January 1st, 1875, with interest, enjoined by an order made in this cause by the judge of the circuit court of Warwick county on the 25th day of February, 1873; and also the bonds of the defendant, A. B. Green, to said Bowman, given for the purchase of certain lands in Warwick county, enjoined by another order made in this cause by the judge of the circuit court of Elizabeth City county (to which the cause had been removed), on the 21st day of June, 1873; which said two injunctions ought to continue and remain in full force, to secure the payment, and until payment, of the said sum of four thousand two hundred and fifty dollars with interest as aforesaid, still due to the said Mary Tuly Neilson Jackson, Thomas H. Neilson and Fanny Neilson Wells, as aforesaid.

The court is therefore of opinion, that the decree appealed from in this case is erroneous; and it is decreed and ordered that the same be reversed and annulled, and that the appellee, Samuel M. Bowman, pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here; and that for the payment of the said costs, as well as of the costs by the said appellants expended, and which may by them be hereafter expended,
755 in the prosecution of this suit *in the court below, the said residue of the said trust estate shall also be liable.

And it is further decreed and ordered, that the cause be remanded to the said circuit court of Elizabeth City county for further proceedings to be had therein to a final decree, in conformity with the foregoing opinion and decree; which is ordered to be certified to the clerk of the circuit court of Elizabeth City county.

Decree reversed.

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756 *Rowe v. Bentley & als.

January Term, 1878, Richmond.

In 1851 R was appointed trustee in a deed for B, a married woman, and her children, she taking for her life, and they in remainder. In 1855 R was removed and T appointed in his place. Of the trust property there was $400 which R had lent to a firm of which his brother W was a member, and R directed W to settle for it with T. W transferred to T the bond of H, and received from T a receipt for the $400. In a few months after, H died, and T sued his administrator and recovered a judgment, but the execution upon it was returned "no effects." In 1871, B, still under coverture, by her next friend, and her children, sued R and T for a settlement of their accounts as trustees—HELD:

1. **Trustees—Breach of Trust.**—Both R and T were guilty of a breach of trust in the transfer and receipt of the bond of H, and are liable for the amount to the *cestui que trust*.
2. **Same—Same—Statute of Limitations.***—The statute of limitations is not a bar to the claim as to either of the trustees.

***Statute of Limitations—In Equity.**—In McCarty v. Ball, 82 Va. 872, the principal case is cited for the rule that courts of equity follow the law as respects the statute of limitations. If a legal claim, based at law, is asserted in equity, it is equally barred there. See also, Ayre v. Burke, 82 Va. 341; Switzer v. Noffsinger, 82 Va. 523; Hutcheson v. Grubbs, 80 Va. 257; Cottrell v. Watkins, 89 Va. 810; Coles v. Ballard, 78 Va. 149.

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3. **Same—Same—Lapse of Time.***—Under the circumstances—the coverture of B, the life tenant, the suspension of legal proceedings during the war in that county, the subsequent stay laws, and the ignorance of the facts by the *cestui que trust*—the lapse of time is not a bar to the recovery of the claim.

4. **Decree.**—A decree against R for the amount, leaving him to assert any claim he may have against T, is not erroneous.

This was a suit in equity in the circuit court of Gloucester county, brought in 1871 by Mary E. Bentley, a married woman, by her next friend and her children, against Thomas B. Rowe, Thomas S. Taliaferro and another, for a settlement of the accounts
757 of said Rowe and Taliaferro *as trustees of the plaintiffs, and for general relief. The only question in the case was whether Rowe, who had been removed as trustee in 1855, when Taliaferro was substituted in his place, had paid over to Taliaferro the sum of $400, which was in his hands as trustee. Rowe showed a receipt of Taliaferro's, in which he says: "Received this 7th of May, 1855, of Thomas B. Rowe, trustee and guardian for Mary E. Bentley and children, four hundred dollars in full, for money in his hands held as trustee." There was no doubt that Rowe did not pay the $400 in money to Taliaferro, but that Taliaferro received a bond or note of Thomas Hall for the amount. Hall died a few months afterwards; and in October, 1856, Taliaferro recovered a judgment upon the bond for the amount against Rowe as the administrator of Hall upon which an execution was issued, which was returned "no effects." The only witnesses in the case were Thomas B. Rowe, his brother William H. Rowe and Taliaferro, whose evidence as to the circumstances and condition on which the bond of Hall was received by Taliaferro was conflicting, and this court does not undertake to decide which of them was correct.

The cause came on to be heard at the July term, 1874, when the court held that Rowe was responsible for the $400, and made a decree against him for $814, with interest on $400, part thereof, from the 1st of April, 1872, in accordance with the report of a commissioner which had been made in the cause. And thereupon Rowe applied to this court for an appeal; which was allowed. The case is stated by Judge Burks in his opinion.

M. B. Seawell and John S. Wise, for the appellant.

L. R. Page, for the appellees.

758 *Burks, J., delivered the opinion of the court.

Many years ago James H. Bently, by deed, settled certain property to the separate use of his wife, Mary E., for her life, with remainder to her children, and in the year 1851 the appellant, Thomas B. Rowe, was appointed by the circuit court of Gloucester county trustee under the deed, and amongst the trust property came to his hands were four hundred dollars in money. He acted as trustee until some time in the month of February, 1855, when he was displaced by order of court, and the appellee, Thomas S. Taliaferro, substituted as trustee. No portion of this money, nor of the interest which has accrued thereon since the first day of January, 1855, has ever been paid to the cestuis que trust by either of the trustees, and this suit, commenced in February, 1871, against the trustees to enforce payment, resulted in a decree against the appellant for the principal sum and interest. It is this decree of which the appellant complains.

It was his duty, and a plain one, as soon as the new trustee was appointed, to account with him and make payment of the trust money in his hands. He insists that he made such payment, and that the decree against him was therefore erroneous. We do not propose to go into the evidence, conflicting as it is, which, it is claimed, establishes the payment to his successor in the trust. It is sufficient to say that in our opinion, it falls far short of relieving him of the liability to the cestuis que trust for which he has been called to account in this suit. Instead of paying the money as he should have done, he left it with his brother, who was a member of a firm to whom the money had been lent, in violation of the trust, without security of any sort, to arrange and settle the matter with the trustee to whom payment was
759 to be made. *The arrangement made was to turn over to the trustee the unsecured bond of a third party of doubtful solvency, which was never collected, and thus the trust fund was first illegally put to hazard and finally lost. This was a palpable breach of trust in which both of the trustees actively participated, and

*Laches——Knowledge of Rights.—The principal case has been frequently cited for the proposition that laches cannot be imputed to a person who is ignorant of his rights. Jameson v. Rixey, 94 Va. 346; Craufurd v. Smith, 93 Va. 629; Moorman v. Arthur, 90 Va. 475; Cottrell v. Watkins, 89 Va. 810; Tunstall v. Withers, 86 Va. 900; Sedgwick v. Taylor, 84 Va. 825; Terry v. Fontaine, 83 Va. 454; Green v. Thompson, 84 Va. 411; Massie v. Heiskell, 80 Va. 804; Lamar v. Hale, 79 Va. 165; Harshberger v. Alger, 31 Gratt. 52; Barton's Ch. Pr. (2d. Ed.) 98, 100, 101, 121; Jones v. Lemon, 26 W. Va. 635; Van Winkle v. Blackford, 33 W. Va. 573, 11 S. E. Rep. 26.

Same—When Not Imputed.—In Morrison v. Householder, 79 Va. 627, the rule is laid down, citing the principal case, that while it is true that equity will not lend its aid to enforce state demands, when, by reason of the death of parties, or loss of papers or from other circumstances there can no longer be a safe determination of the controversy, yet where the demands sought to be enforced were definitely ascertained in the lifetime of the sureties in a suit to which they were parties, and the delay which has occurred in proceeding against them is reasonably accounted for by the infancy of the wards, the war, and other circumstances, laches will not be imputed to them. See also, Lamar v. Hale, 79 Va. 164; Brown v. Lambert, 33 Gratt. 256.

thereby incurred a joint and several liability to the cestuis que trust. Barksdale & als. v. Finney & als., 14 Gratt. 338.

William H. Rowe was the agent of the appellant in making this arrangement. It was through him that the appellant procured from Taliaferro the receipt upon which he so much relies. He cannot be allowed to claim a benefit, and at the same time repudiate the agency through which it was derived.

The receipt of Taliaferro, although in its terms an absolute acknowledgment of the payment of four hundred dollars in full for money in the hands of the appellant as trustee, is merely prima facie evidence of the fact, and not conclusive; and, therefore, the fact which it recites may be not only explained or varied, but contradicted by oral testimony. This is well settled law. 1 Greenleaf on Ev. § 305; The Deleware, 14 Wall. 579, 601.

But it is further insisted by the learned counsel for the appellant, that if the evidence does not establish the payment, the appellant is protected by laches, lapse of time, and the statute of limitations relied on in his answer to the bill.

The general rule undoubtedly is, that in the application of statutes of limitation equity follows the law, and wherever a demand would be barred at law an equitable demand of the like character will be barred in equity. The bar is applied by analogy, or, according to some authorities, by obedience to the statutory enactment; or, in other words, after a bar has been
760 fixed by statute to *the legal remedy, the remedy in a court of equity has, in analogous cases, been confined to the same period. Choldmondely v. Clinton, 2 Jac. & Walk. Ch. R. 1; Kane v. Bloodgood, 7 John. Ch. R. 90; 1 Call, 419, 428.

In cases, however, of direct or express trusts, such as are known and cognizable only in courts of equity, while they are subsisting, as between trustee and cestui que trust, the statute of limitations has no application, and no length of time is a bar. 2 Perry on Trusts, § 863. It has been held, however, that if a trustee repudiates the trust by clear and unequivocal acts or words, and claims thenceforth to hold the estate as his own, not subject to any trust, and such repudiation and claim are brought to the notice or knowledge of the cestui que trust in such manner that he is called upon to assert his equitable rights, the statute will begin to run from the time that such knowledge is brought home to the cestui que trust, but the adverse holding must be clear and brought home to the cestui que trust beyond question or doubt; and it is said that the rule applies, when the relation of trustee and cestui que trust is absolutely ended, whether by breach of trust or otherwise. 2 Perry on Trusts, § 864; Hill on Trustees (side p.), 264 et seq. and notes.

In the cases of fraud the authorities are conflicting, as to whether at law the statute begins to run from the commission of the fraud, or from its discovery. Angell on Lim. § 183 to § 189; Collis v. Waddy. 2 Munf. 511; Rice v. White, 4 Leigh, 474; 1 Rob. Prac. (old ed.) pp. 82, 87, 110.

In equity, however, it would seem to be well settled that the statute begins to run only from the discovery of the fraud. Shields, adm'r, &c., of Waller & others v. Anderson, adm'r of Byrd, &c., 3 Leigh 729; 2 Rob. Prac. (old ed.) 251, 252.

761 *The question often arises, says Judge Story, in cases of fraud and mistake and acknowledgments of debts, and of trusts and charges on lands for payment of debts, under what circumstances and at what time the bar of the statute of limitations begins to run. In general, it may be said that the rule of courts of equity is, that the case of action or suit arises when and as soon as the party has a right to apply to a court of equity for relief. In cases of fraud or mistake it will begin to run from the time of the discovery of such fraud or mistake, and not before. 2 Story's Eq. § 1521d.

In the leading case of Kane v. Bloodgood, 7 Johns. Ch. R. 90, 122, Chancellor Kent says, that fraud as well as trust is not within the statute, and it is well settled that the statute does not run until the discovery of the fraud, for the title to avoid it does not arise until then, and pending the concealment of it, the statute ought not, in conscience, to run.

Such is, without controversy, the settled doctrine of courts of equity. Angell on Lim. § 183 and cases cited in notes, § 30; 2 Perry on Trusts, § 861.

In the light of these authorities the act of limitations cannot avail the appellant as a defence against the claim of the cestui que trust in this case. He cannot rest alone on his adverse claim set up, as he alleges, on the termination of his trust and the appointment of a new trustee. He had to account with this trustee and to turn over to him the trust funds in his possession. In the manner of doing this he co-operated with the trustee in a breach of trust by which the trust subject was imperiled and ultimately lost to the cestui que trust, to whom the two thus became jointly and severally liable for the loss. To incur this liability it is not necessary that they should have been guilty of a moral fraud. It is sufficient that they committed a breach of trust to the injury of the cestui que
762 *trust, and which was followed by the same consequences that would have resulted from evil intent. There is nothing in this record to show that the cestui que trust ever had any notice or knowledge of this breach of trust until they filed their bill, and if they had acquired such knowledge sooner their rights should not have been affected by it, for Mrs. Bently, who is entitled to the trust property during her life, is and has been from the creation of the trust a married woman, and her children are entitled in remainder, so that whether there was knowledge or not the

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statute would not run as against the cestui que trust on the claim asserted in the bill. 2 Perry on Trusts, § 860.

From what has been said, it will be seen that this case in its circumstances is not analogous to the two cases so much relied on in the argument of the learned counsel for the appellant, to-wit: Sheppards v. Turpin, 3 Gratt. 357; Livesay v. Helms, 14 Gratt. 441. The former was a case of constructive trust, while this is a case of express trust. In Livesay v. Helms, Judge Samuels, in his opinions, concurred in by two of the other judges, states expressly that no fraud, collusion, or other thing was shown to deprive the plea of the act of limitations of any part of its efficacy. If such proof had been made, the decision must have been different. If collusion between the administrator de bonis non and the adverse claimant, or the co-operation of the two in a breach of trust to the injury of the distributees of the decedent had been shown, the distributees would have been entitled to relief in a suit against the two, and the statute would have been no bar to such relief, at least in the absence of knowledge on the part of the distributees of the fraud or breach of trust five years before the suit was commenced.

As to the laches relied on by way of defence, it is certainly true that it is an established rule with courts of 763 *equity, independent of any statute limiting the time in which suits can be brought, that they will not entertain stale demands. Hume v. Beal's ex'or, 17 Wall. U. S. R. 336, 348.

This rule is adopted, because after great lapse of time, from the death of parties and loss of papers, there is danger of doing injustice, and there can no longer be a safe determination of the controversy. Bargamin & als. v. Clarke & als., 20 Gratt. 544, 553; 2 Story's Eq. § 1520 and note; 1 Perry on Trusts, §§ 228, 229. Whether, however, the lapse of time is sufficient to bar a recovery must, of necessity, depend upon the particular circumstances of each case. Harwood v. R. Road Co., 17 Wall. U. S. R. 78.

Some of the cases decided by this court, in which the rule was applied, are cited by Judge Joynes in Bargamin & als. v. Clarke & als. supra.

The delay in this case is sufficiently accounted for by the occurrence of the war and the obstructions occasioned thereby, the partial suspension of legal remedies by statute for eight years, the disabilities under which the claimants labored and the lack of knowledge of their rights. Acquiescence cannot be imputed in the absence of all knowledge of the facts of which it is predicated. There were no complicated accounts to settle, and the parties to the single transaction, the subject of investigation, are all alive and testified in the case.

It is assigned as error that the appellant is held primarily bound. We think there is no error in this. As between him and the cestuis que trust, he has never accounted for the trust funds in his hands. If, under the circumstances, he has any remedy (and we express no opinion as to whether he has or not) against his co-defendants, Thomas S. Taliaferro and William H. Rowe, or either of them, he will be at liberty 764 to pursue *it. The decree appealed from settles nothing as between the defendants, and as the cause will be remanded, their equities, inter se, may, on proper pleadings, be inquired into and adjusted by the circuit court upon the proofs now in the cause, and such further proofs as may be adduced by them respectively. The objection for the want of necessary parties was waived at the bar by the appellant's counsel.

The court is of opinion that there is no error in the decree of the circuit court, and that the same should be affirmed.

Decree affirmed.

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765 *Tyler, Serg't &c. v. Taylor, Auditor &c.

January Term, 1878, Richmond.

Absent, MONCURE, P.

Fines—Mandamus.—Fines collected by the sheriff of a county, or by the sergeant of a city or town, are to be paid by him to the treasurer of his county, city or town, and not to the auditor of accounts of the state; and therefore a *mandamus* will not lie at the suit of a sheriff or sergeant, to compel the auditor to receive coupons which have been paid to him in a discharge of a fine.

This was an application to the supreme court of appeals, by James M. Tyler, sergeant of the city of Richmond, for a writ of mandamus to compel William F. Taylor, auditor of accounts of the state, to receive coupons from bonds funded under the act of March 30th, 1871, which the said sergeant had received in payment of a fine which had been imposed upon one David C. Mayo, by the hustings court of the city of Richmond. The only question considered is, whether the auditor of accounts was the proper person to receive the fines.

W. L. Royal, for the petitioner.
The Attorney General, for the auditor.

Christian, J., delivered the opinion of the court.

The court is of opinion, that the important and interesting question so ear- 766 nestly and ably argued by the *counsel for the petitioner and the attorney-general, to-wit: whether under the act of the general assembly known as the "funding act" a party who has incurred a penalty by way of fine for a violation of the criminal laws of the state, can discharge such liability by paying such fine in "coupons," does not arise in the case before us.

This court is always willing and ready to decide to the best of its ability all questions, however important or difficult, or however

See Clarke v. Tyler, 30 Gratt. 134, and *note*, and Milliner v. Harrison, 32 Gratt. 422, and *note*.

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they may affect public or private interests, which are properly brought before it, no matter how great or far-reaching may be the responsibilities it must assume in such decision. But the court is not willing, nor is it any part of its judicial functions, to decide questions outside of the case before it, and thus constitute itself a moot court to determine abstract questions.

The petition in this case calls upon the court to exercise its extraordinary jurisdiction, by way of mandamus, to compel the auditor of public accounts to receive from the sergeant of the city of Richmond a certain amount which one Mayo paid over to said sergeant in "coupons" for a fine imposed upon said Mayo for a criminal offence.

Now, the first question which meets us upon the very threshold of our investigation is necessarily this: Does the law make it the duty of the auditor of public accounts to receive from the sergeant of the city of Richmond all fines collected by him? If it clearly does, then this court may compel him to perform that duty by its mandamus. If not, the writ will be withheld.

Now, there are certain well-defined legal principles which govern all cases of mandamus, and upon which the case as made by the record must be decided. These may be succinctly stated as follows:

1. The writ of mandamus, known in England as a high prerogative writ, is justly regarded in this country as one of the highest writs known to our system of
767 jurisprudence; *and it only issues when there is a clear and specific legal right to be enforced, or a duty which ought to be and can be performed, and where there is no other specific and adequate legal remedy. The right which it is sought to protect must therefore be clearly established, and the writ is never granted in doubtful cases.

2. An important feature of the writ of mandamus, and one which distinguishes it from other remedial writs is, that it is used merely to compel action and order the performance of a pre-existing duty. In no case does it have the effect of creating any new authority or of conferring power which did not previously exist; its proper function being to set in motion and compel action with reference to previously existing and clearly defined duties. It is therefore in no sense a creative remedy, and is only used to compel persons to act where it is their plain duty to act without its agency.

3. It may be stated generally that where the law enjoins upon a public officer the performance of a specific act or duty, obedience to the law may, in the absence of other adequate remedy, be enforced by mandamus. It will not, however, lie to compel an officer to perform an act which, without the mandate of the court, would be unlawful for him to perform. And to warrant the court in granting the writ against a public officer, such a state of facts must be presented as to show that the relator has a clear right to the performance of the thing demanded, and that a corresponding duty rests upon the officer to perform that particular thing. See High's Legal Remedies, sections 7, 9, 32, and cases there cited.

Upon these well settled principles this court can only issue its writ of manadmus to a public officer to compel him to perform a duty which the law unquestionably imposes on such officer. And the very
768 first and conclusive *inquiry we must make is this: Is the auditor of public accounts the officer whose duty it is to receive fines collected by the sergeant of the city of Richmond? or, in other words, to whom, under the statute laws of this state, must the sergeant of the city of Richmond pay over the fines collected by him —to the auditor of public accounts, or to the city treasurer? This is the question first to be solved, and this question must be determined without reference to the interesting question so earnestly and elaborately argued at the bar, as to whether a fine imposed for a violation of law can be discharged in "coupons." For if it be made to appear that the city treasurer, and not the auditor of public accounts, is the officer designated by law to receive fines collected by the city sergeant, then it is plain that this court cannot issue its writ of mandamus to compel the auditor of public accounts to perform a duty which belongs to another officer and not to him. After a careful examination of the statutes on this subject, we are constrained to hold that the city treasurer, and not the auditor of public accounts, is the proper officer to whom all fines collected by the sergeant of the city of Richmond should be paid. We deem it only necessary to refer to those statutes fixing the duties of county and city treasurers, and those fixing the duties and liabilities of city sergeants generally, including those of the city sergeant of Richmond. In section 26, chapter 46, Code of 1873, is the following provision: "The county treasurer shall receive from the sheriff of his county all fines collected by him and account for the same in his annual settlement with the auditor of public accounts."

On the 29th of March, 1875, an act was passed and approved, entitled "an act prescribing the duties, powers, liabilities, and compensation of certain county offi-
769 cers, *providing for the collection of taxes, and for the repeal of chapters 37 and 46 of the Code of 1873."

In this act repealing chapter 46, Code of 1873, the above provision, requiring the county treasurer to receive from the sheriff all fines collected by him, was retained and re-enacted. See Sess. Acts 1874-75, ch. 269, § 19, p. 346.

In ch. 54, § 13, Code 1873, p. 524, is found the following provision respecting city and town treasurers: "As to the collection and payment of the state revenue in such city or town, their duties, liabilities, and compensation shall be the same as are or may hereafter be defined by law for county treasurers except so far as may be inconsistent with this act." Now, these sections place

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the city treasurers on the same footing with respect to their duties and liabilities as the county treasurers. One of these duties is to receive and collect all fines.

Let us now inquire what duties are imposed on the sergeants of the cities in respect to fines collected by them. The general provision above quoted requires the sheriffs of the counties to pay over to the county treasurers all fines collected by them. And the 7th section of chapter 49, Code of 1873, fixing the duties, liabilities, &c., of sergeants, provides that "they shall account for and pay over to the city treasurer all taxes or other moneys received by them proper, to be paid to said treasurer in the same manner as is or may hereafter be required of the collector of townships to account for and pay over to the county treasurer." And the same section further provides that "the sergeant shall, within the jurisdiction of his corporation, exercise the same powers, perform the same duties, and be subject to penalties touching all process issued by the court of such corporation, or by the clerk of such court, or
770 otherwise lawfully *directed to him, that the sheriff of a county exercises, performs, and is subject to in his county."

This is the general law with respect to sergeants of all the cities and towns. In the city of Richmond the sheriff, and not the sergeant, was charged with the collection of state taxes up to March 22d, 1871. Acts 1870-71, p. 253. But as to the duties and liabilities of the sergeant of the city of Richmond, both the general law found in the Code and the chapter of the city of Richmond has the following provision: "The said sergeant shall attend the terms of the court of hustings and act as the officer thereof. He shall in all respects (except as to the collection of taxes) have the same powers and authority, and shall perform the same duties, and be subject to the same liabilities and penalties, and be proceeded against in the same manner as sheriffs."

Now, it is plain that by these enactments the duties and liabilities of city and town treasurers, being the same as county treasurers, and the duties and liabilities of city and town sergeants (with the single exception of the collection of taxes in the city of Richmond) being the same as those of sheriffs, it was the duty of the city sergeant to pay, and the city treasurer to receive all fines collected by the former. It follows, therefore, that this court cannot issue a mandamus against the auditor of public accounts to compel him to discharge a duty which the law does not impose upon him, but upon another officer, to-wit: the city treasurer.

Without, therefore, intimating any opinion at this time (because the question does not arise in this case), whether a party may discharge a fine by the payment of "coupons," we must discharge the rule against the auditor of public accounts, because he is not the public officer upon whom the law imposes the duty of receiving fines due the commonwealth from the city sergeant.
771 See Parker, *register, v. Anderson, 2 Pet. & Heath. 38. It is proper to remark, however, in justice to the learned counsel for the sergeant of the city of Richmond, that there was such an apparent confusion and conflict in the various statutes as found in the Code of 1873 as required judicial construction. It grew out of the fact that there were certain provisions of the Code of 1860 incorporated in the Code of 1873, which were enacted before there were such officers as city and county treasurers known to our laws and constitution. These provisions required the clerks of courts to report a list to the auditor of public accounts of all fines collected, those by the clerk paid into court, and those for which execution had issued, and which contained the following provisions, found in section 20, chapter 43, Code of 1860, and same in section 20, chapter 41, Code of 1873: "Upon the receipt of the list aforesaid (that is, the list of fines returned by the clerk), the auditor of public accounts shall charge the fines therein mentioned as follows: He shall debit the clerk with all which shall have been paid into court, and shall debit the sheriff or other officer with all which he has received, and also with the amount of any for which an execution shall have been returnable, &c."

From this and other provisions following in that chapter, it might well be doubted, in the absence of a critical examinaion of the other acts heretofore referred to, whether the sheriff is not to account directly to the auditor. But it is plain, upon a proper construction of the acts passed since the adoption of the present constitution, when the offices of county and city treasurers were created, it is the duty of the sheriffs and sergeants now to pay fines, not to the auditor of public accounts, but to the county and city treasurers. In the system of accounting adopted by the legislature since the creation of the offices of treasurers
772 (county and city), it is manifest *that it was intended, and would be most convenient, to have the accounting done between the auditor and the treasurer, instead of between the auditor and both sheriff or sergeant and the treasurer. Nor is there any such conflict between the provisions of the Code of 1860, above referred to, and the more recent enactments respecting county treasurers. The provision is, that the auditor shall debit the sheriff, or other officer, with the fine received by him. The auditor has now but to debit the treasurer of the county or city with the fines received, instead of the sheriff or sergeant. The clerks must still report to the auditor the list of fines; and he must debit the clerk with such as he has received, and the treasurer of the county, city or town with what he has received, instead of debiting the sheriff under the old law. These acts may therefore both well stand together, notwithstanding an apparent conflict.

The learned counsel for the petitioner, perhaps anticipating this judicial construction,

has, upon the eve of the close of the present term, filed in this cause a new petition asking for a mandamus to compel the city treasurer to receive the coupons which he received from Mayo in payment of the fine imposed upon him. We can only decide one case at a time. At the next term of the court we will consider the case as it may be made then upon the record.

Whatever questions may be properly raised in the new case will be deliberately and carefully considered and firmly determined.

As to the case now before us, we are constrained to say no case is made for the issuance of a mandamus against the auditor of public accounts, and the rule against the auditor must be discharged.

Mandamus refused.

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773 *City of Petersburg v. Petersburg R. R. Co. & als.

January Term, 1878, Richmond.

Exemption from Taxation—Repeal.—The 17th section of the charter of the Petersburg Railroad Company, which exempted the property of the company from taxation, has been repealed by the act of April 2, 1853, which united it with the Greenesville and Roanoke railroad company; which act was accepted by the company; and the property of the said company is now subject to taxation.

This was a suit in equity in the circuit court of the city of Petersburg, brought in June, 1873, by the Petersburg Railroad Company, and Reuben Ragland, claiming to be a large stockholder in said company, to enjoin the City of Petersburg from collecting certain taxes for the years 1871 and 1872, assessed on the property of the railroad company by the City of Petersburg.

The injunction was granted, and the City of Petersburg having demurred to and answered the bill, the cause came on to be heard on the 4th of June, 1874, when the court perpetuated the injunction. And the City of Petersburg applied to this court for an appeal; which was allowed. The case is stated in the opinion of Anderson, J.

Ould & Carrington, for the appellant.
W. W. Gordon, for the appellees.

Anderson, J., delivered the opinion of the court.

By the act of incorporation of the Petersburg Railroad Company, passed February 10th, 1830, (Session Acts *of 1829-30, § 17, p. 65,) "All machines, wagons, vehicles and carriages purchased as aforesaid with the funds of the company, and all their works constructed under the authority of this act, and all profits which shall accrue from the same, shall be vested in the respective shareholders of the company forever, in proportion to their respective shares, and the same shall be deemed personal estate, and shall be exempt from any public charge or tax whatsoever." And by section 32, the act is subject to amendment, alteration and modification by any future legislature, except so much thereof as prescribes the rates of charges for transportation, and provided that the rights of property acquired by the company under the act shall not be taken away or impaired. Under this charter the Petersburg Company was organized and constructed the road.

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By an act of the general assembly, passed April 2, 1853, (Session Acts of 1852-3, p. 142)—it would seem from the preamble, by the request of the two companies—the Greenesville and Roanoke railroad company became merged in the Petersburg Railroad Company, and the stockholders in the former became stockholders in the latter, and all the property, real and personal, owned by the former, became the property of the latter, and the capital stock of the latter was increased to the amount of the capital stock of both companies; and the charter of the Petersburg Railroad Company, as amended, became the charter of the united companies, as far as the same was applicable.

In the latter clause of section 3, it is declared that, "In no event shall the property of either of said companies within this commonwealth be exempt from taxation."

This act was accepted by both companies, and the presidents of both, in pursuance of the 5th section, *jointly certified to the secretary of state, "that the said companies had become united in pursuance of the provisions of said act of assembly." Thenceforward they were consolidated into one company, and its organization and the conduct of its affairs as a consolidated company, were thereafter in accordance with the provisions of the Petersburg charter as amended by the said act of assembly of 2d of April, 1853.

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It is contended by the appellant that the said act altered and amended the provision in the original charter of the Petersburg Company, which granted it an exemption from taxation, by declaring that "in no event shall the property of either company within this commonwealth be exempt from taxation." If that be so, the two companies, in accepting the amendatory act, accepted it with this provision, and are not entitled to claim the exemption from taxation under the 17th section of the original charter of the Petersburg Railroad Company.

But it is contended for the appellees that the clause relied on by the appellant is a proviso restrictive only of what is enacted in section 3, and does not take away their right of exemption from taxation under the original charter of the Petersburg Company. That enactment is as follows: "That on the expiration of the charter of the Petersburg Railroad Company, if the same shall not be renewed, the stockholders of that company may be stockholders in so much of the railroad as is now the Greenesville and Roanoke railroad, and shall thenceforth be a body corporate, under the charter

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of the Greenesville and Roanoke railroad company, until the same shall expire by its prescribed limitation of time; and during that period, shall have, use and possess all the powers, privileges and franchises which the company now possess and enjoy." And they contend that the clause which denies the right of exemption from taxation, 776 is a *proviso only to said enacting clause, and takes away the right of exemption from taxation only upon the happening of that contingency, and at a remote period, if it ever happens.

The court is of opinion, that such is not the fair construction of the statute. The clause in question cannot be regarded as a proviso at all. There are two provisos which are restrictive of the right which is given by the preceding clause to reorganize the company under the charter of the Greenesville and Roanoke railroad company, upon a contingency which may never happen. The first is, that if during the union the charter of the Petersburg Company shall be abridged or forfeited the privileges conferred "by this section shall cease and not be used;" and the second proviso is, that the body corporate "authorized by this section, shall be subject to all the rules, regulations and restrictions prescribed in the Code of Virginia in respect to railroad companies." Both provisos are complete, and apply to this section. Then follows the declaration, not restricted to the contingent event to which the foregoing provisos apply, but which is in these terms: "and in no event, shall the property of either of said companies within this commonwealth be exempt from taxation." There was no such exemption in the charter of the Greenesville and Roanoke company, and there would have been no necessity to insert this clause in order to subject the property of the consolidated company, (which would embrace after the acceptance of this act the property of both companies), to taxation, but for the seventeenth section, before cited, in the charter of the Petersburg Company, exempting the property of that company from taxation, because the right to tax was an inherent and necessary prerogative of government, unless surrendered. The first, second and third sections, all relate to the same sub- 777 ject, the union *and incorporation of these companies into one, and to the corporate name, privileges, property and franchises of the companies thus consolidated, and the clause denying exemption from taxation was unnecessary to make the property of the companies liable to taxation under either section, but for the said seventeenth section in the charter of the Petersburg company. The only object and design of the legislature, therefore, by the declaration in question, was to do away with that section, which was alike applicable to the first and second sections of this act, and to the third. It is impossible to conceive that it was the design of the legislature to legislate so as to avoid its future operation at a remote period, upon an event which was altogether contingent, and to allow it to have a present and continued operation, and if the contingency never happened, of which the third section is predicated, a perpetual operation to exempt the property of these companies from taxation. The court is therefore of opinion, both upon a view of the grammatical structure of the third section and of the clause in question, and of the spirit of the act, the evident design and purpose of the legislature in making this declaration, that it applies as well to the preceding sections, and is not merely restrictive of the enacting clause of the third section, but provides, not in the contingent event indicated in the third section, but in no event the union of the two companies as authorized by the first and second sections, under the Petersburg Company's charter, or its organization under the Greenesville and Roanoke charter as contingently authorized by the third section, at a remote period, "in no event, shall the property of either of said companies, within this commonwealth, be exempt from taxation."

It was evidently the design of the legislature that these companies, under their new organization, should not be 778 *exempt from taxation; but section 17 of the charter of the Petersburg Company had allowed such exemption to that company, and as the Greenesville and Roanoke company, by the first section, had been merged in the Petersburg Company, and the second section had provided that the charter of that company, as it had been amended, should regulate and control the consolidated company, to carry out the design of the legislature it was essential that the declaration in question should have reference to the first and second sections as well as to the third, and it is applicable to the status of the companies under the two first sections as well as to what it might be contingently under the third by the express terms, "and in no event," which comprehends both. It is virtually a repeal of section 17 of the charter of the Petersburg company, or an express assertion on part of the state that the said company's property should not thereafter be exempt from taxation; and this, with the assent of the company, signified by the acceptance of the act and reorganizing and conducting its operations under it. Whether the legislature would have been authorized, under the reservation of section 32 of the charter of the Petersburg Company, above recited, to have made en mero motu this alteration in the charter, is not a question in this case; because the said act of April 2d, 1853, was passed at the instance and request of the said companies, and was accepted by them; and the Petersburg Company, at least, took important benefits under it, such as the enlargement of its charter privileges by the right given to merge the Greenesville and Roanoke railroad company in itself, and to acquire all its corporate rights, privileges, franchises and property, and to add to the amount of its capital stock. It appears also that the company afterwards acquiesced in the prerogative exercised by

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the City of Petersburg to tax its prop-
779 erty within the corporate *limits of the city, which it now resists, by paying taxes to the city for a series of years.

The court being of opinion, for the foregoing reasons, that there is nothing in the charter of the Petersburg company, as now organized, which entitles it to exemption from taxation, and that the City of Petersburg has the right, under its charter, to levy the taxes involved in this suit, deems it unnecessary to consider the questions raised upon the demurrer. It is of opinion, therefore, that the decree of the circuit court of the city of Petersburg be reversed, the injunction dissolved, and that the bill of plaintiffs be dismissed with costs.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the property of the Petersburg Railroad Company, within the limits of the city of Petersburg, is subject to taxation by the said city; and that there is no error in the decree of the circuit court of Petersburg, perpetuating the injunction which restrained the said city from levying and collecting the taxes on the property of the said Petersburg Railroad Company for the years 1871 and 1872. It is therefore ordered, that the said decree be reversed and annulled, and that the appellees pay to the appellants its costs in the prosecution of its appeal here. And this court, proceeding to pronounce such decree as ought to have been rendered by the court below, doth adjudge, order and decree that the injunction which was awarded the plaintiffs below and the same is hereby dissolved, and that the bill of the said plaintiffs be dismissed with costs.

Decree reversed.

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780 *Taylor & als. v. The Commonwealth.

January Term, 1878, Richmond.

1. **Indictment—Injunction—Continuance.**—The defendants in an indictment for a nuisance by obstructing a street, were the joint owners of a house and a lot of two acres, fronting 264 feet on Porter street, in Manchester. The house was ancient, and had been held by the defendants and those under whom they claimed for more than sixty years, according to its present enclosures. The city council of Manchester holding that the said enclosures were in Porter street, directed that they should be removed, and the defendants obtained an injunction to prevent it; and this suit was pending in the same court. When the indictment was called for trial, the defendants moved that the case should be continued until the injunction suit was decided—HELD: The indictment was the appropriate remedy in such a case; and the continuance was properly refused.

2. **Evidence—Admission—Printed Reports.**—The report of a case in a printed volume of reports of decisions of the court of appeals of Virginia, the original record of the case having been destroyed, held admissible in evidence to show that such a map as that mentioned in the report, as Watkins' map, actually existed and was in the papers in said cause; and thereby to lay a foundation for the introduction, as further evidence in the cause, of a map purporting to be and certified as a map of Manchester by the clerk of the superior court of chancery of the Richmond district.

3. **Same—Same—Maps.**—Copies of two maps attached to two deeds for lots in Manchester, recorded in the clerk's office of Chesterfield county, one deed dated August 10th, 1816, and the other January 3d, 1847, held to be admissible for the purpose of ascertaining the scale and verifying the map of Manchester certified by the clerk of the superior court of chancery for the Richmond district, which had been previously admitted as evidence; but for this purpose only.

781 *4. **Same—Same—Proceedings of City Council.**—S. Taylor, under whom the defendants claimed the house and lot, was a member of the council of Manchester in 1855—HELD: That certain proceedings of the council at that time when he was present, in regard to what is called the Percival survey of said town, were admissible evidence for the purpose of showing said S. Taylor's connection with said survey.

5. **Streets—Dedication to Public.***—William Byrd having laid off the land comprised within certain limits of the town of Manchester, into lots and streets, and made a map of the town so laid off, showing the lots and streets, and having sold lots with reference to said maps, all the streets designated on said map were thereby irrevocably dedicated to the public; and the public have a right to have the streets, as designated on that map, throughout their entire length and width, thrown open forever, and kept free from any and all encroachments or obstructions.

6. **Same—Same—Acceptance by Public.**—The act of the house of burgesses, passed November, 1769, establishing the town of Manchester as laid off into lots and streets, was an acceptance on the part of the colony of Virginia of the streets thus dedicated to the public.

7. **Same — Same — Same — Obstructons — Length of Occupancy.**†—The streets of the city of Manchester having been dedicated to the public by William Byrd, when he laid off the town, and this dedication having been accepted by the act of the house of burgesses in November, 1769, the streets are public highways; and any occupation of a street, or a part of a street, by the owner of an adjoining lot, however long continued, cannot give such occupant a right to hold it, or bar the right of the public to the use of the street to its full width and extent.

This was an indictment in the hustings court of the city of Manchester, against William G. Taylor and nine others, for a nuisance in obstructing Porter street in

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***Same—Dedication of Streets.**—As to what constitutes a valid dedication of a street to the public, see Talbott v. Railroad Co., 31 Gratt. 685, and *note*.

†**Municipal Corporations—Statute of Limitations.**—See Yates v. Town of Warrenton, 84 Va. 337, and Buntin v. Danville, 93 Va. 200, where the principal case is cited for the rule that lapse of time in the case of an obstruction in a public street does not bar the right of the proper authorities to have it removed. See also, Norfolk City v. Chamberlaine, 29 Gratt. 534, and *note*.

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the city of Manchester. There was an issue on the plea of "not guilty;" and on the trial of the case the jury found a verdict against the defendants, and assessed the damages against each of them at one dollar; and the court rendered a judgment in accordance with the verdict, and for an abatement of the nuisance. The defendants thereupon applied to one of the judges of its court for a writ of error; which
782 was awarded. The *case and all the questions made in it are fully stated in the opinion of Moncure, P.

W. W. Gordon, for the appellant.

Attorney-General R. T. Daniel and Logan & Bransford, for the Commonwealth.

Moncure, P., delivered the opinion of the court.

This is a writ of error to a judgment of the hustings court of the city of Manchester, rendered on the 20th day of October, 1876, convicting the plaintiffs in error on an indictment found against them in the said court, charging them with a nuisance in erecting and continuing an obstruction of an ancient and common highway and public street in the said city of Manchester. There was a plea of not guilty in the case, on which issue was joined, which was tried by a jury. A verdict of guilty was found against the accused, and a fine of one dollar each was assessed against them. Judgment was rendered accordingly, and for the abatement of the nuisance. To this judgment the plaintiffs in error applied to a judge of this court for a writ of error, which was accordingly awarded. Sundry errors in the said judgment are assigned in the petition for the said writ, founded on sundry bills of exeception, which were taken by the said plaintiffs in error in the course of the proceedings in the said case, which bills of exception and assignment of error thereon we will notice in their order:

1. The first bill of exceptions stated, that upon the calling of the cause the defendants moved for a continuance of the same upon the ground that an injunction was awarded on the 25th day of July, 1876, to restrain the city of Manchester from removing or in any manner interfering
783 *with the property which is charged in the indictment as being an obstruction to the public highway; and in support of said motion the defendants offered in evidence the record in the said injunction suit now pending in the hustings court of said city, which record is set out in the said bill of exceptions. In the injunction bill the complainants claim to be the joint owners in fee of a house and lot in the town of Manchester, fronting on Porter street 264 feet, which lot embraces nearly two acres of land. The house situated on said lot is an old family homestead, which was the birthplace and residence, during his life, of Samuel Taylor, through whom the complainants claim title. They say that they and those through whom they claim have been in the actual possession of the said property, certainly, for about seventy years—probably not less than a century; that the common council of the town, acting through A. L. Johnston, its city engineer, and other agents, are now threatening to enter upon the aforesaid premises, take possession and destroy the front yard and a part of the garden, and pull down the front enclosure and part of the dwelling-house, or at least the greater part of the front portico, under the pretence of widening or opening Porter street in the said town, and that in carrying this purpose into effect the value of the homestead will be materially lessened, if not absolutely destroyed, and irreparable damage done to the freehold. They therefore pray for an injunction, which was awarded as aforesaid. Which motion for a continuance the court overruled, and the defendants excepted to the action of the court in that respect. That such was the action of the court is the first assignment of error in this case.

We are of opinion that the court did not err in overruling the said motion for a continuance. A street of a city is a public highway, the obstruction of which is
784 an *indictable offence. On the trial of an indictment for such an offence, the questions, whether the locus in quo be a public highway, and whether the same be obstructed by the accused in the manner charged in the indictment, are questions of law and fact which properly arises for decision. And such trial cannot of right be delayed by reason of the pendency of a civil suit, such as is the chancery suit in the first bill of exceptions mentioned. There might be peculiar circumstances sufficient to induce and warrant the court, in which a prosecution for such an offence is pending, to delay the trial of the prosecution for a reasonable time on account of the pendency of a civil suit involving the same questions involved in the criminal prosecution; but it does not appear that such circumstances existed in this case; and if any case this court would reverse the judgment of an inferior court for refusing a continuance in such a case, certainly the reasons for doing so ought to be very strong. Indictment is the appropriate remedy for a nuisance in a public highway, and generally, if not always, the questions involved in a charge of such an offence can be decided in that way, at least, as well as, if not better, than in any other. In a suit inter partes, such as is the injunction suit aforesaid, the decision might be upon grounds which ought not to affect the public at large in their right to the use of the highway.

2. The second bill of exceptions states "that upon the trial of the cause, The Commonwealth offered to introduce in evidence the report of the case of Mayo v. Murchie, as contained in the third volume of Munford's Virginia Reports from page 358 to 417, (it having been admitted by the defendant's counsel that the original record above referred to was destroyed by fire at

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the close of the late war), the counsel for The Commonwealth stating that the purpose of introducing this evidence
785 *was to show that such a map as that mentioned in the case above referred to as Watkins' map, actually existed, and was in the papers of the above cause; and thereby to lay a foundation for the introduction, as further evidence in this cause, a map of Manchester, by the clerk of the superior court of chancery for the Richmond district. Wherefore the defendants moved the court to exclude from the jury the report so offered in evidence; which motion of the defendants the court overruled, upon the ground that it was a public record; and the defendants excepted to the action of the court in that respect. Such action of the court is the second assignment of error in this case.

We are of opinion that the court did not err in overruling the defendant's motion to exclude from the jury the said report. By an act of the legislature of Virginia, passed in November, 1769, it was recited that it had been represented to the then present general assembly, that the honorable William Byrd had lately laid out a parcel of his lands at Rocky Ridge, at the falls of James river, in the county of Chesterfield, in lots and streets for a town, and had made sale of most of the said lots of divers persons, some of whom had since settled and built thereon, and that it would tend to the more speedy improvement and settling the same, if the freeholders and inhabitants thereof should be entitled to the like privileges enjoyed by the freeholders and inhabitants of the other towns in the said colony; and it was enacted that the said parcel of land should be, and the same was by the said act constituted, appointed, erected and established a town in the manner it was already laid out in lots and streets, agreeable to a plan and survey thereof made by Benjamin Watkins, surveyor of the county of Chesterfield, containing the number
786 of 312 lots, as by *the said plan and survey, relation being thereto had, might fully and at large appear, and should be called and known by the name of Manchester; and that the freeholders of the said town should forever thereafter enjoy the same rights and privileges which the freeholders of other towns erected by acts of assembly in said colony had and enjoyed. And nine persons named in the said act were thereby appointed trustees of the said town, with the powers and for the purposes therein mentioned. 8 Hen. St. at Large, p. 421.

The original Watkins' map referred to in the said act, having been lost or destroyed, according to an admission which seems to have been made in this cause, The Commonwealth sought to introduce, as secondary evidence in the cause, a map purporting to be, and certified as a map of the town of Manchester by the clerk of the superior court of chancery for the Richmond district, and to lay a foundation for the introduction of said evidence, offered to introduce in evidence the report of the case of Mayo v. Murchie as aforesaid, stating that the purpose of introducing this evidence was to show that such a map as that mentioned in the report of the case above referred to as Watkins' map, actually existed, and was in the papers of the said case, (it having been admitted by the defendant's counsel that the original record in that case was destroyed by fire at the close of the late war).

That case of Mayo v. Murchie is a very important and elaborate case, which appears from the report to have been a decision of this court at the October term thereof in 1811; but it must have been decided at a later day, as it appears to have been argued in December, 1812, and again in December, 1813. It was an appeal from a decree of Chancellor Taylor, made in May, 1807, in a suit brought in the superior court of chancery for the Richmond district, by John Murchie,
787 surviving trustee *of the town of Manchester, against John Mayo and others. The complainant charged in his bill in said suit, "that in the year 17—, Colonel William Byrd proposed to found the said town of Manchester by way of lottery; and agents were appointed by him and his trustees for superintending the laying off and bounding of the same; that the said agents proceeded to execute the business confided to them; and in making out the boundaries of the town, they expressly declared and set apart the slip of land which lies between James river and the lots of said town, near what is now called Mayo's bridge, as part of the said town, to be annexed thereto, and held by the inhabitants thereof as a common forever; and the same hath been so held and enjoyed by the inhabitants of the said town ever since," &c., &c.; "that all these facts were well known to —— Mayo, who nevertheless, for a trifling consideration, purchased the said Byrd's right to the said slip of land, and obtained a deed therefor (although the same was then in the possession of the said town), from him and two of his trustees, without any warranty," &c.; and that John Mayo, devisee of the said —— Mayo, "had commenced an action of ejectment against the complainant as trustee of the said town, in the Richmond district court, and threatened to turn him and the said inhabitants out of possession, notwithstanding their equitable title aforesaid." The prayer of the bill, therefore, was that John Mayo be enjoined from all further proceedings in his said action; that a conveyance of the legal title to said slip be made to the complainant as trustee for the said town; that he and the inhabitants of said town be quieted in the possession thereof, and for general relief.

John Mayo filed his answer to the said bill; sundry depositions were taken in the suit, and a decree was rendered by the chancellor in conformity with the
788 prayer of *the bill. That decree was substantially affirmed by this court, after the case had been twice argued in it by the ablest counsel on both sides. The three

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judges of the court, Coalter, Roane and Fleming, pronounced their opinions seriatim. It would appear from the opinion of Judge Roane, that Watkins' survey was not itself in the record, as he says in brackets: "[for the survey itself is not before us.]" But the contrary would rather appear from the opinion of Judge Fleming, who seems to have devoted special attention to the merits of the case and the evidence therein. "This being a cause of much expectation and great interest to the contending parties," he says at the commencement of his opinion, "and having been argued with great ability on both sides, the court bestowed on it peculiar attention and deliberation; though much of what I had to remark on the subject, especially respecting the capacity of the appellee to sue, and the want of parties (the only points on which I ever doubted), has been anticipated and ably discussed by my brother Roane. I shall therefore confine myself principally to the merits of the cause, and there being a division of the court, shall, as the ground of my own opinion, take the liberty of briefly stating the origin, foundation and establishment of the town of Manchester." And this he proceeds quite fully to do. After referring to the act of 1769, establishing the town of Manchester, and reciting a portion thereof, including that which relates to the plan and survey of said town, made by Benjamin Watkins, surveyor of Chesterfield county, he uses this language: "When we cast our eyes on the plan and survey of the town referred to in the act of assembly, it appears to extend upwards of half a mile parallel with the river, between which and the canal mentioned in the proceedings, lies the narrow slip of land now the subject of controversy," &c.

789 *The original plan and survey of Watkins having been destroyed or lost, and also the original record in the suit from the decree in which the appeal in Mayo v. Murchie was taken, we think the report of that case, as contained in the third volume of Munford's Va. Reports, from page 358 to 417, was admissible, as secondary evidence, for the purpose for which it was offered. 1 Greenleaf on Evidence, § 509, and cases cited in note 5; Id. § 84, and note 2 and books and cases therein cited. That report strongly tends to show that such a map as that mentioned therein, to-wit: Watkins' map, actually existed, and was in the papers of the cause; or if it did not exist, and had been lost or destroyed when the suit was brought, then that a copy of said plan and survey, or proof of their contents, was in the said papers.

3. The third bill of exceptions states: "That upon the trial of the cause The Commonwealth offered as evidence copies of two maps, one accompanying and being a part of a deed from Tasleton Sanders to William McKensie, dated 10th day of August, 1816, recorded in Chesterfield county court clerk's office, in D. B. 21, page 141, and the other attached to a deed from Myers, &c., to Whitehead and als., dated January 3rd, 1847, recorded in Chesterfield County court clerk's office, D. B. 37, page 101, which two maps are in the following words and figures, to-wit:" (then follows the maps, surveyor's and clerk's certificates) "for the purpose of ascertaining the scale and verifying the map heretofore offered in evidence as a plat of the town of Manchester, which said last mentioned map is signed by the clerk of the superior court of chancery for the Richmond district, and is the one referred to and embraced in the defendants' second bill of exceptions. The defendants, by their counsel, objected to the introduction of the maps as evidence, upon the ground that neither the aforesaid deeds nor the maps

790 *which accompany the same, or a part thereof, is competent evidence in this cause. Whereupon the court overruled said objection and allowed said maps to be offered as evidence for the purpose aforesaid, but for no other." The defendants excepted to the action of the court in that respect; which action of the court is the third assignment of error in this case.

We are of opinion that the court did not err in allowing "said maps to be offered as evidence for the purpose aforesaid, but for no other."

Watkins' map, referred to in the said act of 1769, more than a hundred years before the trial of this cause, had, long before such trial, been lost or destroyed, and a map, purporting to be a map of the town of Manchester, and certified as such by the clerk of the superior court of chancery for the Richmond district, was sought to be introduced by the Commonwealth as secondary evidence of the contents of said Watkins' map. Upon the question whether the former is in fact a copy of the latter map, the copies of the two maps set forth in the third bill of exceptions were admissible evidence for the purpose therein mentioned. They were made many years before the trial of the cause, of portions of the said town of Manchester, and were annexed and recorded with deeds whereby such portions or parts thereof were conveyed by the owners to purchasers from them respectively. 1 Greenleaf on Evidence, §§ 139, 145, and cases cited in the notes to those sections, especially Penny Pot Landing, &c., v. City of Philadelphia, 16 Penn. St. R. 79.

4. The fourth bill of exceptions states that at the trial of the cause, the Commonwealth having first proven by a witness, C. C. McRae, that Dr. Samuel Taylor, who is referred to in the extracts thereinafter mentioned, was the owner, at the time of the proceedings therein mentioned, of the lots of land Nos. 163 and 177 in the plan

791 *of Manchester, fronting on the north line of Porter street, between Ninth and Tenth streets, offered in evidence an extract from the minutes of the board of trustees of the town of Manchester, and certain other proceedings of the said board, of which the said Taylor was a memeber, in regard to what is called the Percival survey of the said town, which was then, to-wit: in December, 1855, in progress (which

said extract and other proceedings are set out in the said bill), for the purpose of showing Dr. Samuel Taylor's connection with the said Percival survey (the defendants claiming to have derived the property, which is charged in this case to be an obstruction of the public highway and a nuisance, from and under the said Dr. Taylor). And the defendants moved the court to exclude from the jury said extract and other proceedings, but the court decided to admit the same, and the defendants excepted to such action of the court; which action of the court is the fourth assignment of error in this case.

We are of opinion that the court did not err in admitting the said extract and other proceedings as evidence in the case. The admissions of Dr. Taylor, as trustee in regard to his own individual interest, would bind himself individually, and would bind all who might afterwards claim as volunteers under him, the property in regard to which the admission may have been made. What ought to be the effect of such evidence, was a question which the court did not decide, and was not called on to decide. The only decision was that it was admissible evidence; and we think it was.

5. No error is assigned on the matter of the fifth bill of exceptions, and we think that none could have been well assigned thereon. No further notice need therefore be taken thereof.

792 *6. The sixth bill of exceptions states that upon the trial of this cause, evidence was introduced tending to prove that the property charged in the indictment as constituting an obstruction, is comprised within Porter street in the town of Manchester; evidence was further introduced, tending to prove a dedication to and acceptance of Porter street by the house of burgesses, and by the city of Manchester; evidence was further introduced, tending to show that the defendants, and those under whom they claim, have been in the actual possession of, and had under inclosure the property aforesaid, charged as constituting an obstruction, claiming it as their own for a period of fifty or sixty years; whereupon the defendants' counsel asked the court to give the following instructions to the jury, to-wit:

1st. The corporation of Manchester, in its private character as owner and occupier of lands and appurtenances, is regarded in the same light as an individual owner and occupier, and must be dealt with accordingly.

2d. In order to find the defendants guilty, the jury must be satisfied from the evidence that there was a dedication to and acceptance by the city of Manchester of the street known as Porter street, and that the property owned by the defendants and claimed to be an obstruction, is part of that street as so dedicated and accepted; and even though there was such dedication and acceptance, if the jury believe from the evidence that the defendants and those through whom they claim, have had in their actual possession and inclosure, claiming it as their own, the property referred to in the indictment as constituting an obstruction for a period of forty or fifty years last past, then they must find a verdict of not guilty.

But the court gave the jury the first of said instructions, and refused to give the second.

793 *The Commonwealth then asked the court to give the following instructions to the jury:

1. That if they believe from the evidence that William Byrd laid off the land comprised within the limits of the town of Manchester into lots and streets, and made a map of the town so laid off, showing the lots and streets, and that lots were sold by him with reference to such map, all the streets designated on said map were thereby immediately and irrevocably dedicated to the public, and the public have a right to have the streets, as designated on said map, throughout their entire length and width, thrown open forever and kept free from any and all encroachments or obstructions.

2. That any substantial encroachments upon, or obstruction of, a public highway or street, is a public nuisance which no length of time will legalize or render lawful, and the fact that such encroachments or obstructions have been maintained and continued for a long time, it matters not how long, does not operate as a bar to the right of the public to have the nuisance abated or the encroachments and obstructions removed, nor to give the accused the right to continue or keep such obstructions and encroachments in the highway or street. And if the jury believe from the evidence that Porter street was originally laid out and dedicated to the public by William Byrd as it now runs, and within its present boundary lines, as shown by the map made in this case by A. L. Johnson, under the order of this court, and that the same has been obstructed by the defendants as charged in the indictment, then they must find the defendants guilty.

3. That the act of the house of burgesses, passed November, 1769, establishing the town of Manchester as laid off into lots and streets, was an acceptance on the

794 *part of the then colony of Virginia of the streets thus dedicated to the public.

Which said instructions asked for by the Commonwealth were given.

To which opinion of the court refusing to give the second instruction asked for by the defendants, and giving the three instructions asked for by the Commonwealth, the defendants excepted; and that exception is the subject of the fifth and last assignment of error.

We do not think there is any error in the judgment of the court in regard to the instructions asked for on either side. The first instruction asked for by the defendants was given, and properly so; but of course they do not complain of that action of the court. The second was properly refused. A valid dedication of a street to the public use, perfected by acceptance, as the in-

struction supposes, makes it a highway, an unlawful obstruction of which is not legalized by lapse of time. Nullum tempus occurrit regi, applies in this state to the Commonwealth, as it does in England to the king. The three instructions asked for by the Commonwealth were properly given by the court. There can be no doubt or difficulty in this case, as to the facts, that a valid dedication was made by Colonel William Byrd of streets in the town of Manchester to the public use, and that the dedication was accepted by the public and thus made perfect. It was accepted by the highest representative authority in the land—the legislature. Nor can there be any doubt or difficulty in the case as to the question of law in regard to the effect of the lapse of time and adverse possession upon the public right. The only room for question, if any, is in regard to whether the locus in quo is a part of one of the dedicated streets; which was a question for the jury. There have been several recent decisions of this court upon the subject of dedication, *and also upon the subject of a street in a city being a public highway, and of the effect of an unlawful obstruction thereof. On the former subject, is the case of Harris v. The Commonwealth, 20 Gratt. 833, in which Judge Staples delivered the opinion of the court; and on the latter is the case of The City of Norfolk v. Chamberlain, in which Judge Christian delivered the opinion of the court, which is not yet reported, having been decided only a few days ago. See supra, 534. See also 2 Smith's Leading Cases, p. 142, marg. 200, Dovaston v. Payne, and notes, English and American; Angel on Highways; City of Cincinnati v. The Lessee of White, 6 Peters' R. 431; Commonwealth v. McDonald, 16 Serg. & R. 390; Penny Pot Landing v. City of Philadelphia, 16 Penn. St. R. 79; Mayo v. Murchie, supra; Ralston, &c., v. Miller, &c., 3 Rand 44; Kelly's Case, 8 Gratt. 632.

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Upon the whole, we are of opinion that there is no error in the judgment of the court below, and that same ought to be affirmed.

Judgment affirmed.

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796 *Johnson v. The Commonwealth.

January Term, 1878, Richmond.

Criminal Law — Burglary — Evidence.*—A case in which upon a prosecution for burglary, held the evidence does not identify the prisoner as the person who had committed the burglary.

***Criminal Law — Circumstantial Evidence.**—The principal case is cited by many subsequent cases for the rule that where the accused is sought to be convicted on circumstantial evidence, the evidence should be acted on with the utmost caution. See Finchim v. Com., 83 Va. 690; Anderson v. Com., 83 Va. 326; Savage v. Com., 84 Va. 626; Prather v. Com., 85 Va. 126; Brown v. Com., 87 Va. 220; Brown v. Com., 89 Va. 379; Cluverius v. Com., 81 Va. 787; Leath v. Com., 32 Gratt. 873; State v. Ragland, 31 W. Va. 509, 7 S. E. Rep. 424.

On the 5th of November, 1877, the grand jury of the hustings court of the city of Richmond found the following indictment against George Johnson:

The grand jurors of the Commonwealth, for the body of the city of Richmond, on their oaths, present that George Johnson, on the 30th day of October, in the year one thousand eight hundred and seventy-seven, at the said city, and within the jurisdiction of the said hustings court of the city of Richmond, in the night of that day, feloniously and burglariously did break and enter into the dwelling-house of Stephen Hunter and E. S. Pendleton, situated in the said city, with intent the goods and chattels of one J. B. Crenshaw, in the said dwelling-house, then and there being, then and there feloniously and burglariously to steal, take and carry away, and one note of the United States currency, for the payment of twenty dollars, and of the value of twenty dollars, and divers other notes of the United States currency, the number and denomination of which are to the grand jurors aforesaid unknown, for the payment of divers sums of money, in the whole amounting to the sum of forty dollars, the property and notes of the said J. B. Crenshaw, in the said dwelling-house in the city aforesaid, *then and there being found, the said sum of twenty dollars, and the said sum of forty dollars secured and payable by and upon the said notes, being then and there due and unsatisfied to the said J. B. Crenshaw, then and there feloniously and burglariously did steal, take, and carry away, against the peace and dignity of the Commonwealth of Virginia.

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The prisoner was put upon his trial at the same term of the court, but the jury failed to agree, and was discharged by the court. He was again tried at the same term of the court, and was found guilty by the jury, and his term of imprisonment in the penitentiary was fixed at five years; and the court sentenced him accordingly.

On the trial, the prisoner took five bills of exception to rulings of the court. The first, second, third and fourth were to the refusal of the court to exclude certain evidence offered by The Commonwealth, and the fifth was to the refusal of the court to grant him a new trial on the ground that the verdict was contrary to the law and the evidence. And he applied to this court for a writ of error; which was awarded.

In the fifth bill of exceptions, all the evidence is certified by the judge, and is set out in the opinion of Judge Moncure. The other exceptions need not be stated.

S. M. Page, for the prisoner.

The Attorney General, for the Commonwealth.

Moncure, P. This is a writ of error to a judgment of the hustings court of the city of Richmond, rendered on the 23d day of November, 1877, convicting the plaintiff in error, George Johnson, of burglary, and

sentencing him therefor to confinement in the penitentiary for the term of five years, the period by the jurors in their ver-
798 dict *ascertained. There were two trials in the case, both of them on the general issue joined on the plea of not guilty. The first trial commenced on the 10th day of November, 1877, when the jury having heard the evidence and not agreeing upon a verdict, were committed to the custody of the sergeant of the city on the usual charge and oath in such cases. On the 12th day of the same month the accused was again led to the bar in the custody of the sergeant, and the jury were also brought into court in the custody of the said sergeant, and still failing to agree upon a verdict, for reasons appearing to the court the said jury was discharged. Afterwards, and at the same hustings court, continued by adjournment and held on the 16th day of the same month, the case was again tried, when the jury found the accused guilty, and ascertained the term of his confinement in the penitentiary at five years. He thereupon moved the court to set aside the verdict and grant him a new trial, which motion the court overruled. On the 23d day of the same month he was sentenced according to the verdict of the jury. During the progress of the trial he excepted to five decisions of the court given against him, and tendered to the court his five several bills of exceptions, which were received, signed and sealed by the court, and ordered to be made parts of the record. The accused applied to this court for a writ of error to the judgment, which was accordinly awarded.

The petition for a writ of error assigns various errors in the said judgment, the first of which is, in the action of the court in discharging the first jury, there being "no manifest necessity" for such discharge. I see no error in the action of the court in that respect, but there is no necessity for deciding the question in this case, and it is not intended to be decided; it being suffi-
cient to say in regard to this assign-
799 ment of error that no objection *was taken in the court below to the action of the court in this respect.

The other errors assigned in the petition are founded on the five bills of exceptions which were made parts of the record, and which I will now proceed to consider, but as they all depend on the fifth bill, which is made a part of each of the other four, and in which all the evidence introduced on the trial is set out, I will consider the question arising on that bill in the first place. My opinion upon that may render it necessary to take little or no notice of the other bills.

The fifth bill of exceptions is to the action of the court in overruling the motion of the accused to set aside the verdict, because the same is contrary to law and the evidence; and on the motion of the accused the court certified the evidence taken in the case, which is as follows:

Fifth Bill of Exceptions.

"Be it remembered that on the trial of this case, after the evidence for the Commonwealth had been heard, and argument by counsel, the jury retired to make up their verdict, and after some time returned into court and returned their verdict, which is in the figures and words following, to-wit: 'We, the jury, find the prisoner guilty, and ascertain the term of his confinement in the penitentiary at five years.' And thereupon the prisoner, by his counsel, moved the court to set aside said verdict, because the same is contrary to law and the evidence. But the court overruled the said motion, and the prisoner excepted to the ruling and judgment of the court, and moved the court to certify the evidence taken in his case, and sign and seal and make this, his bill of exception, a part of the record, which is accordingly done."

And the court certifies the evidence as fol-
lows: Julian B. Crenshaw, a witness
800 for the Commonwealth, was *sworn, and testified that he boarded at the St. Clair hotel on corner of Grace and Ninth streets, Richmond, Va. About 5 o'clock A. M., day breaking about twenty minutes after, on the 30th day of October, 1877, my room was entered; my room is in the new building of the St. Clair hotel, of the city of Richmond, of which Stephen Hunter and E. S. Pendleton are proprietors. There are eight or nine rooms on the hall of that floor, I think, the rooms being on each side of the hall; my room is on the western side of the hall, and not quite midway; it is No. 14, and the window looks out on the yard of the hotel; when I went to bed my door was shut with the ordinary latch, but not locked, and could have been opened from the outside by simply turning the knob; when I first awoke about 5 A. M., I heard my door creak; I listened and heard distinctly steps on the threshold; then heard it pass along the hall four or five steps; the person appeared then to stop; then heard a sound as of some one touching the wall or a door; I then got up and struck a light, and found my door slightly ajar, four or five inches, and no one but me in my room; went to the door and looked out into the hall; it was perfectly dark, and I could not see any one in it; I looked to see if anything was gone from my room; I had that night about fifty dollars in the left pocket of my pants; I found it was gone; I then dressed, went down stairs, and told the night clerk of my loss and gave him my suspicions; after consultation with him, he thought it advisable to go to room No. 11 for trace of my money or the person who too it; No. 11 is on the same floor, the door about fifteen feet from mine, on the opposite side of the hall or passage, and the window opens out on Ninth street; my room is between rooms No. 12 and No. 16; No. 13 is opposite my room and No. 11
opposite No. 12; the night clerk, Mr.
801 John *L. Weatherford, sent for a policeman, and when he arrived we

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went up to room No. 11; Mr. Weatherford led the way, and we knocked, and receiving no answer, knocked again; when Carter opened the door, Weatherford asked who occupies this room? Carter answered he did with his friend; Weatherford asked what friend, or some such question, and Carter answered "Davis;" we had then got on the threshold; Mr. Weatherford was in the room; Weatherford asked Carter who registered the names; Carter said he did, and being reminded he had not registered any such name as Davis, he corrected himself and said, "Oh, his name in Johnson, George Johnson;" the names registered on the book were "C. L. Carter" and "George Johnson;" not much talking was done on either side after we got in the room; I don't think there was any light when we knocked at the door; there was one very soon after we got in; either Weatherford or John T. Hall, the police officer, said: "Your neighbor across the way has been robbed of some money, and they were looking for it; these men did not appear to express any surprise; Johnson said it was rather a cool reception; the policeman told them both to get ready and come along with him; the police and Weatherford made a partial search of the room, also of some bags or valises—I think one valise and one bag; I saw several things they found, among others a file. (A file was here shown to witness and identified.) I think it was found in Johnson's valise; I know Weatherford or Hall asked him about it; they were looking over his valise, and they held it up and said, "Hullo! what's this?" He replied, "It belongs to a friend of mine." He was asked what friend, and answered, "No matter; if you can make any use of it, do so." I also saw a collar with a name on it, which I spelt as best I could, "Canne;" Johnson took it up, but I don't know whether
802 it was his or not; *there were some papers found upon them with other names still; there was a railroad pass with the name of L. Lewis; it was on buff paper, not like ordinary railroad tickets, but like a railroad pass.

When I awoke I heard the door creak and four or five steps; could not tell and would not say in which direction they were going; my belief at the time was they were going in a room. I heard some other little noise, but cannot say what it was; the sound created the impression on my mind that some one had touched a door, or was at a door; the steps were distinct. I lost about fifty dollars; It might have been forty-nine dollars or fifty-one dollars; I had not had it out of my pocket for a day or so, but felt it in my pocket that night before I went to bed; put my hand in my pocket, and know it was there when I went to bed. I am very positive, I did not lose it in my room; I put my pants on a chair, but am sure it did not drop out; my pants were in three feet of the gas, and I dressed there to go to the office. I passed by No. 11, going to the steps at the end of the hall on my way to the office, No. 11 being nearer the steps than my room. Nos. 10, 11, 12, and 9 are all nearer the steps than my room. When you get to the end of the hall you turn to the right in a kind of elbow of the passage, then pass on a few steps to the stairway to the story above; the steps from the story above land in this elbow at the end of the passage. A person coming down those steps lands right at No. 9; the steps going down stairs go from that elbow; there is no exit from the passage at the other end of it. Carter and Johnson both manifested some curiosity as to whether I saw the party who entered my room; Johnson asked me if I saw the party. I replied I did not. One said they had known each other sixteen years ago in New Orleans, but had not met since until a day or two ago in Washington
803 *city, and came down here together; they were then in the prisoners' box at police court; Johnson was walking about in the prisoners' box, and I think could have heard the conversation, but I do not know whether he did or not; it was loud enough for Johnson to have heard it, but I cannot say whether he heard it or not.

On cross-examination he testified as follows:

I found my coat, pants and vest on the chair as nearly as possible as I left them when I went to bed; I had felt the money in my pocket that night when I went to bed, but had not had it out of my pocket for several days; I had in my pocket a twenty dollar bill, two tens, a five and one or two twos and ones; there are two servants that attend my room, one a male servant, the other a female servant named Matilda, I don't know her other name; they have a pass-key to my room; I have seen them with a bunch of keys going round the room doors; the thief might have disturbed my clothes in getting the money from my pocket, but if he did he had placed them back as he found them; but steps I heard did not appear to die away, but just to stop; I did not see any one when I looked out into the hall from my room. There was no twenty dollar bill found either upon the prisoners or about their baggage that I know of, but there was not a thorough search made, they only searched through their pockets and pocket-books; they did not search the room they were in so thoroughly but that the money might have been in the room and still not have been found; there were some things found on them, after they were carried to the station house, that we did not find on them in the preliminary search. Before I saw Weatherford, I had no impression it was in No. 11 any more than any other room on that floor. I knew it was not in the room immediately adjoining mine by the steps I heard. My idea, when I first heard the door creak
804 and *the steps on the floor, was that it might be a robber going into another room to rob somebody else; I listened a short time and heard no sound of any kind. The bureau drawers in the room were opened, but I have no recollection of search inside of bureau. They shook up the bed a

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little, looked under the pillows, bolster and bed-clothes, about the bureau, mantel-piece and washstand.

John L. Weatherford, another witness for the Commonwealth, after being sworn, testified:

I am night clerk at the St. Claire hotel, and was on duty at the time of the occurrence. I have a list of the occupants of the rooms on that floor that night; there are eight rooms on that floor, numbered from 9 to 16. In No. 9, were W. L. C. Walker, of Tappahannock, J. E. Gaines, of Charlotte county, and J. A. Coleman, of Halifax; in No. 10, were Henry Taylor, of Louisa, M. A. Miller, of Staunton; in No. 12, Miss Miller, of Staunton; in No. 9, L. Lewis, of Clarke county; in No. 13, the Rev. Preston Nash, United States army; in No. 15, Dr. George West and wife; in No. 14, Mr. J. B. Crenshaw; and in No. 11, C. L. Carter and George Johnson, Atlanta, Ga. I knew all but these two; Crenshaw came to me about twenty to twenty-five minutes after 5 o'clock, A. M.; about 5 o'clock, I went up to the room of another Mr. Crenshaw, No. 17, to wake him; No. 17, is on the floor above 11 and 14, and immediately over No. 9; the steps from that floor come down at the end of the passage, on the floor below, just opposite the door of No. 9, which is next to No. 11; a few minutes before 5 o'clock, I came down these stairs, having waked Mr. Crenshaw up stairs before I came down; as I came down I examined the hall; as I reached the door nearly opposite No. 9, I heard something that caused me to stop; that noise continued until the latch fell; I knew
805 *it was the latch of No. 11; when I heard the latch, I passed the door of No. 11 and No. 14; No. 14 door was closed, two lights were burning in the passage; I expected to be called, but hearing nothing, I turned back and went to the office; I was satisfied the noise was in No. 11 before I heard the latch catch; I then heard the latch catch, and am positive it was No. 11; the first sound was as if some one was pushing the door gently to, and then the distinct click of the latch. It was about 5 o'clock when I got back to the office, and about six minutes to 5 when I left the office to go up to No. 17 to wake the other Mr. Crenshaw up. In twenty to twenty-five minutes, Mr. Julian B. Crenshaw, who was robbed, came down and told me he had been robbed. We then sent for Mr. John T. Hall, sergeant of the city police, and he went off and got a warrant and returned with officer John D. Perrin, and at about 6 o'clock, A. M., we all went up to No. 11, and I knocked at the door. There was no answer to the first knock, and I knocked again; then one of these men, Carter, answered and opened the door. I stepped in and asked Carter who occupied the room? He said, "I do." I also said, who is your friend? and he said, Mr. Davis. I asked him, did you register the names? and he said, "Oh, yes, that is George Johnson." I then said to him, your friend has come in rather unexpected, you did not expect him until this morning; how did you get up to your room? He answered me, I did expect him last night, and I did not tell the clerk I did not expect him until this morning; he came last night, and I brought him up to the room. George Johnson was then lying in bed. I said to him, Carter, your neighbor across the hall here has been a little unfortunate, and lost some money, and we have come in here to get it. (I did not mention the circumstances of having heard his
806 door shut.) There *was but one bed in the room, and both of them slept in it. He said, well, it's all right, sir, you can look, we know nothing about it. Some search was then made of the room. A valise was handed me, and in it I found some clothing, some writing material, and this file. This is a common file, an ordinary machinist's file. When you find burglars with one, it is of that character. I did not find anything else, but saw a counterfeit five dollar bill one of the officers found. I also saw one hundred and eighty or one hundred and ninety dollars in money, and some railroad tickets that were found. I did not go to the station-house with them. I searched a valise and a satchel; in the stachel I found some clothing and a pistol. The pistol was found in a small satchel claimed by Carter. Johnson said, yes, it's an English pistol—its mine. Nippers being shown the witness, he said, I first saw them Tuesday last, the 13th day of November—that is a burglar's instrument, used to open a door from the outside when the key is in the lock. Two keys were here shown the witness, and he said, these keys are burglar's keys; I tried them the other day, and opened every door in the City Hall but two or three with them. A knife, the blade in imitation of a fine saw, was here shown witness; he said it was taken from Johnson's clothes. I can file an iron bar with this. He then said, I went into the room first; both were awake and both undressed. Carter had shirt and drawers of red flannel. Johnson stirred in bed. They had no access either to their clothes or baggage after we entered their room. They answered my second knock. They showed no agitation or excitement. Carter claimed the satchel and Johnson the valise. I saw the money that was taken from them, and saw there was no twenty dollar bill among it. Only a partial search was made of the room. I took off the
807 clothing of the bed and *searched the bed; I have been a professional detective; I moved the bed from the wall, seached the bureau, took out the two bottom drawers, searched the washstand, took the top off that; I stopped searching because I thought I had searched enough; I looked around under the edge of the carpet and for holes in it; there was no other piece of furniture or anything else in the room that we could have searched; I do not know how many men slept on that floor on that night; there were two servants on that floor, Nelson Meadows and Matilda Otey. As I went up

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to No. 17, I saw Nelson asleep in the bathroom; Matilda has a room next to the bathroom, but I do not know whether she was in her room on that night or not; there was a boy named Richard, floor servant, on the floor above; any servant in the house could have gone through and returned from the passage as I did; the room has been occupied since the arrest of the prisoner; I saw an excursion ticket from Washington to Richmond and return, among the articles found on the prisoner; the doors to the hotel were all locked except the door to the office in which I sat.

John T. Hall, police officer, another witness for the Commonwealth, after being sworn, testified:

On the 30th day of October last, about half-past five o'clock A. M., I was sent to for to — the St. Claire hotel; I went there and was informed by Mr. Weatherford that a robbery had been committed. I went up to the room of these two men, and Weatherford knocked two or three times on the door, when Carter opened it, Johnson being still in bed; I told him to get up and dress himself; Weatherford entered the room first and spoke to Carter; asked him who is your friend in bed, and he said Davis; he then said, oh, Johnson! I searched them while they were dressing by searching each piece of clothes before they put them on; I
808 searched their *baggage, but did not make a thorough search of that until we got to the station-house; I found this file in Johnson's valise, and found in Johnson's pocket-book one hundred and eighty-four dollars in money, and in Carter's pocket-book ten dollars, five of which was a counterfeit five dollar bill, the balance in ones and a two; I searched the bed, the bureau, and in fact everything in the room; I found nothing in the bureau; I pulled the drawers of the bureau out so as to see in them good, but found nothing in them; I did not see the nippers now shown me in the bureau; I then took the prisoners to the station-house, then searched them again, separated them and questioned them; I asked Johnson how long he had known Carter, and he told me he never saw him until the day before he met him in Washington. I then searched their baggage carefully and found two skeleton keys in the lining of the hat, a black slouch hat in the valise; the keys were wrapped up in a piece of brown paper; these were in Johnson's valise; also found a piece of wax and two keys; the keys are called skeleton keys; I also found two small wooden keys; they are called pattern keys from which keys are moulded; they were in Carter's pocket-book; I saw them last in the police court, but have not seen them since; the book shown me I took from Carter, and it has "J. D. Cannon's book" written in it; this book has been in Carter's possession since the hearing at the police court, and the name does not look as plain as it did down there; the tickets I saw were in this book, and are in the words and figures following, to-wit:

This blank is to be filled up at the mailing office and given to the person who presents the letter for registration.

809 *Receipt for a Registered Letter.

No. 337. ——, 1877.

Postoffice D——, received of H. Burton, ——326 E. 14——, a letter addressed to T. D. Van Horn, New Orleans, La.

T. Miley, Jr., P. M.

Endorsed on face: Registered October 10, 1877, branch D, New York postoffice.

Return Registered Letter Receipt.

Note.—This return receipt, after being signed by the party to whom the letter or package which accompanies it is delivered, must be immediately enclosed to the postmaster at the office where it originated.

Should the registered letter not be delivered, this receipt must be forwarded with it in due course, to the dead-letter office.

No. 2220. ——, 1877

6

Mailed at ——, by Charles T. Burton, 139 E. 19 ———, a letter addressed to Charles G. Irish, ——— 303 Washington street, Buffalo, N. Y.

Received the above described letter.

Charles G. Irish.

Sign here,

J.

Stamp here the office and date of delivery: Buffalo, N., September 5, 1877, registered.

810 *Endorsed on face: Registered September 1, 1877, branch D, New York postoffice.

There was one pass for L. Lewis and another for Lewis Lewis; they are not now in the book; I have gotten such articles as this file, nippers and skeleton keys from burglars.

On cross-examination he said: I did not take out the bureau drawers, and set them on the floor; I am pretty certain they were not taken out by any one. I made a more careful search of the room than usual; I wanted to find that money. The town was flooded with thieves and burglars during the late visit of the President; the money I found on Johnson consisted of three fifty dollar bills, three tens and two twos. The first thing I said when I went into the room was to tell Johnson to get up; I have no recollection of telling him I wanted that fifty dollars; the keys might have worked themselves inside the hat where I found them.

Dr. E. S. Pendleton, another witness for the Commonwealth, after being sworn, testified:

I am one of the proprietors of the St. Clair hotel. Since the arrest of the prisoners two ladies, one Miss Booten and the other Miss Stansbury, two ladies of excellent standing, have been the only occupants of room No. 11 until the day before yesterday; the nippers were in the hands of the attorney for the Commonwealth before that.

On cross-examination he said: I cannot say no one else has been in the room since the arrest of the prisoners, and don't know

how many people have occupied that room since. The bureau has been in it now about eighteen months; don't know where the bureau came from; think it came from Watson's factory; nearly all our furniture came from there.

811 *Matilda Otey, another witness for the Commonwealth, after being sworn, testified:

I am a waiter at the St. Claire hotel, and heard of the robbery next day. I was asleep in my room at the time it occurred, and had not been upon that floor since about ten o'clock that night. I found this instrument (the nippers) in No. 11; it was inside of the top drawer of bureau. I found it one day this week in taking out the drawers of the bureau to dust in behind them; as the ladies always like to have everything clean about the bureau I always take the drawers out to dust them.

J. B. Angle, a policeman, and witness for the Commonwealth, after being sworn, testified:

I searched the valise at the station-house. The hat (a black slouch hat) lay in the valise on one side of it. The hat was mashed flat, and the keys, wrapped in brown paper, were inside of it. The valise was pretty full. The keys lay inside the hat, and there was no lining inside of the hat. Don't think the keys could have worked themselves in the hat, but they might have done so. The valise was pretty full, but more could have been gotten into it.

I certify that the foregoing is the substance of the evidence introduced for the Commonwealth in this case, there being no evidence for the defence.

Witness my signature and seal.

A. B. Guigon. [Seal.]

To sustain a charge of a criminal offence there must be proved, first, the corpus delicti; and, secondly, that the accused committed the offence charged against him. In this case there was sufficient proof of the corpus delicti, of the breaking and entering in the night time, by some person, of the dwelling-house of another, with

812 *intent to commit a felony therein; in other words, of a burglary, as charged in the indictment.

But was there sufficient proof that the accused committed the offence to warrant his conviction thereof by the jury? To warrant such conviction, the evidence should be such as, if true, to exclude all rational doubt of the guilt of the accused.

I do not think it was such in this case. The evidence introduced, and not the facts proved on the trial, is certified in the bill of exceptions. No evidence was introduced in behalf of the accused; and in considering this question we must regard as true all the evidence of the witnesses introduced in behalf of the Commonwealth.

So regarding the evidence, did it warrant the verdict of the jury? Did it legally show that the accused committed the burglary charged against him? Again I say, I think not. It makes out no more than ground for suspicion against the accused, however strong that suspicion may be. It falls short of proof of his guilt beyond all rational ground of doubt to the contrary. The evidence tending to connect the accused with the offence charged, if there can be said to be any such evidence, is inconclusive, and is consistent with an hypothesis which assumes the innocence of the accused of the offence charged in the indictment. That burglars' instruments were found in possession of the accused, if such was the fact, was a suspicious circumstance, and tended strongly to show that the accused had come to Richmond on the occasion of the crowd which at that time assembled in the city, with a purpose on his part to avail himself of any opportunity he might have on that occasion to commit such an offence. But surely that evidence was wholly insufficient, in itself, to connect the accused with the particular offence charged against him in the indictment. And there was

813 little other evidence in the case *to strengthen and support that evidence; certainly not enough, in my opinion, in connection with that evidence, to establish his guilt of the offence charged beyond a rational doubt to the contrary. That the accused, at the time of the commission of the offence, occupied a room in the same hotel with the room which was broken and entered, and that the two rooms were on the same passage, though on opposite sides, and but fifteen feet apart, are also suspicious circumstances, when taken in connection with the tools found in possession of the accused as aforesaid. They at least show that the accused was near enough to commit the offence. The same may be said of the circumstance that when Crenshaw, whose room was opened and entered, awoke, "he heard the door creek and four or five steps; he could not tell, and would not say, in which direction they were going, though his belief at the time was, they were going in a room; he heard some other little noise, but could not say what it was; the sound created the impression on his mind that some one had touched a door, or was at a door; the steps were distinct." And the same may be said of the circumstance stated by the witness Weatherford, the night clerk at the St. Claire hotel: "About 5 o'clock A. M., which was but a few moments before the alleged burglary was committed, he went up to the room of another Mr. Crenshaw (No. 17), to wake him; No. 17 is on the floor above 11 (occupied by the accused), and 14 (occupied by the Crenshaw whose money was alleged to have been stolen, and immediately over No. 9); the steps from that floor came down at the end of the passage, on the floor below, just opposite the door of No. 9, which is next to No. 11; a few minutes before 5 o'clock, witness came down these stairs, having waked Mr. Crenshaw up stairs before he came down; as witness came down he examined the hall; as he reached

814 *the floor, nearly opposite no. 9, he heard something that caused him to

stop; that noise continued until the latch fell; he knew it was the latch of No. 11; when he heard the latch he passed the doors of No. 11 and No. 14; No. 14 was closed; two lights were burning in the passage; witness expected to be called, but hearing nothing, turned back and went to the office; he was satisfied the noise was in No. 11, before he heard the latch catch; he then heard the latch catch, and was positive it was No. 11; the first sound was as if some one was pushing the door gently to, and then the distinct click of the latch. It was 5 o'clock when he got back, and about six minutes to 5 when he left the office to go up to No. 17, to wake the other Mr. Crenshaw up. In twenty to twenty-five minutes, Mr. Julien B. Crenshaw, who was robbed, came down and told witness he had been robbed."

These circumstances, taken singly or all together, while they create a suspicion of guilt, are yet inconclusive and wholly insufficient to prove such guilt. They are consistent with the fact of guilt, but are also consistent with the fact of innocence. If they be not at least as consistent with the fact of innocence as with the fact of guilt, they certainly do not amount to such degree of proof as to connect the accused with the offence and to warrant his conviction thereof.

But the other evidence in the case, so far from strengthening the suspicion of guilt, rather tends to weaken if not disprove it. There were two obvious modes of connecting the accused with the offence, either of which would have been probably sufficient for the purpose if it had been sustained by evidence. One was, by identifying the accused as the person who entered the room of J. B. Crenshaw; and the other was, by identifying some of the money found in possession of the accused as the money, or some of it, which had been stolen from Crenshaw. *But so far from identifying the accused as the person who entered the room of Crenshaw, the latter did not see the person who entered his room, either while such person was in the room or before or after he entered it. While Crenshaw heard distinctly steps on the threshold and passing along the hall, he did not see the person whose steps he heard. And so far from identifying some of the money found in possession of the accused as the money, or some of it, which had been stolen from Crenshaw, not a dollar of the latter was identified; but on the contrary, it was proved that a twenty-dollar bank note was a part of the money taken from Crenshaw, and yet no such note was found in the possession or room of the accused. It is difficult to believe that the money of Crenshaw could have been stolen by the accused without being found in his room on the search which was made therein by Crenshaw, the owner of the money, Weatherford, the night clerk at the St. Claire hotel, and Hall, the police officer, almost immediately after the offence was committed. When they went to the room of the accused to make the search they found the door closed, and the accused and his companion, Carter, were undressed and in bed. They denied their guilt, manifested no alarm, and invited a search of themselves and their room and of everything in it; which search was accordingly made, and though $184 in money were found in the pocket-book of Johnson, the accused, and $10 in the pocket-book of Carter, five of which was a five dollar counterfeit bill, not a dollar of either parcel was identified as a part of the money which had been stolen from Crenshaw; and the twenty-dollar note which was stolen from him could not possibly have been a part of the money found as aforesaid. It was argued that the search was not complete, and some of the evidence tends to show that such was the case. But certainly the three *persons who made the search had the strongest motives to make it complete, so far as it could reasonably be expected to lead to the discovery of the money, supposing it to be in the possession or room of the accused. Each of them testified as to the manner and extent of the search, and it is difficult to conceive how it could have been more complete than it was. Reference can be had to their testimony to see how complete the search was. While certain tools, which were called in the argument burglars' tools, were found in the possession and room of the accused and his companion, Carter, in making the search, not one of them could have been used in breaking and entering the room of Crenshaw, the door of which was not even locked, and was opened and entered merely by turning the knob on the outside.

Another material circumstance of the case in connection with the one last stated, is, that when the alleged offence was committed all of the rooms near the one occupied by Crenshaw, and no doubt most of those in other parts of the hotel, were occupied by guests, and there were two servants, one a male and the other a female, who attended to his room and had a pass key to it, and who slept on the same floor with the said room on the night on which it was broken and entered. Now, without meaning to say, what certainly does not appear, that the evidence in this case creates the slightest suspicion that any one of these guests and servants, other than the accused, was guilty of the offence charged against him, certainly the circumstance just stated is material to be considered in deciding the question whether the conviction of the accused was warranted by the evidence in the case.

I will now notice such of the cases referred to in the argument of the case as I deem material to be noticed, from which it will appear that the evidence, supposing it *all to be true, was wholly insufficient to warrant the conviction of the accused.

In Algheri v. The State of Mississippi, 25 Miss. R. 584, referred to by the counsel of the plaintiff in error, it was held by the high court of errors and appeals of that state: 1st. That in the application of cir-

cumstantial evidence to the determination of a case, the utmost caution and vigilance should be used. 2d. That it is always insufficient, where, assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true; for it is the actual exclusion of every other hypothesis which invests mere circumstances with the force of truth; and 3d. That where the evidence leaves it indifferent which of several hypothesis is true, or establishes only some finite probability in favor of one hypothesis, such evidence cannot amount to proof, however great the probability may be. The second and third of these propositions were literally taken from 1 Stark. on Ev. 572, and correctly expound the law.

I will cite only two other of the cases referred to by the counsel for the plaintiff in error, but they are cases of the highest authority, being the unanimous decisions of our late general court when it was our court of appeal in criminal cases, and when it was composed of judges of the greatest ability and experience, especially in regard to the criminal law. I mean Grayson's case, 6 Gratt. 712, and same case, 9 Id. 613. Grayson was twice convicted of murder and sentenced to be hung therefor. Judge Field, who presided at each trial, refused in each case to grant a new trial on the ground that the verdict was contrary to the evidence. And the general court, in each case, reversed the judgment and remanded the cause for a new trial to be had therein. Judge Scott, who delivered the opinion of the court in the former case, concluded it by saying: "In the case at bar my 818 opinion *is, that there is no evidence which connects the accused with the homicide of which he has been convicted; that at most it amounts only to a suspicion that he had some hand in it, and that the evidence is plainly insufficient to warrant the verdict." Judge Leigh, who delivered the opinion of the court in the latter case said: "The court is fully aware of the weight which ought to be given to the two concurring verdicts approved by the judge who presided at the trials, and if, in our opinion, the evidence made even a probable case of guilt, we would be unwilling to disturb the judgment. But at the last term this court was of opinion, unanimously, that the evidence introduced on the first trial was plainly insufficient to connect the accused with the murder. The evidence on the second trial is somewhat different from the evidence on the first trial, but this difference is favorable to the accused, and after examining the testimony anew, we are again unanimously of opinion that it is wholly insufficient to sustain the verdict and judgment."

The principle of these two cases is directly applicable to this; and according to the principle the judgment in this case ought to be reversed on the ground that the evidence in the case was insufficient to support the verdict.

I do not think there is anything in the cases cited by the attorney-general in conflict with those above referred to. They apply more to the questions arising on the other bills of exceptions, or some of them, than to that arising on the 5th, now under consideration. They are the cases, 1st, of the Commonwealth v. Williams, 2 Cush. R. 582; 2d. The People v. Larned, 3 Selden R. 445; and 3d. Foster v. The People, 10 Supreme Court Reports, N. Y. 6. In the first of these cases, it was held that on the trial of an indictment for breaking and entering a building and stealing therefrom, a number of burglarious tools and implements found together in the possession of 819 *the defendant at the time of his arrest, may be brought into court and exhibited to the jury, although some of them only, and not the residue, are adapted to the commission of the particular offence in question. In the second, it was held that tools with which a burglary is supposed to have been committed, may be exhibited to the jury in connection with evidence tending to show them to have been used in its commission and to connect them with the prisoner. And in the third a box containing burglars' tools, found in the office of the Adams Express Company at Boston, shortly before the burglary, was produced and identified at the trial. It was proved that it was made for the prisoner; that it was taken to his residence and sent away by an express wagon; that it was marked with the name of Foster, (his name), and that he, with another person, was at the express office when it was found. It was held that the evidence was sufficient to connect the prisoner with the box, and that an objection to its reception in evidence, on the ground that such connection was not sufficiently established, was not sustainable. In all these cases the tools found in the possession of the accused, or at least a part of them, were such as might have been used, and no doubt were so, in the commission of the offence charged against him. In this case, none of them were, or could have been, so used. The diversity between those cases and this, is therefore most obvious.

Besides the two cases of Grayson, cited by the counsel for the plaintiff in error from the decisions of the highest court of appeal in criminal cases in this state, there are two cases recently decided by this court which have an important bearing upon this case. In each of them the opinion of the court was delivered by my brother Christian, and the court was unanimous. In one of them, Smith's case, 21 Gratt, 809, the 820 question was to the *corpus delicti, on a charge of murder of a bastard child. The court held that on a trial for murder, the death of a person charged to have been murdered must be proved by the most cogent and irresistible evidence, either by witnesses who were present when the murderous act was done, or by proof of the body having been seen dead, or by proof of criminal violence adequate to produce death, and which accounts for the disappearance of the body. Every one who reads the evidence in the case must be morally

convinced that a murder had been committed, and that the accused was guilty of the offence, but there was not sufficient evidence of the corpus delicti for his conviction, and this court, therefore, reversed the judgment against him. In concluding his opinion, Judge Christian said, that "tutius semper est errare in acquietando, quan in puniendo, &c., is the wise and humane maxim of the criminal law." The same sentiment has often been expressed by another maxim of the same law, that "it is better that ninety-nine (that is, an indefinite number of) guilty persons should escape punishment, than that one innocent person should be punished." In the other of the two cases referred to, Pryor's case, 27 Gratt. 1009, the rules in relation to new trials, stated in Grayson's case, 6 Gratt. 712, and Blosser v. Harshbarger, 21 Id. 214, were approved and reaffirmed; and in that case (Pryor's) the evidence being wholly circumstantial, it was held in the appellate court to be plainly insufficient to warrant the finding of the prisoner guilty of the offence charged in the indictment.

I am therefore of opinion, that the court of hustings erred in overruling the motion of the plaintiff in error to set aside the verdict.

In regard to the questions presented by the 1st, 2d, 3d and 4th bills of exceptions, very little need be said. The 5th bill of exceptions being made a part of each *821 of the *other bills of exceptions, and the evidence set out in the 5th bill of exceptions being plainly insufficient to convict the accused of the burglary charged against him in the indictment, the evidence set out in the other bills of exceptions was at least inadmissible in connection with the other evidence set out in the 5th bill of exceptions, and the hustings court therefore erred in overruling the motions to exclude the evidence mentioned in the 1st, 2d, 3d and 4th bills respectively, made after all the evidence set out in the 5th bill of exceptions had been introduced. It is very common and sometimes proper to admit evidence when first offered which may by evidence subsequently introduced be rendered admissible, and afterwards to exclude it when not made admissible by evidence subsequently introduced. In this case all the evidence set out in the 5th bill of exceptions being wholly insufficient to connect the accused with the offence, those parts of the said evidence which are set out in the other bills of exceptions thus became inadmissible, and the hustings court erred in overruling the motions of the plaintiff in error to exclude them.

I am therefore of opinion, that the judgment of the hustings court ought to be reversed, the verdict of the jury set aside, and the cause remanded to the said hustings court for a new trial to be had therein, in conformity with the foregoing opinion.

Christian, J., concurred in the opinion of Moncure, P.

The other judges concurred in the opinion of Moncure, P., on the fifth exception. There was a diversity of opinion on the questions involved in the other exceptions.

The judgment was as follows:

For reasons stated in writing and *822 filed with the record, *the court is of opinion, that in regard to the first assignment of error in this case, to-wit: that "the said hustings court erred in discharging the jury regularly empanelled and sworn on Saturday, the 10th day of November, 1877, to try the issue joined between the Commonwealth and the petitioner," &c., it is sufficient to say that no objection was taken in the court below to the action of the court in this respect; and no further notice will be taken of that subject.

But the court is further of opinion, in regard to the fifth bill of exceptions, which is to the action of the said hustings court in overruling the motion of the plaintiff in error to set aside the verdict of the jury, "because the same is contrary to law and the evidence," that the evidence set out in the said bill of exceptions, which was all the evidence introduced on the trial of the case, was wholly insufficient, even conceding it all to be true, to connect the plaintiff in error with the offence charged against him in the indictment and to warrant his conviction thereof by the jury; and that the said hustings court, therefore, erred in overruling the said motion to set aside the said verdict.

In regard to the other bills of exceptions, to-wit: the first, second, third and fourth, the court is not unanimous; a majority of the judges being of opinion that the said hustings court did not err in overruling any of the motions to exclude any of the evidence mentioned in the first and fourth of said bills; but did err in overruling the motions to exclude the evidence mentioned in the second and third of said bills. In regard to the second bill of exceptions, however, the said majority consisted of but three judges, one of whom is of opinion that the said hustings court would not have erred in admitting as evidence the conversation therein mentioned upon condition that the jury believed that the said conversation *823 *was heard by the accused; and the said judge is of opinion that evidence of the said conversation ought to have been admitted upon that condition.

Therefore it is considered, ordered and adjudged by the court, that for the errors aforesaid, the said judgment of the said hustings court be reversed and annulled, the said verdict of the jury be set aside, and a new trial be awarded to the plaintiff in error for the said offence; and the cause is remanded to the said hustings court for a new trial and further proceedings to be had therein in conformity with the foregoing opinion; which is ordered to be certified to the said hustings court of the city of Richmond.

Judgment reversed.

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824 *White v. The Commonwealth.

January Term, 1878, Richmond.

Indictment—Endorsement.—An indictment for a felony is endorsed "A true gun," which is signed by the foreman. The jury present the paper in court as an indictment, it is read to them by the clerk as their indictment, and assented to by them; it is entered on the record as an indictment, and the prisoner is tried upon it upon the plea of not guilty. Upon a motion to arrest the judgment—HELD: No endorsement is necessary on the indictment to constitute it such; and the mistaken endorsement cannot invalidate it.

The case is stated by Judge Moncure in his opinion.

George S. Bernard, for the prisoner.

The Attorney General, for the Commonwealth.

Moncure, P., delivered the opinion of the court.

This is a writ of error to a judgment of the county court of Dinwiddie county, convicting the plaintiff in error, White, of felony, and sentencing him therefor to confinement in the penitentiary for the term of three years. The indictment on which he was convicted, charged that he, "on the 15th of October, 1877, in the said county, a certain out-house, commonly called a barn, or tobacco-house, with a stable attached, belonging to James W. Gunn, which, with the property then therein contained, was of the value of $400, feloniously and 825 *maliciously did burn, against the peace and dignity of the Commonwealth of Virginia." When the grand jury returned into court with the indictment, it had on it, or under it, these words in writing, subscribed by their foreman: "A true gun." A. T. Towree, Foreman. The accused being arraigned, plead not guilty to the indictment. Whereupon, a jury being sworn to try the case, found a verdict therein in these words: "We, the jury, find the prisoner guilty of the charge in the within indictment, and that the barn and contents are worth more than $100; and fix his term of confinement in the public jail and state penitentiary for three years, and recommend him to the executive for mercy." The accused, by counsel, moved the court in arrest of judgment; which motion the court, after taking time to consider, overruled. And judgment was thereupon rendered according to the verdict. The accused applied to the judge of the circuit court of said county for a writ of error to said judgment; which being refused, he applied to this court for such writ; which was accordingly awarded.

There is but one question in the case, which arises on a bill of exceptions taken therein. It is stated in said bill, "that after the jury rendered their verdict in this case and were discharged, the prisoner, by his counsel, moved the court in arrest of judgment, and submitted that it ought not to proceed to judgment upon the verdict aforesaid, for the reasons following:

"1st. No indictment has been found against the prisoner by a grand jury, in a court of competent jurisdiction. The original paper treated in this case as an indictment against the prisoner is not an indictment so found, inasmuch as said original paper nowhere bears the indispensable words, 'a true bill.'

"2d. The prisoner has, in no way whatever, waived the privilege given him, 826 to require that he shall not be *put upon trial for a felony charged against him until an indictment shall have been first found against him by a grand jury in a court of competent jurisdiction.

"3d. Said privilege, requiring to be first so indicted before being put upon trial for a felony, is a right given to the prisoner by the constitution of the state, and cannot be waived."

It is further stated in said bill that in support of the said plea in arrest of judgment, upon grounds aforesaid, "the prisoner, by his counsel, called the attention of the court to, and asked the court to inspect, said original paper, treated as an indictment in this cause, and its endorsements," (which paper and endorsements are set out in the bill); "and the court further certifies that it appears in this cause that the record shows that the grand jury were regularly empanelled and sworn and charged, and having retired to their room and spent some time therein, came into the courtroom and answered to their names, and were then asked by the clerk if they had agreed upon any bills of indictment; to which they replied yes, and handed to the clerk the paper treated as an indictment in this cause; and the clerk with the said paper before him, read in the presence of the grand jury—'The Commonwealth vs. Alex. White alias Elick White: Indictment, a true bill;' and then entered upon the record—to-wit: the minute-book—the following as the finding of the grand jury, to-wit: 'The Commonweath v. Alex. White alias Elick White: Indictment, a true bill.' And thereupon the prisoner was brought into court, and arraigned in the usual form, upon the said paper, treated as an indictment in this cause; and upon his arraignment, pleaded 'not guilty.' The trial then proceeded regularly to verdict. And thereupon, the court having fully considered said motion in arrest of judgment, and the grounds 827 therefor, doth overrule the *same; the court being of opinion that the said original paper, treated as an indictment in this cause and endorsed as aforesaid, is not, in any wise, defective in substance, but only in form. And as the prisoner made no objection thereto till after the verdict aforesaid had been found by the jury and recorded by the clerk, but had pleaded 'not guilty,' he, the prisoner, must be treated and considered as having waived all objections to said indictment as to form. To which opinion of the court, overruling said motion in arrest of judgment, the prisoner

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by counsel excepted, and tendered this his bill of exceptions, and prays that the same be signed and sealed by the court and made part of the record in this cause; which is accordingly done."

Thus it appears that the only question presented by this record for the decision of this court is, whether the original paper, upon which as an indictment the plaintiff in error was tried for and convicted of felony, was found by the grand jury to be a true bill.

There can be no doubt but that the grand jury, or rather the foreman, in endorsing the bill a "true gun," meant a "true bill," being probably led into the mistake by the fact that the indictment on which the endorsement was made, charged that the house burned was the property of a man named Gunn, who was thus, no doubt, the prosecutor. So that if it were necessary that a bill, in order to be made a good indictment, should have on it an endorsement by the grand jury, or its foreman, that it is a true bill; yet as the word "gun" was here obviously used for the word "bill," as it was read by the clerk in the presence of the jury and acquiesced in by them—as it was so entered of record by the court, and as the accused plead not guilty to the indictment, and made no objection to the finding of the grand jury until after the verdict was rendered against him, it was then too
828 late to *make the objection if it ever would have been a valid one. Sparks v. Commonwealth, 9 Penn. State R. 354, which was cited in the argument of this case, strongly, if not conclusively, sustains this view. It was held in that case not to be error to sentence a defendant convicted on an indictment found "a bill" omitting the word "true." Gibson, C. J., in delivering the opinion in the case said: "But to endorse it 'a bill' is in effect to endorse it 'a true bill,' for though an indictment is strictly called a bill before it has been found, yet it is in common parlance often called so afterwards. In this instance the omission of the word 'true' may have been deemed immaterial, or may have been accidental; but the court might have supplied it in either case as 'matter of form, not touching matter of substance.' The grand jury certainly intended to do something; as they did not intend to endorse the bill 'ignoramus,' they intended to endorse it a true bill. The omission is one of those clerical slips which, it is well settled by Hawk. B. 2, ch. 25, § 97, and Chitty's Cr. L. 297, 325, the court has power by the previous assent of the grand jury to amend."

But it is not necessary that a bill, in order to be made a good indictment, should have on it an endorsement by the grand jury, or its foreman, that it is a true bill. It is sufficient that the bill was actually found to be a true bill by the grand jury; that such finding was announced in court by the clerk on the return, and with the acquiescence, of the grand jury, and entered of record; as was done in this case. Such was the unanimous decision of this court in Price's case, 21 Gratt. pp. 846, 855, 862. The subject is so fully considered and the authorities so fully reviewed in that case that it is unnecessary to say more here, as that case settles the law upon the point. It may be proper to say, however, that there is nothing in Bradshaw's case, 16
829 Gratt. 507, (which was much relied *on by the counsel for the plaintiff in error in his argument of this case), at all in conflict with Price's case, in which it was not referred to, no doubt because it was not considered as affecting the question involved in the latter case. The said counsel's reliance on Bradshaw's case seems to have proceeded from his supposing by mistake that what was quoted by Judge Daniel in that case from the opinion of Judge Phelan, in Garaway v. The State, 23 Alab. R. 772, was a part of Judge Daniel's opinion.

If no endorsement on the indictment of any finding by the jury would not have made the judgment erroneous in this case, as is conclusively shown by Price's case, supra, a fortiori, an endorsement which is either equivalent to an endorsement of "a true bill" by the grand jury, or else amounts in effect to no endorsement at all (as is the case here), cannot make the judgment erroneous.

The court is therefore of opinion that there is no error in the judgment, and that it ought to be affirmed.

Judgment affirmed.

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830 *Givens v. Commonwealth.

January Term, 1878, Richmond.

1. **Rape—Carnal Knowledge of Female Child.***—To carnally know a female child under twelve years of age, whether with or without her consent, is a rape.
2. **Same — Same—Attempt—Punishment.**—To attempt to carnally know a female child under twelve years of age, whether with or without her consent, is an offence embraced in the statute, Code of 1873, ch. 195, § 10, and is punishable with confinement in the penitentiary for a period of not less than one nor more than eighteen years.
3. **Same—Same—Same—Death Penalty.**—The statute provides that the offence charged may be, at the discretion of the jury, punished with death, or confinement in the penitentiary. This is a death penalty, and the attempt to do the act forbid, is embraced in the statute, Code of 1873, ch. 195, § 10.
4. **Same—Same—Verdict—Reversal.**—In a prosecution for carnally knowing a female child under twelve years of age, the jury find the prisoner not guilty of the act, but guilty of the attempt to commit it. The only witness as to the act, was the child, who was proved by her mother to be between ten and eleven years old. The court below having refused to set aside the verdict and grant a new trial, the appellate court will not reverse the judgment.

***Rape—Indictment—Verdict of Attempt to Commit.**—The principal case is cited in Glover v. Com., 86 Va. 384, for the proposition that upon an indictment for rape, the accused can be convicted of an attempt to commit rape. See also, Mings v. Com., 85 Va. 638.

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This was an indictment by the grand jury of Nelson county court against Horace Givens, for carnally knowing a female child under twelve years of age. The prisoner was tried for the offence, and the jury found him not guilty of the felony charged in the indictment; but guilty of an attempt to commit such felony; and fixed his term of confinement in the penitentiary at five years. And there was a judgment according to the verdict.

831 *The prisoner moved the court for a new trial, on the ground that the verdict was not sustained by the evidence. But the court overruled the motion; and he excepted. The only evidence mentioned in the bill of exception, is that of the child, by whom the fact of the attempt to carnally know her was proved, and that of the child's mother, who proved that the child was in the eleventh year of her age.

The circuit court having refused to grant the prisoner a writ of error to the judgment, he applied to this court for it; and it was awarded.

Thomas P. Fitzpatrick, for the prisoner.

The Attorney General, for the Commonwealth.

Anderson, J., delivered the opinion of the court.

On an indictment for felony, the jury may find the accused not guilty of the felony charged in the indictment, but guilty of an attempt to commit such felony. (Code of 1873, ch. 202, § 31.) Such is the finding of the jury in this case, and they fix the prisoner's term of confinement in the penitentiary at five years; which is the judgment of the court.

It is contended for the prisoner and assigned as error in the judgment, that the attempt of which he is convicted, is not punishable by the statute with confinement in the penitentiary, but by confinement in the jail not less than six nor more than twelve months, because the offence which he was convicted of an attempt to commit is punishable with death, or confinement in the penitentiary.

The section under which he was indicted, (Code of 1873, ch. 187, § 18) is in these words: "If any person carnally know a female of the age of twelve years or

832 *more, against her will, by force, or carnally know a female child under that age, he shall be at the discretion of the jury punished by death, or confined in the penitentiary, not less than ten nor more than twenty years." It was under this last clause of the section that the prisoner was indicted, the female child being under the age of twelve years and over ten. It is doubtless under this section that the crime of rape is punishable, although the term "rape" is not to be found in it. The offence in case the female was twelve years old and over, as described in this section, unquestionably constitutes the crime of rape; and the offence in case the female was under the age of twelve years, is treated as of the same grade and of equal atrocity, and both are alike punishable at the discretion of the jury with death, or by confinement in the penitentiary. And both are embraced in Lord Chief Justice Hale's definition of rape. "Rape (he says) is the carnal knowledge of any woman above the age of ten years against her will, and of a woman child under the age of ten years with or against her will." 1 Hale's Pleas of the Crown (first American ed.), p. 627. Our statute makes the age twelve years, which is the age of consent of a female. And Lord Hale, in the same book, in commenting upon the statute of 18 Eliz. ch. 7, which declares, "that if any person shall unlawfully and carnally know and abuse any woman child under the age of ten years, it shall be felony without the benefit of clergy," says, "if she be above the age of ten years and under the age of twelve years, it is rape: 1. Because the age of consent of a female is not ten, but twelve." And he quotes my Lord Coke as saying "that these words within age must be taken for her age of consent, viz: twelve years, for that is her age of consent to marriage, and consequently her consent is not material in rape, if she be under twelve years old." (Ibid. p.

833 630.) *This doctrine has been controverted, and opinions and decisions may be found on both sides of the question; but if the legislature, in using the term "rape" in the section which prescribes punishments for attempts to commit offences, had reference to the section under which this prosecution was made, recited supra, and intended to embrace the crime in both phases, as it is described in that section, in the term "rape," it was well warranted in doing so by high authority upon such a question.

That section provides (Code of 1873, ch. 195, § 10), that "if the offence attempted be punishable with death, the person making such attempt shall be confined in the penitentiary not less than one nor more than five years; except that in cases of attempt to commit rape, the term of confinement in the penitentiary shall not be less than one nor more than eighteen years." This exception implies that the offence of an attempt to commit rape was embraced in the first clause, but that the punishment for the attempt to commit such offence, like the attempts to commit all other offences embraced in said clause, would be limited to confinement in the penitentiary not exceeding five years, but that the legislature, intending that an attempt to commit a crime so heinous and abominable, should be liable to a severer punishment, authorized the greater punishment thereof, by confinement in the penitentiary for eighteen years, and excepted it from the provision whereby its punishment, like all attempts to commit the offences indicated, could not have exceeded confinement in the penitentiary for a term of five years. But for this exception, the attempt to commit the offence which is denominated "rape" would have

been punishable by confinement in the penitentiary not exceeding five years. And that the legislature, in employing the term "rape" as descriptive of the offence, 834 had reference *to section 18 of chapter 187, above recited, and meant the offence therein described, is evident, because it is the only section in the statute book which denounces a penalty against the offence of rape; and it treats it as of the same grade of atrocity, and subject to the same punishment, whether the female was over or under twelve years of age, requiring only to constitute the offence that it should in the former case be committed against her will and with force; whilst in the latter it is made not material to the offence, whether it was committed with or against her will. The said section makes it one and the same offence, and we are of opinion it was so regarded by the legislature, and that they intended and did embrace it in the said 10th section of chapter 195 in the term "rape."

Again, there can be no doubt that the legislature, in the enactment of this 10th section, regarded the offence described in the said 18th section as punishable with death, and so treated it, although the jury, by the terms of the section, have a discretion to reduce the punishment to confinement in the penitentiary. And the punishment of the offence in both its phases being the same, and it being an offence unquestionably by the statute punishable with death in its first phase, it must also be an offence punishable with death in its second phase.

We have not found a case in which the exact question has been raised and decided, whether, where the statute declares that if the offence is punishable with death, the attempt to commit it shall be confinement in the penitentiary, the attempt to commit the offence shall be so punishable, when the offence itself is punishable with death, or confinement in the penitentiary at the discretion of the jury. But the principle, we think, is settled in Price's case, 21 Gratt. 846. That was a prosecution for horse-stealing, and the question was, 835 whether the *circuit court or the county court had jurisdiction of the case. By the act of assembly the circuit court had jurisdiction if the offence charged was punishable with death. The offence charged was punishable with death or confinement in the penitentiary at the discretion of the jury. The court held (Judge Moncure delivering the opinion), that the circuit court had jurisdiction; thus holding that the offence was punishable with death, although it might be punished, at the discretion of the jury, with the lighter punishment of confinement in the penitentiary. Elviza's case, 16 Gratt. 561, is an authority in support of the same principle. Upon every view of the case, we are of opinion that the attempt to commit the offence of which the prisoner in the case at bar was found guilty, is punishable by confinement in the penitentiary.

The court is further of opinion, that the circuit court did not err in overruling the prisoner's motion to set aside the verdict and grant him a new trial. The only evidence against him to be found in the record is the testimony of the prosecutrix, a girl who was over ten, but not eleven years old. She was a competent witness. The weight to which her testimony was entitled was a question for the jury. In cases of this kind it is desirable that there should be concurrent circumstances in support of the testimony of a witness who has not attained the age of discretion. But the current of authority is, that no general rule can be laid down on the subject; and that as the prisoner may be legally convicted on such evidence alone and unsupported, the degree of corroboration which the testimony of the witness requires, is a question exclusively for the jury, to be determined from all the circumstances, and especially from the manner in which the child has given her testimony. "That evidence may be such as to leave no reasonable doubt of the pris- 836 oner's guilt, although it *stands unsupported by other witnesses." Russell on Crimes (8th Amer. ed.) p. 695; 1 Phil. on Ev. 7. But it does not appear from the record that there was not other evidence. The bill of exceptions does not show that the certificate of evidence contains all the evidence that was given to the jury. The court is of opinion, upon the whole, that there is no error in the judgment of the court below, and that the same be affirmed.

Judgment affirmed.

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837 *Wooddy v. The Commonwealth.

January Term, 1878, Richmond.

Ship-Broker—Acts Which Do Not Constitute.—W, agent in Fredericksburg for New York owners of lumber, proposes to P, captain of a vessel returning north, to furnish him with a cargo at $5.50 per 1,000 feet, if P would allow W two and a half *per cent.* on the amount P received as freight on the lumber. This P refused. W made another proposition, which P also refused. The freight was then fixed at $5.50 per 1,000 feet of said lumber, and the vessel loaded the same, W being in and about the vessel working and superintending the loading, and he employed two men to assist the crew, and he paid them. These acts were those of a stevedore. After the work was done W received from P two and a half *per cent.* on the freight. W did not act as a ship-broker.

The case is stated by Judge Moncure, in his opinion.

J. B. Sener, for the appellant.

The Attorney General, for the Commonwealth.

Moncure, P., delivered the opinion of the court.

This is a writ of error to a judgment of the corporation court of Fredericksburg, in

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a case of misdemeanor. The plaintiff in error, James P. Wooddy, was indicted for acting as a ship-broker without a license. The indictment found against him contained two counts. In the first, it was charged generally, that he "did unlawfully act as a ship-broker without a license au-
838 thorized by law." *In the second, it was charged specially, that he "did unlawfully act as a ship-broker without a license authorized by law, by engaging in the management of certain business matters occurring between the owners of the schooner Lizzie Titus, whose names are to the jurors unknown, acting through their agent, William E. Phillips, captain of said Schooner Lizzie Titus, and the shippers of freight carried on said schooner, the names of said shippers being also to the jurors unknown." The defendant pleaded not guilty to the indictment. A jury was sworn to try the issue joined on that plea, and having heard the evidence, found a verdict in these words: "We, the jury, find the defendant, Captain J. P. Wooddy, guilty as charged in the indictment, and assess his fine at one hundred dollars. R. B. Berry, foreman." The defendant moved the court to set aside the verdict of the jury and grant him a new trial; which motion the court overruled. And judgment was thereupon rendered according to the verdict. To the action of the court in overruling the said motion, the defendant excepted, and the facts proved on the trial of the cause were certified in the bill of exceptions. The defendant applied to this court for a writ of error to the said judgment; which was accordingly awarded.

Several errors are assigned in the petition for a writ of error, but there is only one question in the case: whether, upon the facts proved in the case, the plaintiff in error acted as a ship-broker in the transaction certified to have been proved on the trial.

The law under which the indictment was found is the act approved March 27, 1876. Acts of assembly 1875-6, p. 162. By section 62 of that act, page 189, it is, among other things, enacted that "no person or corporation shall, without a license authorized by law, act as a ship-broker, stock-broker or private banker. Any person engaged
839 in *the management of business matters occurring between the owners of vessels and the shippers or consignors of the freight which they carry, shall be deemed to be a ship-broker," &c. "Any person or corporation violating the provisions of this section shall pay a fine of not less than one hundred dollars nor more than five thousand dollars for each offence." And by section 63 of the same act, page 190, it is enacted that "the specific license tax on a ship-broker shall be twenty dollars."

A definition of "ship-broker" is thus given by the act. And "did the defendant act as such ship-broker, in the meaning of the said definition, in the transaction referred to," is the question we now have to solve.

The facts certified to have been proved at the trial are as follows: "That James P. Wooddy, the accused, had not a ship-broker's license as required by the state of Virginia, upon the 29th day of August, 1877, nor since that date, nor for twelve months before; that on the 21st or 22d of August, 1877, the accused, being the agent for the owners of a large amount of lumber in the town of Fredericksburg, and the owners residing in New York city, offered one Captain W. E. Phillips, the captain of a schooner called the Lizzie Titus, which had recently before arrived in Fredericksburg from New York, a return freight or load of lumber at $5 per 1,000 feet as freight, provided Captain Phillips would allow him (Wooddy) a commission of two and a half per cent. on the amount received by Captain Phillips as freight on said lumber; that Captain Phillips would not agree to this, and that Captain Wooddy then offered, by writing to his principals in New York, to obtain for Phillips, as freight, $5.50 per thousand feet of lumber if Captain Phillips would allow him (Wooddy) a commission of five per cent. on the amount he was to receive from the freight on said lumber; that Cap-
840 tain Phillips did not agree to *this; that the freight for said lumber was then fixed at five and a half dollars for 1,000 feet of said lumber; all the attempts at bargaining occurred in presence of A. Kishpaugh, and the schooner loaded with the same; that during the loading of the lumber Captain Wooddy was about the schooner, and in the hold working as well as superintending the loading of the lumber, and employed two men to assist the crew, and these two men were paid by the accused; these duties performed by the accused were those of a stevedore; that after the schooner was loaded Captain Wooddy demanded of Captain Phillips five per cent. commission on the amount of said freight on said lumber, which was a little over $25.00; that Captain Phillips refused to pay this amount, and both parties agreed to submit the matter to A. Kishpaugh, a merchant of Fredericksburg, to whom the cargo brought by the Lizzie Titus to that place had been consigned, and that Kishpaugh advised, as a settlement of the matter, that Captain Phillips pay to Captain Wooddy two and a half per cent. of the amount of said freight, which being agreed to, Kishpaugh drew up a receipt, which was carried off by Captain Phillips when he sailed, and is now outside of the commonwealth; this receipt was for twelve dollars and some cents, stated to be for commission on charter of freight due to said Wooddy and signed by said Wooddy on his receiving said amount of twelve dollars and some cents from Captain Phillips in payment of the same; that Captain Phillips was the agent for the owners of the Lizzie Titus, the owners being non-residents of Virginia, and their names unknown; that during the loading of the vessel Captain Phillips was absent from his vessel nearly all the time at the store of A. Kishpaugh; that after argument

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by counsel the jury retired, and after a short absence the jury returned into court with a verdict of guilty and assessment
841 of the fine of *the accused at one hundred dollars; thereupon, the accused moved to set aside the verdict, and asked that he be allowed until the next day to be heard in argument on his motion."

The court is of opinion, that the accused did not act as a ship-broker, within the meaning of the said definition, in the transaction referred to in the said statement of facts. He was not thereby engaged in the management of a business matter occurring between the owners of the schooner "Lizzie Titus" and the shippers or consignors of the lumber which it carried on the occasion referred to. The transaction was a single one between the accused, who was the agent of the owners of the lumber, (the said agent residing in Fredericksburg, and the said owners of the lumber in the city of New York), and Phillips, the captain of the said schooner. It does not appear that the owners of the said lumber, or the owners of the said schooner, all of whom were, no doubt, non-residents of the state, had anything to do with the transaction, or ever had any knowledge of it. The accused made two propositions to Phillips to furnish him with a return load of lumber for the said schooner, on condition of receiving from him a certain commission on the freight; each of which was rejected. Afterwards, without any new proposition or any agreement in regard to receiving any such commission, so far as the record shows, the vessel was loaded with the said lumber, and the freight for the same was fixed at five and a half dollars per thousand feet of said lumber. During the loading of the lumber the accused, Captain Wooddy, was about the schooner and in the hold working, as well as superintending the loading of the lumber, and employed two men to assist the crew, and these two men were paid by the accused. These duties performed by the accused were those of a stevedore,
842 "whose occupation is to load *and unload vessels in port." After the schooner was loaded, Captain Wooddy demanded of Captain Phillips five per cent. commission on the amount of the freight on the lumber, which was a little over $25. Captain Phillips refused to pay this amount, and both parties agreed to submit the matter to A. Kishpaugh, a merchant of Fredericksburg, to whom the cargo brought by the schooner to that place had been consigned. Kishpaugh advised, as a settlement of the matter, that Captain Phillips should pay to Captain Wooddy two and a half per cent. of the amount of said freight; which being agreed to by the parties, the same was accordingly paid, amounting to twelve dollars and some cents, which was stated in the receipt given for the same "to be for commission on charter of freight due to said Wooddy." Captain Phillips was the agent of the owners of the schooner, who were non-residents of Virginia, and whose names were unknown. During the loading of the vessel Captain Phillips was absent therefrom nearly all the time at the store of A. Kishpaugh.

Thus it appears that the compensation received by the accused from the said Phillips was merely for services performed by the former, at the request or with the consent and acquiescence and for the benefit of the latter, and the amount was fixed by an arbitrator agreed upon by the parties, and that in performing those services the accused acted as a stevedore, and not as a ship-broker. It is not probable that there is a licensed ship-broker, or any occasion for any, in the city of Fredericksburg. We are informed that there are but two in the city of Richmond; though these facts do not appear in the record, and they are not material to the decision of this case.

The court is therefore of opinion that the said judgment is erroneous and ought to be reversed and annulled, and the verdict of the jury set aside, and the cause
843 remanded *for a new trial to be had therein according to the foregoing opinion.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the plaintiff in error did not act as a ship-broker in the transaction stated in the certificate of facts proved at the trial of this cause, and that the corporation court of Fredericksburg erred in overruling the motion of the plaintiff in error to set aside the verdict of the jury and grant him a new trial. Therefore it is considered, ordered and adjudged, that the said judgment of the said corporation court is erroneous, and that it be reversed and annulled, and that the verdict of the jury be set aside, and the cause remanded to the corporation court for a new trial to be had therein in conformity with the foregoing opinion; which is ordered to be certified to the said corporation court of Fredericksburg.

Judgment reversed.

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844 *Helfrick v. The Commonwealth.

January Term, 1878, Richmond.

Statute—Indictment.*—If an indictment for a statutory offence, by following the language of the statute, charges expressly or by necessary implication, every fact necessary to constitute the offence, it is sufficient.

Moffett Register Law—Constitutionality.—The provision of the act of the general assembly of March 30th, 1877, known as the Moffett register law, which directs that the cities of the Commonwealth shall be first supplied with the registers, is not unconstitutional as being an unjust and partial discrimination against liquor dealers in the cities.

The case is sufficiently stated in the opinion.

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*See Thon v. Com., 31 Gratt. 887, and monographic *note* on intoxicating liquors appended.

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John B. Young, for the appellant.

The Attorney General, for the Commonwealth.

Staples, J., delivered the opinion of the court.

The first error assigned in the petition is to the judgment of the hustings court overruling the defendant's motion to quash the indictment for defects apparent on its face. The indictment charges that the defendant, Helfrick, on the 19th of September, 1877, did sell and deliver to one Warren L. Wheelright, one drink of malt liquor, and unlawfully did, then and there, wilfully fail, immediately upon the sale of said drink of malt liquor, in the presence of the said Warren L. Wheelright, to turn the crank of the proper register until the bell
845 thereof *had struck once, and the indicator on the dial of said register had moved one point for the said drink of malt liquor so sold by him, the said Phillip Helfrick as aforesaid, the said Phillip Helfrick being then and there a bar-room keeper and a licensed bar-room liquor dealer.

The point made by the defendant's counsel is, that the indictment does not show, nor does it otherwise appear, that the malt register had been placed in the defendant's bar-room in the manner required by the act of March 30th, 1877; the third and fourth sections of that act provided for the construction of the registers, and prescribed the mode in which they should be placed in the bar-rooms of every licensed bar-room liquor dealer, and until this was done, no such dealer could be required to discharge the duties enjoined; and the indictment upon its face should show by direct averment that the register had been placed in the bar-room of the defendant. Conceding that such an averment is essential, we are of opinion that in this case it has been made, if not directly, at least by inevitable intendment.

It is averred that the defendant failed to turn the crank of the proper register until the bell thereof had struck once and the indicator on the dial of said register had moved one point. This is substantially a charge that there was a register in the defendant's bar-room at the time alleged. The indictment pursues the language of the statute; and this is generally sufficient. The rule laid down by the authorities is, if every fact necessary to constitute the offence is charged or necessarily implied by following the language of the statute, the indictment will undoubtedly be sufficient.

In Rex v. Lauby, 2 Strange R. 903, on an information for attempting to persuade a witness not to appear and give evidence against Japhet Crooke for forgery, it was objected that the information did not
846 positively aver *that Crooke was indicted. It was only laid that the defendant, knowing that Crooke had been indicted and was to be tried, did so and so; whereas, in all criminal cases, the fact must be positively alleged and not by inference. The court of king's bench held the information good. It is said, "Giving a mortal wound, receiving stolen goods, knowing them to be stolen, are all as loose. And there is no inconvenience, because if there was no such indictment proved at the trial, the defendant must have been acquitted." And so here, if no register is proved on the trial to have been placed in the defendant's bar-room, he must have been acquitted.

The case of the United States v. Mills, 7 Peters, R. 138, is perhaps a still stronger authority. There the indictment alleged that the defendant procured and advised Joseph J. Straughan, a mail carrier, to rob the mail. It was objected that the indictment ought to aver directly that the carrier did in fact commit the offence of robbing the mail. The supreme court said it must appear upon the indictment undoubtedly, that the mail had been robbed, but it was of opinion that the indictment sufficiently alleged that fact. It charged the defendant not only with advising but procuring and assisting Straughan to secrete and embezzle. This necessarily implied that the act was done, and is such an averment or allegation as made it necessary on the part of the prosecution to prove that the robbery had been committed. If authorities were needed upon this question, we think these are sufficient.

The main ground of objection, however, to the indictment is founded upon the alleged unconstitutionality of the act of March 30th, 1877. The provision to which this objection is particularly directed is found in the 3d section of chapter 253 of that act. It declares "it shall be the duty of the auditor of public accounts, as soon
847 *after the passage of the act as practicable, to cause to be constructed in sufficient numbers, by letting to the lowest bidder, an apparatus to be known as a bar-room register. Whenever he shall have the same constructed in sufficient numbers to supply any county, city or town therewith, he shall notify the commissioner or commissioners of the revenue of the fact, and forward the same to him or them in the safest and most economical manner, taking a receipt for the same. The cities of the commonwealth shall be first supplied." It is insisted that so much of this section as directs the cities first to be supplied with registers is an invidious and unjust discrimination against the city liquor dealers, and in favor of the country dealers; that the effect is to impose upon the former a new and burdensome system of taxation, from which the latter are wholly exempt for a considerable period, and thus to violate the rule which secures equality and uniformity of taxation upon all engaged in the same business.

This objection is a very grave one, striking at the foundation of the act in question; and although the objection may be removed

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by amendment, still, if it is well taken, the state has no just title to a dollar of the revenue she has derived from this source, and may be called on to refund at the suit of those who have been subjected to the tax. It is universally conceded that to declare a legislative enactment void is the exercise of a judicial function of a most delicate character, never to be done except upon the clearest conviction of the unconstitutionality of the law. Nowhere has this doctrine received a more unqualified sanction than has been given to it by this court. See the cases of Eyre v. Jacob, sheriff, 14 Gratt. 422, and cases there cited; Homestead Cases, 22 Gratt. 266; Roberts' adm'r v. Cocke, &c., 28 Gratt. 207; Reed v. Union Bank of Winchester, supra. There is 848 another *principle equally familiar and equally well settled as that just mentioned, which must not be forgotten in considering this question; and that is, that the legislature possesses the full, absolute, supreme power of taxation, except so far as it may have been surrendered to the general government, or may be interdicted by the restrictions and mandates of the state constitution. We do not go to our constitution to see what powers of taxation are given, but to ascertain what limitations upon its general sovereign power are imposed by its provisions. Eyre v. Jacob, sheriff, supra; Commonwealth v. Moore & Goodsons, 25 Gratt. 95.

And now as to the facts: It appears that the register was placed in the bar-room of the defendant, and in other places of the city, about the 11th of September, 1877. Afterwards other cities of the state were supplied; at what time does not appear. When the indictment was found against the defendant on the 25th of September, not more than half the cities and towns and some of the counties had been supplied with registers.

What has been since done, the record does not inform us. All that can be said is, that during the period between the 11th and 25th September, the defendant was required to conduct his business under the new system, while licensed dealers in other parts of the state, not being supplied with the registers, were allowed to proceed under the licenses previously granted them. The learned counsel for the defendant does not rest the cause of his client upon that ground. He concedes that if the matter of fixing the registers in the different towns and cities and counties had been left to the discretion of the auditor, any irregularities or inequalities which might arise in its practical enforcement, might have been justly attributable to the character of the duties to be performed by the officer, or to some 849 defect of action on his *part, and might have constituted no available objection to the law itself; but inequality and want of uniformity in the burthen it imposes, he insists, are stamped upon the face of the law, and constitute the very essence of its enforcement. If this position be sound, the law must be pronounced invalid, even though the auditor was ready with the registers, and had supplied every bar-room in the state the day after the defendant was supplied. Surely if the legislature foresaw the difficulties in the way of the auditor in furnishing the registers, and directed him to do what he might have done without any direction, the law is not thereby rendered invalid. If the legislature had left the whole matter to the discretion of the auditor, and he had placed the registers first in the cities, the defendant would have as good cause of complaint as he has now.

In the nature of things, it was impossible that the registers could be put in operation all over the state—in every city, town and county at the same time. Necessarily there would be some delay due to defects in the registers, the ignorance or forgetfulness of commissioners, and to other causes not to be foreseen or provided for in giving effect to the new system of taxation. Whatever might be the foresight, care and diligence of the auditor, it would be wholly impracticable to supply at once the requisite number of registers for the entire state. Consequently there must have been some period during which liquor dealers in different parts of the state would operate under different systems. Accordingly to the argument, every man supplied with a register may violate the law with impunity by showing there are other dealers in the state who have not been supplied.

The legislature has never attempted exact uniformity and equality in the license tax. In looking over the various tax laws which have been from time to time 850 *passed by the legislature, we find numerous instances in which the rule of equality and uniformity has been violated. Absolute equality and justice are unattainable in tax proceedings. The most that can be done is to approximate them as near as possible. It has been repeatedly held by this court that the provisions in the constitution requiring equality and uniformity of taxation, apply only to a direct tax on property, and not to license tax, which do not admit of a tax strictly equal and uniform in the sense contended for. But, if it be conceded that the rule must apply to all subjects, yet it can only be applied as far as practicable. If a given subject be only susceptible of a modified application of the principle, it must receive this, and not be rejected, because the rule cannot be applied with perfect precision to its whole extent and in all its results. See Eyre v. Jacob, sheriff, 14 Gratt. 422, and the laws there cited; see also Ould & Carrington v. The City of Richmond, 23 Gratt. 464; which last case is a strong illustration of this doctrine. It is not meant to assert that the legislature may apply one system of taxation as a permanent revenue measure in one part of the state and another system in another part of the state. Such legislation would constitute at best but arbitrary exactions under the forms of taxation. But when a new and important revenue system is adopted and

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put into execution, which is but an experiment, a large discretion must be left to the legislative department as to the mode and manner of assessment and collection of the tax. If the delay in a complete enforcement of the law is not unreasonable, if it is such as might be fairly expected under all the circumstances, the courts cannot interfere with it, because they may think some other more satisfactory and expeditious means might have been adopted. When a law violates no express provision of the
851 constitution, but is *assailed because it is supposed to be contrary to the principles of good government, the injustice and oppression ought to be very clear and flagrant which would justify the judiciary in interposing and arresting its execution.

What motives influenced the legislature in directing the registers first to be supplied to the cities, it is not for us to inquire. It was, perhaps, easier to reach them than the counties. Commencing here, in the city of Richmond, the auditor would be enabled to see at once the practical working of the new plan; to detect and find out any defects in the machinery, and apply the remedy before the registers were forwarded to the distant counties and cities. If it be conceded that the object in part was the larger revenue to be derived from the cities, it does not follow that the law is violated on that ground. This court has nothing to do with the motives of the legislative department, unless they are apparent on the face of the statute, and evince a design unmistakably to impose invidious and oppressive legislation upon a particular class. The main object of the Moffett register act would seem to be a change in the mode of assessing and collecting the tax upon licensed liquor dealers and to graduate the amount of the tax by the sales made. If the sum paid into the treasury by the defendant is large, it is only because his sales are also large, and there is every reason to believe that what is so paid is derived mainly from the consumer. The burden, whatever it be, borne by the defendant, is in common with those around him engaged in the same business, and if it be different from that of others pursuing the same occupation in other parts of the state, it is only for a brief period reasonable in itself, and such as is necessarily incident to the execution of a new and untried system of revenue. It cannot be expected that the courts will search out these temporary inequalities as a ground for attributing to the legis-
852 lature *the exercise of unconstitutional powers. On the contrary, they should rather be astute to sustain that body in the exercise of one of the highest and most essential attributes of sovereignty, the power of taxation.

Upon the whole, we are of opinion that the judgment of the hustings court is correct, and should be affirmed.

Judgment affirmed.

853 *Marxhausen v. Commonwealth.

January Term, 1878, Richmond.

Moffett Register Act — Liability for Breach.—A person selling liquor without a license at a time after the passage of the Moffett register act, but before the registers provided for in that act were supplied, is not liable to the punishment of imprisonment imposed by that act, but only to that punishment by fine imposed by former revenue laws.

The case appears in the opinion.

John B. Young, for the appellant.

Attorney General, for the Commonwealth.

Staples, J., delivered the opinion of the court.

The defendant was convicted in the hustings court of this city of retailing ardent spirits without a license, and a fine of one hundred dollars assessed against him by the jury. The judge of that court, in addition to the fine, sentenced him to imprisonment in the city jail for thirty days. The defendant applied for and obtained a writ of error from this court.

The offence with which he is charged was committed in the months of May and June, 1877.

At that time the registers known as the "Moffett registers," provided for by the act of March 30th, 1877, had not been supplied to the city of Richmond. The evidence shows this was not done until the 11th of September last.

854 *Under the act of 1875 and 1876, a person selling ardent spirits without a license was liable to a fine upon conviction, but not to imprisonment. The latter punishment was first imposed by the act of March 30th, 1877, as amended by the act of April 2d, 1877. The question now presented is, whether the defendant is liable to the increased punishment prescribed by the last named act, or whether he is simply amenable to the act of 1875 and 1876.

We are of opinion that the additional penalty imposed by the "Moffett register" act applies only to those who violated the peculiar provisions of that act. The offence of selling without license was designed to be of a graver character when thus committed than it was under previous statutes. The advocates of the Moffett register indulged in very sanguine expectations as to the amount of revenue it would furnish if the law was properly executed. The legislature determined it should be so executed, and with that view they added the punishment of imprisonment to the offence of selling without license. It is very true that the act of March 30th was declared to be in force from its passage. This, however, was only because it was impossible to foresee at what time the registers would be supplied to the different cities and counties in the state, and because it was necessary that persons obtaining license under the act of 1875 and

See Thon v. Com., 31 Gratt. 887, and monographic *note* on intoxicating liquors appended.

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1876, before the registers were supplied by the auditor, should do so subject to the provisions of the act of March 30th, 1877.

By the sixth section of that act it was provided, that until the auditor of public accounts is prepared to put the act into operation in any of the counties, cities or towns of the Commonwealth, license shall be granted to applicants according to the provisions of the license law now in force, or as it may hereafter be amended,
855 but subject, *nevertheless, to the provisions of this act. "And it was further provided by the same section that as soon as the auditor was prepared to issue the registers to any county, city or town, the same shall be issued, and thereupon the licensed dealer shall be subject to all the provisions of this act." Had the defendant, in May or June, applied for a license, he must have applied under the act of 1875 and 1876, because the registers were not then ready and could not be supplied to liquor dealers; it is the act of 1875 and 1876, therefore, which the defendant has violated, and to that act we must look to determine his punishment.

As the act of March 30th, 1877, could not practically be enforced until the auditor was ready to furnish the registers, it is clear that the increased penalties imposed by that act ought not to be enforced at an earlier period. It is manifest that such was the intention of the legislature, and such plainly is the rule of justice and humanity. We are therefore of opinion, that in this case the defendant is not liable to the imprisonment imposed upon him by the hustings court.

All that the defendant is liable for is the fine assessed by the jury and the costs of the prosecution.

We are of opinion, there is no other error in the judgment of the hustings court. The demurrer to the indictment was properly overruled upon the authority of the case of Sledd v. Commonwealth, 19 Gratt. 813-818. The points arising in that case are not precisely the same as in this, but the reasoning of the court and the conclusions arrived at cover all the grounds of objection urged here. The other errors relied upon by the counsel for the defendant have been considered and disposed of in the case of Helfrick v. Commonwealth, and need not be again discussed.
856 *So much of the judgment as imposes imprisonment upon the defendant in the city jail is reversed, and the residue affirmed.

Judgment reversed.

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857 *Maybush v. The Commonwealth.

January Term, 1878, Richmond.

1. **Marriage License—Evidence of Female's Age.**—The act, Code of 1873, ch. 159, § 13, authorizes the clerk of a county or corporation court, when an application is made to him for a marriage license, to require evidence that the female to be married is over the age of twenty-one years, and to administer an oath to the person giving the testimony.

2. **Subornation of Perjury.**—M is prosecuted for subornation of perjury, found guilty, and judgment rendered against him. At the same term of the court, but after the conviction of M, G is tried for the perjury, and is acquitted. M then moves the court for a new trial. G having been acquitted of the perjury, M should have a new trial; as if G was not guilty of the perjury, M could not be guilty of subornation or perjury.

In January, 1877, the grand jury of the hustings court of the city of Richmond indicted John Maybush for subornation of perjury. In the indictment it was alleged that Maybush, wishing to obtain from A. Jenkins, clerk of the hustings court of the city of Richmond, a license to marry Anne Elizabeth Humphreys, and Jenkins, before issuing the license, requiring to have evidence that Miss Humphreys was twenty-one years old, by the oath of some one having knowledge thereof, Maybush, corruptly, &c., did suborn and procure one John B. Graves, to falsely, &c., swear and make affidavit in writing, before the said Jenkins, clerk as aforesaid, that the said Anne Elizabeth Humphreys was then of the full age of twenty-one years; whereas she was in truth but of the age of sixteen years.
858 *Maybush demurred to the indictment. The ground on which the demurrer was rested, was that the clerk had no legal authority to administer the oath. The court overruled the demurrer; and upon the

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ACCESSORIES.

Before the Fact.

Before Conviction of, State Must Prove That the Principal Has Committed the Felony.—An accessory to a felony cannot be prosecuted for a substantive offence, but only as an accessory to the crime perpetrated by the principal felon. And, in order to his conviction, although it is not necessary now to show that the principal felon has been convicted, it is necessary to show that the substantive offence, to which he is charged as having been accessory, has been committed by the principal felon. Hatchett v. Commonwealth, 75 Va. 925.

Same—Same—Same.—There can be no accessory to a crime not committed by a principal. Under the laws of this state, to convict a person as an accessory to a crime, he must be indicted and tried as such. A guilty principal cannot escape punishment because he is not guilty as an accessory. State v. Lilly, (W. Va.) 35 S. E. Rep. 837.

Offence Defined—How Indicted.—If the procurers or aiders are not present, they are accessories, and must be indictment specifically as such, and not as principals. Rasnick v. Commonwealth, 2 Va. Cas. 356.

Cannot Be Indicted as a Principal.—An accessory before the fact to a felony, cannot be convicted on an indictment against him as a principal. Thornton v. Commonwealth, 24 Gratt. 657.

Accessories—When and Where Tried—How Indicted.—An accessory, either before or after the fact, may, whether the principal felon be convicted or not, or be amenable to justice or not, be indicted, convicted, and punished in the county or corporation in which he became accessory, or in which

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trial, Maybush was found guilty, and his fine was assessed at fifty dollars; and there was a judgment according to the verdict, for the fine of fifty dollars, and imprisonment in the jail of the city for one year, the period fixed by law, &c.

After the trial of the cause, but at the same term, the prisoner moved the court for a new trial, on the ground that John B. Graves, the person whom it was charged he had suborned, had been tried upon the charge of perjury after verdict had been rendered against him (Maybush), before the same court, and a verdict of "not guilty" had been returned, and the said Graves had been discharged; but the court overruled the motion; and the prisoner excepted. And he applied to this court for a writ of error; which was awarded.

William Ellyson, for the appellant.

The Attorney General, for the Commonwealth.

Anderson, J., delivered the opinion of the court.

The court is of opinion, that there is no error in the judgment of the hustings court in overruling the demurrer to the indictment in this case. By section 13 of chapter 159 of the Code of 1873, any clerk of a court, or his deputy, may administer an oath in any case wherein an affidavit is necessary or proper as the foundation of an official act to be performed by him. The words italicized "or proper" have been inserted in the statute since the decision of Matthew Williamson's case, 4 Gratt. 554, wherein it was held that a clerk, under the statute as it 859 *then was, had no authority, when applied to for a marriage license, to examine a witness on oath as to the age of the parties; the court construing the law as it then stood, to apply only to such cases in which, without regard to circumstances, the making of the affidavit was necessary as a prerequisite to the performance of the official act required of the clerk. But the legislature soon after that decision, at the revisal of 1849, having amended the law by inserting the words above recited, evidently designed, we think, to authorize the clerks and their deputies to administer an oath in such cases, because it is highly proper that the clerk, before issuing the marriage license to parties who had not the consent of parents or guardians, or such evidence of it as the law required, should have authority to examine a witness on oath as to the age of the parties. We think that the authority is given by the statute as it now stands.

But the court is further of opinion, that the Commonwealth wholly failed to prove the allegation of the indictment, that the plaintiff in error did wilfully, corruptly and unlawfully commit subornation of perjury by procuring John B. Graves to commit wilful and corrupt perjury, in the oath which he is before alleged in said indictment to have taken. In order to convict the plaintiff in error of subornation of perjury, it was essential for the Commonwealth to show that the person whom he is alleged to have suborned had committed perjury. 2 Bishop on Crim. Proced. § 879. But if it had been shown to the contrary that the person alleged to have been suborned had been indicted for the offence of the perjury alleged, and had been tried and acquitted, it would have entitled the plaintiff in error to an acquittal of the offence of subornation for which he was indicted. It appears from the plaintiff's third bill of exceptions that after the trial of his case, but 860 while the matter was yet *in the breast of the court, he moved the court for a new trial, upon the ground that John B. Graves, the person whom it was charged

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the principal felon might be indicted. Any such accessory before the fact may be indicted either with such principal or separately. Sec. 3887, Va. Code.

How Principal in Second Degree and Accessories Punished.—In the case of every felony, every principal in the second degree and every accessory before the fact, shall be punished as if he were the principal in the first degree, and every accessory after the fact, shall be confined in jail not more than one year, and fined not exceeding five hundred dollars. Sec. 3885, Va. Code.

Verdict Must Show What Crime Accused Is Accessory to.—A verdict, which finds a person indicted as being accessory to murder, to be guilty thereof, but not determine whether he is guilty as accessory to the murder in the first, or second degree, is erroneous, and ought to be set aside, and a *venire facias de novo* awarded. Commonwealth v. Williamson, 2 Va. Cas. 211.

Where Principal Departs from Accessory's Instructions.—If a principal totally and substantially departs from the instructions of an accessory, and commits a different offense, or an additional offense, he stands single in such different or additional offense, and the other is not held responsible for it as accessory. Watts v. State, 5 W. Va. 532.

After the Fact.

Accessory after the Fact Defined.—Says the Court in Wren's Case, 26 Gratt. 955: "This charge constitutes what the law denominates 'an accessory after the fact.' The common law definitely and distinctly defines who is such an offender. He is a person who knowing a felony to have been committed by another, receives, relieves, comforts or assists the felon."

Reason of the Law.—"The reason on which the common law makes a party in such a case criminal, is that the course of public justice is hindered, and justice itself is evaded by facilitating the escape of the felon." Wren's Case, 26 Gratt. 955.

What Constitutes the Offense.—"To constitute one an accessory after the fact, three things are requisite: 1. The felony must be completed; 2. He must know that the felon is guilty; 3. He must receive, relieve, comfort or assist him. It is necessary that the accessory have notice, direct or implied, at the time he assists or comforts the felon, that he has committed a felony." Wren's Case, 26 Gratt. 956.

Actual Notice Required.—"And although it seemed at one time to be doubted, whether an implied notice of the felony will not in some cases

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he had suborned, had been tried upon the charge of perjury after the verdict had been rendered against him, the said plaintiff, before the same court, and a verdict of not guilty had been returned, and the said Graves had been discharged; which motion for a new trial the court overruled. If this evidence had been before the jury upon the trial of the plaintiff in error, they would have been bound to have found a verdict in his favor. And inasmuch as in the nature of things the evidence of Graves' acquittal of the perjury charged could not have been given in evidence in that trial, because his trial and acquittal did not occur until afterwards, it was error in the court to overrule his motion for a new trial. We are of opinion, that the court ought to have set aside the verdict and awarded the prisoner a new trial.

The court is of opinion, therefore, that for this cause (the overruling the motion of the plaintiff in error for a new trial) the judgment must be reversed, the verdict of the jury set aside, and a new trial awarded the plaintiff in error, and the cause is remanded for further proceedings therein in conformity with this opinion.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the hustings court did not err in overruling the demurrer to the indictment; but being of opinion that the trial and acquittal of John B. Graves in the said hustings court, of the charge of perjury, for the subornation of which the prisoner was indicted in this case, would be conclusive to show that the prisoner was not guilty of the offence
861 for which he *was prosecuted. And such trial and acquittal of Graves having been subsequent to the trial and finding of the jury against the prisoner in the same court, it was error to overrule the prisoner's motion to set aside the verdict and grant him a new trial on that ground. It is therefore considered that the judgment be reversed and annulled, the verdict of the jury set aside and a new trial awarded the prisoner. And the cause is remanded to the hustings court of the city of Richmond for further proceedings to be had therein, in conformity with this order and the opinion of this court filed with the record.

Judgment reversed.

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suffice, as where a man receive a felon in the same county in which he has been attainted, which is supposed to have been matter of notoriety, it seems to be the better opinion, that some more particular evidence is requisite to raise the presumption of knowledge." Wren's Case, 26 Gratt. 956.

Knowledge Must Be Brought Home to Accused—Jury the Judge.—"But knowledge of the commission of the felony must be brought home to the accused, and whether he had such knowledge is always a question for the jury." Wren's Case, 26 Gratt. 956.

What Constitutes the Offence—Generally.—"As to the receiving, relieving and assisting, one known to be a felon, it may be said in general terms, that any assistance given to one known to be a felon in order to hinder his apprehension, trial or punishment, is sufficient to make a man accessory after the fact; as that he concealed him in the house, or shut the door against his pursuers, until he should have an opportunity to escape; or took money from him to allow him to escape; or supplied him with money, a horse or other necessaries, in order to enable him to escape; or that the principal was in prison, and the jailer was bribed to let him escape; or conveyed instruments to him to enable him to break prison and escape. This and such like assistance to one known to be a felon, would constitute a man accessory after the fact. But merely suffering the principal to escape, will not make the party accessory after the fact; for it amounts at most but to a mere omission. Or if he agree for money not to prosecute the felon; or if knowing of a felony, fails to make it known to the proper authorities; none of these acts would be sufficient to make the party an accessory after the fact. If the thing done amounts to no more than the compounding a felony, or the misprison of it, the doer will not be an accessory. The true test whether one is accessory after the fact, is to consider whether what he did was done by way of personal help to his principal, with a view of enabling his principal to elude punishment; the kind of help rendered appearing to be unimportant." Wren's Case, 26 Gratt. 956.

Who Not Deemed Accessories after the Fact.—But no person in the relation of husband and wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity, or servant to the offender, who, after the commission of a felony, shall aid or assist a principal felon or accessory before the fact, to avoid or escape from prosecution or punishment, shall be deemed an accessory after the fact. Sec. 3886, Va. Code.

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INDEX.

APPELLATE COURT.

1. A supplemental report of a commissioner for the sale of land, not excepted to, but received and acted on by the court, can not be objected to in the appellate court.

Crockett *v.* Sexton & als., 46

2. Decrees for the sale of land, and for confirmation of the sale, are made in the absence of some of the joint owners of land; and upon appeal these decrees are reversed, and the cause sent back that they may be made parties, and have an opportunity to defend their interest; though the decree is in other respects confirmed, these absent owners, when made parties, have a right to except to the sale and its confirmation, and are not precluded by the affirmance of the decree in other respects than those on which it is reversed. Idem, 46

3. There is a verdict on the trial of an issue devisavit vel non, and a motion to set it aside on the ground that the verdict is contrary to the evidence; which the court overrules, and makes a decree according to the verdict; and the party moving files a bill of exceptions to the refusal of the court to set aside the verdict, and all the evidence is set out in the bill of exceptions. The appellate court will reject all the parol evidence of the exceptor which is in conflict with that of the other party; and if upon the evidence of the appellee and the written evidence of the appellant the case is in favor of the appellee, the decree will be affirmed.

Lamberts *v.* Cooper's ex'or & als., 61

4. Though the amount in contest is less than $500, yet if the case involves the constitutionality of a statute, the court of appeals has jurisdiction of it.

Pretlow *v.* Bailey's ex'x & als., 212

5. To authorize the reversal of a judgment for error in admitting irrelevant evidence, not only must the evidence be irrelevant, but it must be of such a nature as that its admission may have prejudiced the adverse party. If he may have been so prejudiced, even though it be doubtful whether in fact he was so or not, it is sufficient ground for reversing the judgment.

Southern Mut. Ins. Co. *v.* Trear, 255

6. To render the admission of illegal evidence sufficient ground for the reversal of a judgment, it must be excepted to, and must be such as may have been prejudicial to the exceptant. Idem, 255

7. Where the question before the jury was as to the quantum of damages to which the plaintiff is entitled, and there is evidence tending to sustain the verdict found by the jury, although there is evidence strongly indicating that the damages assessed by the jury were excessive, the question is one of fact for the jury; and the court will not disturb the verdict, even though on the same testimony, it would have found differently from the jury. Idem, 255

8. It is too late to make the objection in the appellate court, that the notice of motion to correct a judgment by default or quash an execution, was insufficient, when the parties appeared and made no such objection in the court below.

Dillard *v.* Thornton, 392

9. The appellate court will not disturb the action of the court below in refusing a continuance of the cause for the absence of a witness unless such action was plainly erroneous.

Balt. & Ohio R. R. Co. *v.* Wightman's adm'r, 431
Matthews *v.* Warner's adm'r, 570

864 10. Where it does not appear that *all the evidence given on the issue joined is stated in the bill of exceptions, an instruction to the jury that if they believed certain facts stated, they must find for the plaintiff, the appellate court must reverse the judgment on the ground that the facts are too imperfectly stated to enable the court to decide whether or not the instruction is correct.

McVeigh & al. *v.* Allen, 588

11. Where a party to a case is examined in his own behalf, and cross-examined at length by the other party, without objection to his competency, the objection cannot be made in the appellate court. But where an objection to the competency of a party as a witness is written at the commencement of the deposition, the objection is not waived by the cross-examination.

Neilson & als. *v.* Bowman & als., 732

12. Appellate court will not reverse a judgment of conviction of an attempt to commit a rape on an infant between ten and eleven years old, though the conviction was on her evidence.

Givens' case, 830

ATTACHMENTS.

1. The shares of a stockholder in a joint stock company incorporated by and conducting its operations in whole or in part in the state, are such estate as is liable to be attached in a proceeding instituted for that purpose by one of the creditors of such stockholder; and such estate may properly be considered, for the purpose of such proceeding, as in the possession of the corporation in which the shares are held, and such corporation may properly be summoned as a garnishee in the case.

Chesapeake & Ohio R. R. Co. *v.* Paine & Co., 502

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2. Of such a proceeding a court of law has jurisdiction as well as a court of equity.
Idem, 502

3. Where along with the answer of the corporation in such a proceeding, an affidavit is filed, alleging that some third person claims the said stock, and that the corporation claims no interest therein, nor colludes with such claimant, but is ready to dispose of the stock as the court shall direct, the court should require such third person to appear and state the nature of his claim, and maintain or relinquish the same.
Idem, 502

4. If, in such a proceeding, the stock should appear to be liable to the lien of the attachment, it ought to be sold for the satisfaction of the same under an order of the court made for that purpose in the attachment proceeding: but it is error for the court to render a judgment against the garnisheed corporation for the value of the stock, unless it appears that the lien of the attaching creditor on the stock was lost by the act of the corporation. Idem, 502

5. See Partners, No. 1 and
Lindsey *v.* Corkery & Milward & als, 650

ATTORNEYS AT LAW.

1. An attorney employed in a cause is not a competent commissioner to take an account ordered in the cause.
Bowers' adm'r *v.* Bowers & als., 697

BANKRUPTS.

1. J, the surety of M, who was the guardian of R, paid R $4,000 of the indebtedness of M to R, as guardian. J dies and his administrators sue M in assumpsit for the amount so paid, and M pleads his discharge in bankruptcy in bar to the recovery. The administrators of J reply that the debt due by M to their intestate is a fiduciary debt from which he is not discharged under section 32 of the bankrupt act—HELD:

1. The debt due by M to the estate of J is not a fiduciary debt, and his discharge in bankruptcy is a bar to the recovery of the same. The debt due by M to J's estate was a simple contract debt, provable under the bankrupt act and discharged by it.
Cromer *v.* Cromer's adm'rs, 280

2. What are fiduciary debts within the meaning of the phrase "while acting in a fiduciary character," mentioned in section 33 of the bankrupt act? Idem, 280

855 *3. How, when and in what court a creditor of a partnership, where the partners are declared bankrupts, may proceed to enforce his claim, see Partners, No. 3, 4, 5, and
Lindsey *v.* Corkery & Milward & als., 650

BOARD OF PUBLIC WORKS.

1. When the Board of Public Works is a necessary or proper party. See Circuit Court of Richmond, No. 1, 2, 3, and
Ragland *v.* Broadnax & als., 401

BONDS.

1. C & P executed their single bill, dated October 18, 1871, whereby they promised, "six months after date to pay to H or order the sum of seven thousand dollars, with interest at the rate of 12 per centum per annum from date"—HELD:

1. The contract for interest at the rate of 12 per cent. per annum was legal under the constitutional provision in force at the time of the contract, and is not affected by the subsequent abolition of that provision.
Cecil & Perry *v.* Hicks, 1

2. The obligors in the bond are bound to pay interest after the rate of 12 per cent. per annum, not only up to the maturity of the note, but after maturity and until the payment thereof. Idem, 1

2. A bond secured by deed of trust cannot be produced. The obligee held under all the circumstances of the case, entitled to enforce the deed for the payment of the bond.
Coffman's ex'ors *v.* Shafer & als., 173

3. A bond on which principal and surety are both bound, once paid by the surety in the lifetime of the principal, without assignment by the creditor, or an agreement to assign, is forever dead as a security, as well in equity as at law. There can be no subrogation in such a case.
Cromer *v.* Cromer's adm'rs, 280

4. Where a bond dated in Texas, signed by the principal obligor, a resident of Texas, and by two sureties, residents of Virginia, payable to a resident of Virginia, where the drafts, which were the consideration of the bond, were sent to and received in Texas, and the money borrowed used in Texas by the principal obligor—HELD: To be a contract governed by the laws of Texas, and not affected by the laws of usury in Virginia.
Backhouse's ex'x *v.* Selden, 581

5. The common law rule of presumption of payment of bonds arising from the lapse of time has not been affected by the statutory provisions adopted at the revisal of 1849, prescribing the limitation of actions on such instruments.
Booker's adm'r *v.* Booker's rep., 605

6. When more than twenty years has elapsed between the time of payment of a bond and the institution of a suit thereon, it affords a presumption of payment, which the obligee may rebut by satisfactory evidence; and whether the evidence is sufficient for that purpose is a question for the jury, and not for the court. Idem, 605

BURGLARY.

1. A case in which upon a prosecution for burglary, held the evidence does not identify the prisoner as the person who had committed burglary. Johnson's case, 796

CIRCUIT COURT OF RICHMOND.

1. The circuit court of the city of Richmond has no equity jurisdiction except in certain cases specified in the statute, in which the state is interested, or some of the

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officers and boards representing the state, are necessary or proper parties; and in such cases its jurisdiction is exclusive. Sess. Acts 1869-'70, pp. 42, 43.

Ragland *v.* Broadnax & als., 401

2. Upon the facts of this case held, the Board of Public Works of the state was a necessary party to a suit brought by parties claiming to be stockholders in the Petersburg Railroad Company, against the Company, the city of Petersburg, Ragland and others, to set aside certain acts of the railroad company done in favor of Ragland, as the *holder of a large amount of the stock of the company which he purchased from the city of Petersburg. This stock had been pledged by the city to the state as collateral security for the guaranty by the state of a debt of the city.

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Idem, 401

3. The state having returned the stock to the city of Petersburg, and it being held by the city as collateral security for the debt Ragland owed for the stock, and his note falling due, the city sued him upon it, and advertised the stock for sale. Ragland then filed his cross-bill in the first suit to enjoin the suit and sale until the questions in the first suit as to the character of the stock which the state had held, whether preferred or common, should be settled. All the parties to the original bill were made defendants to the cross-bill. The causes were heard together, and the original bill dismissed—HELD:

1. The second bill asking for relief against the City of Petersburg, which could not be given on the pleadings and proceedings in the original bill, but which was based upon grounds involved in that case, it was the proper subject of a cross-bill; but the relief sought by it being outside of the original bill, the dismissal of the original bill did not involve the dismissal of the cross-bill. Idem, 401

2. If the cross bill is to be treated as an original bill in the nature of a cross-bill, all the parties being before the court, and the case having been matured, it was proper to proceed to decide it upon the merits. And certainly Ragland is not to be heard to question the jurisdiction of the court after having had the determination of the question brought by him into the case. Idem, 401

CLERKS OF COURTS.

1. The act, Code of 1873, ch. 159, § 13, authorizes the clerk of a county or corporation court, when an application is made to him for a marriage license, to require evidence that the female to be married is over the age of twenty-one years, and to administer an oath to the person giving the testimony.

Maybush's case, 857

COMMONWEALTH OF VIRGINIA.

1. A judgment in the name of the Commonwealth, for W, treasurer of C county, founded on a notice in the name of the Commonwealth proceeding by W, late treasurer of C, against F, the collector of township M, and his sureties, upon his official bond, is a judgment in favor of the Commonwealth.

Commonwealth by, &c. *v.* Ford & als., 683

2. On such a judgment the Commonwealth at the relation of T, auditor of accounts, may maintain a suit against F and his sureties. Idem, 683

3. The judgment having been recovered in C county, the suit may be brought in that county. Except in cases where it is otherwise specially provided, the Commonwealth may prosecute her suits in any of the courts in which other parties may prosecute suits of like character. And this case is not embraced in the statute, Code of 1873, ch. 166.

Idem, 683

4. The sureties of a township collector of taxes are not entitled to their homestead exemption as against the Commonwealth, in a proceeding against them and their principal, to recover the amount of taxes for which the collector had failed to account. Idem, 683

5. The property of the sureties being covered by their homestead exemption deeds, the Commonwealth may go into equity to enforce her judgment against them. Idem, 683

CONDITIONAL SALES.

1. Whether a deed absolute on its face is a mortgage or conditional sale, is only to be determined in each case by its own circumstances; but in doubtful cases the courts incline to construe the transaction to be a mortgage rather than a conditional sale.

Snavely *v.* Pickle & als, 27

2. For the circumstances which will be looked to, to determine whether a mortgage or conditional sale is intended, see the opinion of Burks, J. Idem, 27

867 *CONFEDERATE INVESTMENTS.

1. An ante-war creditor refuses to receive from a purchaser of property sold for payment of debts in 1863, Confederate currency in payment, and the purchaser obtains an order of the court to invest the amount in Confederate bonds. It is the purchaser's money which is invested, and he must bear the loss.

Crockett *v.* Sexton & als., 46

2. As to such investments, see Guardians, No. 1, and

Crawford *v.* Shover & als., 69

CONTRACTS.

1. A paper complete on its face, set out an agreement between Mrs. M on the one part and S. M. on the other part, by which she sold to S. M. her dower right in land of her deceased husband, which had been assigned to her, for a certain price on stated credits, and they both executed the paper in duplicate; but it was agreed between them that they should meet on a certain day at the office of S, a lawyer, to have the paper examined by him and put into proper form if necessary. Mrs. M was prevented from at-

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tending at the office of S, on the day named; and soon after she died—HELD: The agreement was a complete and binding contract between the parties from the time of its execution.

Mackey *v.* Mackey's adm'r, 158

2. An action of assumpsit having been brought on said agreement by the administrator of Mrs. M, and judgment recovered against S. M. for the purchase money agreed to be paid by him for her dower right, and the said judgment is conclusive, and S. M. cannot resort to a court of equity to set up the defence that there never was a completed contract between the parties; which defence he could have set up at law under the general issue. Idem, 158

3. Contracts of agency, when and when not valid. See Principal and Agent, No. 3, 4, and

Neilson & als. *v.* Bowman & als., 732

CONVEYANCES—FRAUDULENT.

1. If a grantee in a deed be a bona fide purchaser for a valuable consideration, his or her title is unassailable, whatever may have been the motives or intentions of the grantor in executing the deed. It is absolutely essential that both parties shall concur in the fraud to invalidate the deed.

Herring & als. *v.* Wickham & wife & als., 628

2. Fraud cannot be presumed; it must be proved by clear and satisfactory evidence. Idem, 628

3. Marriage is a valuable consideration, sufficient to support a conveyance of property, even against creditors; and in such a case the wife is deemed a purchaser of the property settled on her in consideration of marriage, and is entitled to hold it against all the world. Idem, 628

4. However much a man may be indebted, an ante-nuptial settlement, made in consideration of marriage, is good against his creditors, unless it appears that the intended wife was cognizant of the fraud. And even though it conveys his whole estate, it is not simply on that account void; and when a settlement is made in contemplation of marriage, the law presumes it was an inducement to it, and the courts cannot assume the contrary to be a fact. Idem, 628

CORPORATIONS.

1. For the liability of a railroad company for injuries to a passenger on its cars, see Railroad Companies, passim, and

Chesapeake & Ohio R. R. Co. *v.* Wightman's adm'r, 431

2. The shares of a stockholder in a joint stock company, incorporated by and conducting its operations in whole or in part in the state, are such estate as is liable to be attached in a proceeding for that purpose by one of the creditors of such stockholder; and such estate may properly be considered, for the purpose of such proceeding, as in the possession of the corporation in which the shares are held, and such corporation 868 may properly *be summoned as a garnishee in the case.

Chesapeake & Ohio R. R. Co. *v.* Paine & Co., 502

3. For the mode of proceeding in such a case to subject the shares, see Attachments, No. 2, 3, 4, and Idem, 502

4. In an action of assumpsit the writ and declaration is in the name of a plaintiff which indicates that said plaintiff is a corporation, but it is not stated to be a corporation. The defendant pleads non assumpsit, but does not file an affidavit that the plaintiff is not a corporation. Under the statute it is not necessary that the plaintiff should prove it is a corporation. Code of 1873, ch. 167, § 40, p. 1094.

Gillett *v.* The American Stove and Hollowware Co., 565

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. On an indictment for obstructing a street in the city of Manchester, the indictment is the appropriate remedy; and it was proper in the court to refuse to continue the case until the question of the rights of the defendants to the use of that part of the street occupied by them could be decided in an injunction suit brought by them in the same court in which their claim was set up.

Taylor and als. case, 780

2. For what evidence may be introduced on the trial of such an indictment, to lay a foundation for other evidence, to fix the line of the streets, or as corroborative of that introduced, see Public Highways, No. 4, 5, 6, and Idem, 780

3. A case in which, upon a prosecution for burglary, held the evidence does not identify the prisoner as the person who had committed the burglary. Johnson's case, 796

4. An indictment for a felony is endorsed "A true gun," which is signed by the foreman. The jury present the paper in court as an indictment, it is read to them by the clerk as an indictment, and assented to by them; it is entered on the record as an indictment, and the prisoner is tried upon it upon the plea of not guilty. Upon a motion to arrest the judgment—HELD: No endorsement is necessary on the indictment to constitute it such; and the mistaken endorsement cannot invalidate it.

White's case, 824

5. When appellate court will refuse to reverse a judgment of conviction for attempt to commit a rape on an infant under twelve years of age, the conviction being on her evidence. Givens' case, 830

6. The act, Code of 1873, ch. 187, § 18, provides that the offence of rape may be, at the discretion of the jury, punished with death or confinement in the penitentiary. This is a death penalty, and the attempt to do the act forbid is embraced in the statute, Code of 1873, ch. 195, § 10. Idem, 830

7. A person selling liquor without a license, at a time after the passage of the

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Moffett register act, but before the registers provided for in said act were supplied, is not liable to the punishment of imprisonment imposed by that act, but only to the punishment by fine imposed by former revenue laws. Marxhausen's case, 853

8. M is prosecuted for subornation of perjury, found guilty, and judgment rendered against him. At the same term of the court, but after the conviction of M, G is tried for the perjury and is acquitted. M then moved the court for a new trial. G having been acquitted of the perjury, M should have a new trial; as if G was not guilty of the perjury, M could not be guilty of subornation of perjury. Maybush's case, 857

DOWER.

1. Where land is sold to satisfy a lien existing on it when brought by the husband, the wife has no right of dower in the land. Any right she may have must be in the surplus of the purchase money after satisfying the prior liens. Whether she has an interest in this must depend on the true construction of the statute, Code of 1849, ch. 110, § 3, Code of 1873, ch. 106, § 3.

Robinson *v.* Shacklett, 99

869 *EQUITY JURISDICTION AND RELIEF.

1. In 1856 G made his note for $775, which was endorsed by J, S and K, and which being protested was taken up by K. G then made a deed by which he conveyed in trust certain personal property, and among it a slave named Jenney, in trust to secure these endorsers and five others, equally for all their suretyships for him. At the same time he conveyed to the same trustee on the same trusts certain real estate, all subject to liens. G being insolvent, K, who was his father, undertook to obtain a release of the slave Jenney, and the other parties except S signed a release on the consideration that the wife of G would release her right of dower in the land conveyed in trust. To induce S to sign the release, K promised to release him from his liability on the said note, and upon that promise S signed the release. K's administrator afterwards recovered a judgment upon the note, and S enjoined it. The trust fund of G was insufficient to pay the claims upon it, and J and S had to pay large amounts for G. Pending the injunction, both J and K became insolvent; and these facts are shown by an amended bill. Upon demurrer to the bills—HELD: The agreement of K to release S, whether an executed or executory contract, is a good ground of relief against the judgment, and S might properly go into equity for relief.

Sitlington *v.* Kinney's adm'r, 91

2. Judgment in assumpsit is recovered upon an agreement. The defendant at law cannot resort to equity to set up the defence, that there never was a completed contract between the parties. He might have made that defence at law under the general issue.

Mackey *v.* Mackey's adm'r, 158

3. S, who is executor of his father, A, and M, who is administrator of T, have a settlement of accounts between S individually and as executor of A and T in his lifetime, extending through a number of years and embracing many items. All these items, whether as individual or as executor, are brought into the statement, and there is a balance against S of $1,176.10. At the foot of the statement S says he is only to be individually responsible for what appeared to be due from him in his individual character. M sues S upon this account, and S applies for an injunction to stay proceedings; which is granted upon his confessing judgment. In his bill he points out a number of what he alleges are errors in the account, and items which are against his testator's estate—HELD:

1. It is a proper case for relief in equity.

Staples *v.* Turner, adm'r & als., 330

2. The injunction should have been granted without requiring S to confess a judgment in the action at law.

Idem, 330

3. The court should direct the account as individual and as executor to be taken separately. Idem, 330

4. Though S should not have been required to confess a judgment in the action at law, it may be held as a security for any amount found upon settling the accounts, to be due from him individually.

Idem, 330

4. For the equity jurisdiction of the circuit court of Richmond, see Circuit Court of Richmond, No. 1, 2, 3, and

Ragland *v.* Broadnax & als., 401

5. Quære. If a party against whom a judgment has been rendered in a court of law, may come into equity to set up payments he has made to the attorney of the plaintiff in the action at law, where it is insisted by the plaintiff at law that the debtor was forbid to pay to the attorney, and the attorney was so informed by the plaintiff.

Coleman's adm'x *v.* Anderson, 425

6. The Commonwealth having recovered a judgment against a township collector and his sureties, for the amount of taxes he had failed to account for, and the property of the sureties being covered by their homestead exemption deeds, which do not
870 *operate against this debt, the Commonwealth may go into equity to enforce her judgment against them.

Commonwealth by, &c. *v.* Ford & als., 683

ESTOPPEL.

1. What prior suits by the holder of a negotiable note or a second endorser, will not estop the surety in an injunction bond of said second endorser, who has paid the debt, from having recourse against the first endorser. See Sureties, No. 5, 6, and

Chrisman's adm'x *v.* Harman & als.,

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2. It is settled law that a judgment of a court of competent jurisdiction, upon a question direc ly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of a judgment it must appear upon the face of the record, or be shown by extrinsic evidence that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment was rendered, the whole subject matter of the action will be at large and open to a new contention, unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined. Idem, 494

3. The doctrine touching estoppel by matter of record stated by Burks, J. Idem, 494

EVIDENCE.

1. In an action of slander, malicious prosecution and false imprisonment, see Malicious Prosecution, No. 1, 2, 3, 4, 5, and

Womack *v.* Circle, 192

2. In a suit on a policy of insurance, the plaintiff was asked what valuation the agent of the insurance company put on the property insured and destroyed by fire? The answer was the valuation stated in the policy by the agent; which was objected to by the counsel for the company on the ground that it was parol evidence offered to vary or explain the written contract of the parties—HELD: The testimony was admissible, as it did not tend to vary the contract of the parties, but was in confirmation of it.

Southern Mut. Ins. Co. *v.* Trear, 255

3. Parol evidence is admissible to prove that the forfeiture of a policy had been unconditionally waived, and that conditions inserted in the receipts given for the back premiums was in violation of the agreement for the waiver of the forfeiture.

McLean *v.* Piedmont & Arlington Ins. Co., 361

4. What evidence is admissible in an action under the act, Code of 1873, ch. 145, §§ 7 and 9. See Railroad Companies, No. 3, 4, 7, and

Balt. & Ohio R. R. Co. *v.* Wightman's adm'r, 431

5. As to objections to the competency of a party to testify in his own behalf, see Witnesses, No. 1, 2, and

Neilson & als. *v.* Bowman & als., 732

6. For what evidence is admissible as a foundation for other evidence or corroboration of it in relation to the lines of streets in a city, see Public Highways, No. 4, 5, 6, and

Taylor & als. case, 780

EXECUTORS AND ADMINISTRATORS.

1. When payment of a legacy by the administrator of the executor of the testator to the administrator de bonis non does not discharge the estate of the executor. See Legacies and Legatees, No. 2, and

Stark & als. *v.* Lipscomb, 322

2. When there may be a personal decree against the administrator for the legacy paid over by him. Idem, 322

FINES.

1. Fines collected by the sheriff of a county or sergeant of a city or town are to be paid to the treasurer of his county, city or town, and not to the auditor of accounts of the state.

Tyler, serg't, &c., *v.* Taylor, auditor, &c., 765

871 *GUARDIAN AND WARD.

1. C died in 1858, leaving a will by which he gave to S $8,000, and appointed W his executor. J qualified as guardian of S. M owed to C, for land purchased in his lifetime, $8,000, secured by the vendor's lien. The legacy to S was reduced to $5,500, and M paid W $1,000, and he paid it over to J. And M having died in June, 1863, his executor proposed to pay to W a part of the debt of M to C. W declined to receive it, but it was understood between them, that if J, as guardian, would receive it, and J's receipt was brought to W, he would credit the amount on M's bond. J, having consulted counsel, and being informed that the judge would authorize the investment of the money in Confederate bonds, J and the executor of M went together to the agent of the Confederate government and gave him $4,500 to be invested in a bond, which was afterwards obtained. And at the same time J filed his petition to the judge for leave to invest, which was authorized by an order in vacation, and J gave a receipt for $4,500 to W, and W credited the bond of M with the amount. On a bill filed by S by his next friend, against J and his sureties—HELD:

1. J was guilty of a breach of trust in receiving the Confederate money in discharge of an ante-war debt well secured.

Crawford *v.* Shover & als., 69

2. That the money was not received in the due execution of his trust, and the judge had no authority to order the investment. Idem, 69

2. By an amended bill by S, W and the executors of M were made defendants, and were charged with participating in and instigating the act of J. But the decree is against J and his sureties, and the amended bill is dismissed. On appeal by J—HELD:

That the plaintiff, S, being satisfied with the decree, and J in his answer, both to the original and amended bill, having averred that he had acted on the advice of his counsel and with the approval of his own judgment, J cannot complain of the decree as not holding W and M's executor liable with him to S. Idem, 69

3. Infants by their next friend file their bill against their guardian, first to surcharge and falsify the settled account of their guardian, and to have him removed; and second, to have a sale of their lands. The guardian demurs to the bill, on the ground that it is multifarious—HELD: That, as the court cannot sell the infants' land on a bill filed by

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them, and no relief on the part of that bill can be given, the court will consider the case as if that part of the bill was not in it; and the demurrer was properly overruled.

Snavely *v.* Harkrader & als., 112

4. Pending the case, some of the plaintiffs come of age, and they all unite in an amended bill asking the same relief against the guardian; and the plaintiffs who have come of age ask for a partition of the land and a sale of it, on the ground that it cannot be divided in kind without injury to all. The guardian demurs to the amended bill on the same ground—HELD: The court cannot decree a partition and sale of the land on this bill; and therefore it will be treated as if this part of the bill was not in it; and the demurrer was properly overruled. Idem, 112

5. Pending the suit all the plaintiffs go off to their relations, in the state of Illinois, and one of these qualifies in that state as guardian of the infants; and they then amend their bill, stating these facts and filing a copy of the proceedings in the Illinois court with a copy of the guardian's bond, and asking that their property may be turned over to their Illinois guardian. The account of the guardian having been settled, showing the amount due to each of his wards, the cause came on to be heard, when the court made a decree removing the first guardian, and that he should pay over to the Illinois guardian the amounts severally reported to be due to his wards—HELD:

1. Under the large discretion vested in the courts in the appointment and removal of guardians, and the circumstances of
872 this case *as developed by the evidence, the court did not err in removing the guardian. Idem, 112

2. It was error to decree the payment of the money of the wards to the Illinois guardian, without proceeding in the mode prescribed by the statute. Code of 1873. ch. 125, § 5. Idem, 112

3. The Illinois guardian may file his petition in this cause for the removal of the personal property of his wards, and the proceedings described by said statute may be had therein. Idem, 112

4. The sale or partition of the infants' land cannot bo made in this case; but the proceeding to effect this object must be as prescribed by the statute. Code of 1873, ch. 124, § 2 to 8. Idem, 112

6. A guardian who receives the money of his wards and does not invest it, but retains it in his own hands, is to be charged interest thereon from the date of its receipt, and not from the end of the thirty days allowed by statute to the guardian for making investments. Idem, 112

7. A guardian receiving from the administrator of the father of his wards, his own bond bearing twelve per cent. interest, as a part of his ward's estate, and not investing the same, is to be charged the same rate of interest upon it to the termination of his guardianship. Idem, 112

8. In the stating of a guardian's account, his commissions on the money received by him should be credited at the time of the receipt of the money, and interest only charged on the balance. Idem, 112

9. The surety of a guardian pays the debt of the guardian to his ward in the lifetime of the guardian—HELD: The debt due by the guardian is not a fiduciary debt. It is a simple contract debt provable under the bankrupt act, and discharged by it; and a discharge to the guardian in bankruptcy is a bar to the recovery of the same by the administrators of the surety.

Cromer *v.* Cromer's adm'rs, 280

HOMESTEAD EXEMPTIONS.

1. The 3d exception in the proviso to the 1st section of article XI of the constitution of the state, in relation to homestead exemptions, which is "For liabilities incurred by any public officer, or officer of a court, or other fiduciary, or any attorney at law for money collected," embraces the liabilities of a collector of taxes and also of his sureties in his official bond. And therefore the said sureties are not entitled to their homestead exemption as against the Commonwealth in a proceeding against them and their principal to recover the amount of taxes for which the collector had failed to account.

Commonwealth by, &c. *v.* Ford & als., 683

2. A homestead exemption cannot be claimed against a fine due the Commonwealth imposed for the violation of the criminal laws.

Whiteacre, sheriff, *v.* Rector & wife, 714

3. The act, Code of 1873, ch. 183, § 3, which authorizes the waiver of the homestead exemption, is not in conflict with the XIth article of the constitution of the state; and if a party, executing his bond or note, waives his homestead exemption as to the bond or note, neither he nor his wife can set up said homestead exemption as against the said bond or note.

Reed & als. *v.* Union Bank of Winchester & als, 719

HUSBAND AND WIFE.

1. A case in which a settlement by the husband on his wife and children vests a separate life estate in the wife. See Trusts and Trustees, No. 1, and

Leake, trustee, *v.* Benson & als., 153

2 Husband settles property on his wife for her life. She afterwards joins him in executing bonds. After his death, her life estate may be subjected to pay the bonds.

Idem, 153

3. When a legacy to wife, on her death, passes to her husband, see Legacies and Legatees, No. 2, and

Stark & als. *v.* Lipscomb, 322

4. F and his wife E join in a deed conveying land held by a trustee for the separate use of E, to H; F acknowledges the
873 deed, but though E *signs it, she does

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not acknowledge it. H has no equitable title to the land which can be enforced against E.

Hawley *v.* Twyman, trustee, & als., 728

5. T, the trustee of E, by F contracts with H to sell the land to him; but E does not join in this contract, and there is no special provision in the deed of trust authorizing her to contract or convey. She is not bound by the contract. Idem, 728

INDICTMENTS.

1. No endorsement is necessary on an indictment to constitute it such, and a clerical mistake in the endorsement cannot invalidate the indictment. White's case, 824

2 If an indictment for a statutory offence, by following the language of the statute, charges expressly or by necessary implication, every fact necessary to constitute the offence, it is sufficient.

Helfrick's case, 844

INFANTS.

1. As to sale of infants' lands, and removal of their estate to another state, see Guardian and Ward, No. 3, 4, 5, and

Snavely *v.* Harkrader & als., 112

INSURANCE.

1. In a suit on a policy of insurance the plaintiff was asked what valuation the agent of the insurance company put on the property insured and destroyed by fire? The answer was, the valuation stated in the policy by the agent; which was objected to by the counsel for the company, on the ground that it was parol evidence, offered to vary or explain the written contract of the parties—HELD: The testimony was admissible, as it did not tend to vary the contract of the parties, but was in confirmation of it.

Southern Mut. Ins. Co. *v.* Trear, 255

2. The P. A. Life Ins. Co. of Richmond, Va., have an agency at Newbern, North Carolina, and the agent there issues a policy on the life of H, of that state, which is assigned to D of New York. D pays the premiums to the agent at Newbern for years. He sends the money to pay the premium for July, 1874, to the agent, who receives it, but does not send him a receipt, nor pay it over to the company, and the company enters the policy as forfeited. D having written several times to the agent and getting no response, does not send the money for the premium for October, 1874, or January, 1875. D sent an agent to Richmond, and after some explanations and an agreement, about which the evidence is conflicting, the secretary at Richmond gave to D's agent receipts for the back premiums; said receipts containing conditions as to the health of H. Upon an action on the policy by D against the company—HELD:

1. Quære: Was the policy forfeited by the failure of D to pay the premium due October 1st, 1874?

McLean *v.* Piedmont & Arlington Life Ins. Co., 361

2. Parol evidence is admissible to prove that the conditions inserted in the receipts was in violation of the agreement between the agent of D and the secretary of the company, and that by that agreement the forfeiture of the policy, if it had been forfeited, was unconditionally waived.

Idem, 361

3. For insurance in the Mutual Assurance Society of Va., see Mutual Assurance Society of Va., passim, and

Mutual Assurance Society of Va. *v.* Holt & als., 612

INTEREST.

1. C and P executed their single bill, dated October 18, 1871, whereby they promised "six months after date to pay to H or order the sum of seven thousand dollars, with interest at the rate of 12 per centum per annum from date"—HELD:

1. The contract for interest at the rate of 12 per cent. per annum, was legal under the constitutional provision in force at the time of the contract, and is not affected by the subsequent abolition of that provision.

Cecil & Perry *v.* Hicks, 1

874 *2. The obligors in the bond are bound to pay interest after the rate of 12 per centum, not only up to the maturity of the bond, but after maturity and until the payment thereof.

Idem, 1

2 The acts of April, 1873, Code of 1873, ch. 173, § 14, p. 1120, which authorizes the abatement of war interest upon debts contracted before the 10th of April, 1865, is unconstitutional and void; and a creditor residing in Virginia during the war is entitled to have interest upon his debt.

Pretlow *v.* Bailey's ex'x & als., 212

3. How a guardian shall be charged with interest. See Guardian and Ward, No. 6, 7, 8, and Snavely *v.* Harkrader & als., 112

4. Where both parties lived in Virginia during the war, the creditor is entitled to war interest.

Johnston, trustee, &c., *v.* Wilson's adm'r & als., 379

ISSUES.

1. On the trial of an issue devisavit vel non, if one of the parties objected to the admission of a person to testify on the ground of interest; or if objection is made to the admission of evidence of the character of a witness who had testified, on the ground that no proper foundation had been laid for its introduction; and the objections are overruled, and the witness and the evidence is admitted; and the objector does not except at the time or give notice of his intention to except before the verdict is rendered, he waives the objection, and cannot rely upon it upon a motion for a new trial. The same rule applies upon the trial of such an issue as applies on a trial at common law.

Lamberts *v.* Cooper's ex'or & als., 61

2. How in such cases bill of exceptions

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containing all the evidence will be regarded by an appellate court, see Appellate Court, No. 3, and Idem, 61

JUDGMENTS.

1. When a court of equity will enjoin a judgment. See Equity Jurisdiction and Relief, No. 1, and

Sitlington v. Kinney's adm'r, 91

2. Judgment in assumpsit is recovered upon an agreement. The defendant at law cannot resort to equity to set up the defence that there never was a completed contract between the parties. He might have made that defence at law under the general issue.

Mackey v. Mackey's adm'r, 158

3. At the February term, 1857, of the court, a judgment was recovered against S and H as his surety, on a forthcoming bond, and it was docketed on the 1st of April, 1857. An execution was issued on this judgment, and it was paid by H. On the 8th of October, 1856, S, by written agreement under seal, sold to E a house and lot, and delivered possession, and on the 18th of the same month S conveyed the same to E. This deed was acknowledged on the same day, H being one of the justices who took the acknowledgment; but it was not presented in the clerk's office for record until March 9th, 1857. Upon a bill by H, against E and S, to be substituted to the lien of the judgment against S—HELD:

1. H is entitled to be substituted to the lien of the judgment.

Eidson v. Huff & al., 338

2. The judgment having been docketed within twelve months from the date of its being rendered, and the deed not having been recorded within sixty days from its acknowledgment, the judgment is a lien upon the house and lot as against the deed.

Idem, 338

3. Notice of a deed or written agreement for the sale of land does not affect a creditor of the grantor. Idem, 338

4. It is error to enter final judgment, in the case of a judgment by default, in less than thirty days from the service of the process.

Dillard v. Thornton, 392

5. How and when such final judgment upon a judgment by default may be corrected. See Practice at Common Law, No. 4, and

Idem, 392

875 *6. When a judgment is or is not conclusive. See estoppel, No. 1, 2, and

Chrisman's adm'x v. Harman & al., 494

7. A judgment in the name of the Commonwealth, for W, treasurer of C county, founded on a notice in the name of the Commonwealth proceeding by W, late treasurer of C, against F, the collector of township M, and his sureties, upon his official bond, is a judgment in favor of the Commonwealth.

Commonwealth by, &c, v. Ford & als., 683

JUDICIAL SALES.

1. The court of appeals having reversed a decree of the court below for the sale of land, and another confirming the sale and distributing the proceeds, in the absence of the owners of one moiety of the land, and having sent the case back, that they may be made parties and have an opportunity to defend their interests; though the decree is in other respects confirmed, these absent owners, when made parties, have the right to except to the sale and its confirmation; and are not precluded by the affirmation of the decree in other respects than those on which it was reversed.

Crockett v. Sexton & als., 46

2. A commissioner appointed to sell land, makes a report of his sale in 1863, and whilst he states the amount for which the land sold, he does not say anything of the kind of money for which it was sold. Some of the owners of the land not having been parties in the cause when the decrees for the sale and its confirmation were made, are afterwards made parties; and they except to the sale, if it was made for Confederate currency. The commissioner then presents a supplemental report, stating that the land was sold for good money, and the report is not excepted to, but is received and acted on by the court. It cannot be objected to in the appellate court. Idem, 46

3. A commissioner for the sale of land is required to make report of his proceedings. If his report be incomplete, insufficient, or in any way imperfect, he may be required to make a further report; and so, if after he has made his report, and it has been received and accepted, at any time before final action upon it, he discovers any material mistake, or omission, or ambiguity in it, he may, by leave of the court, and it would be his duty, to file an amended, additional or supplemental report, correcting the mistake, supplying the omission, or explaining the ambiguity. Idem, 46

4. In such a case the report may be excepted to. But in all cases where exceptions are necessary, they should specify with reasonable certainty the particular grounds of objection, so as to enable the opposite party to see clearly what he is to meet, and the court what it is to decide. Idem, 46

5. An ante war creditor refuses to receive from the purchaser of property sold under a decree in 1863 for payment of debts, Confederate currency in payment, and the purchaser obtains an order of the court to invest the amount in Confederate bonds. It is the purchaser's money which is invested, and he must bear the loss. Idem, 46

6. In 1853, S and wife sold and conveyed to B land for $2,100, retaining a vendor's lien. B paid $1,500, and gave three bonds, each for $200, two of which were assigned to H and one to T. B conveyed the land to T in trust to secure a debt of $627 to W. In May, 1858, B and T made a private sale of this land to A and his wife for $2,100, payable $700 on

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the 1st of August, 1858, and the balance in payments extending to 1863; and A and wife paid of the purchase money $592, which was applied to the debt of W. In 1860, H and T filed a bill against A and wife and others for specific execution of the contract, and to sell the land to pay the vendor's lien held by H and T. In May, 1860, before a decree in the cause, T, B and A and wife made a private sale of the land to R for $2,100, payable $1,000 October 1st, 1860, and three annual payments. R paid to T $1,000, and gave his bonds to T for the balance. This
876 *sale was confirmed by the court at the October term, 1860, and T was appointed a receiver to collect the money and pay it out to the parties entitled. But he was directed not to pay H until he filed the bonds held by him among the papers. T paid the debt of W, retained enough to pay H, and paid the balance to B. The bond of R, due in 1862, was assigned by B and T to S, who recovered a judgment upon it, and R then filed a bill against S to enjoin the judgment. The injunction was granted, and afterwards dissolved. And then R filed a bill of review, on the ground that the wives of B and A were entitled to a contingent right of dower in the land, and that H had a lien on the land. The bill of review was dismissed, and R appealed—HELD:

1. As the bonds of R were left in the hands of the receiver, to pay the debt of H, and were sufficient for that purpose, if R has paid them to T, H can have no lien on the land.

Robinson *v.* Shacklett, 99

2. A's wife having been a party to the suit, she cannot claim dower in the land; and the proceeds of the sale having been exhausted by the prior liens upon it, there is no surplus out of which she may be endowed. Idem, 99

3. The land having been sold to satisfy the liens of H and T, the wife of B can have no right of dower in the lands in the hands of the purchaser R; any right she may have must be in the surplus of the purchase money, after satisfying the prior liens. Whether she has an interest in this surplus must depend upon the true construction of the statute. Code of 1849, ch. 110, § 3; Code of 1873, ch. 106, § 3. That is a question between the assignee S and the wife of B, in which R, the purchaser, is not concerned. But to avoid the hazard of a contest with her, he may bring them before the court to have their respective rights settled by the court. Idem, 99

4. R allowed to amend his bill and make Mrs. B a party. And if the other suit is still pending, to make all the parties to it defendants, and the two cases may be heard together, and a final decree entered adjudicating the rights of all the parties.

Idem, 99

7. An objection to the title of land by a purchaser at a judicial sale must be made before the sale is confirmed by the court. Ordinarily an objection after confirmation comes too late.

Long & als. *v.* Weller's ex'or & als., 347

8. The title to an easement on the land to which it is appurtenant is necessarily connected with the title to the land, and an objection referring to such easement must be governed by the same rules. Idem, 347

9. An objection by such a purchaser, after the sale has been confirmed, that owing to his misinformation as to the boundaries of the land, he does not get certain water privileges which he would have had if he had been correctly informed as to the said boundaries, can only be sustained on the ground of fraud or mistake; and if mistake is relied on, it must be the mistake of both parties.

Idem, 347

10. An objection of the kind should be made to the court as soon as it is discovered by the purchaser. Idem, 347

11. When a judicial sale of land is made upon a credit and the title retained as a security, upon a rule against the purchaser to show cause why the land should not be resold for his failure to pay the purchase money, before making a decree for the sale, the court should ascertain how much of the purchase money is due, and should in the decree give him a day in which to pay it; and if not paid in that time, the commissioner to sell.

Idem, 347

12. Whether the whole or only part of the land should be sold, or whether as a whole or in parcels, must be referred to the discretion of the court, and his act will not be disturbed unless plainly erroneous. Idem, 347

13. At a judicial sale made in August, 1859, D became the purchaser of a tract of land in the county of Franklin, and gave his bonds, payable in one, two and three years. The sale was confirmed, and the general
877 *receiver of the court was directed to collect the money—in advance—if the purchaser chose to pay it, deducting interest. D paid the first bond, and a part of the second before it was due, in his lifetime. Soon after his death D's administrator, in January and February, 1863, paid to the receiver in Confederate money the amount due upon the two last bonds, and took them in. October, 1863, the receiver reported the payment of the bonds, and his report was confirmed and the receiver directed to convey the land to D's heirs; which was done. It appearing that at the time of the payments and confirmation of the sale Confederate money was little depreciated in Franklin, and was generally received in payment of debts—HELD: The payments by D's administrator were valid payments, and the bonds of D are fully discharged.

Dickinson's adm'r *v.* Helms & als., 462

14. A tract of land was fairly sold by commissioners, pursuant to a decree of court, to a purchaser for $27 50 per acre, subject to a contingent right of dower. The tract was assessed in 1870 at $30; and $30 per acre was the value fixed upon the land by a commis-

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sioner of the court, whose report had been confirmed without exception in the cause; in which valuation no allowance was made for the contingent right of dower. The owner of the land objected to a confirmation of the sale on the ground of inadequacy of price, and affidavits touching the value of the land were filed by both parties. The court below set the sale aside and ordered a resale; whereat the same party became the purchaser at the same price. In the meanwhile the assessment of the land had been reduced to $20 per acre. The owner of the land again objected to the confirmation of the sale on the same grounds as before; and the court again refused to confirm the sale, and again ordered a resale—HELD: The first sale should have been confirmed; and the decree setting it aside and all the subsequent proceedings were erroneous.

Curtis *v.* Thompson, 474

15. Quære: If inadequacy of price is alone sufficient to set aside a judicial sale.

Idem, 474

16. A purchaser at a judicial sale of land pays the purchase money to the commissioner; but the commissioner has not exec ted the bond required by the decree, or the bond executed by him is disapproved by the clerk. The purchaser has paid in his own wrong, and the land is liable for the purchase money received by the commissioner and misapplied, though the land has been conveyed by the commissioner to the purchasers, as the decree directed to be done when the purchase money was paid.

Lloyd *v.* Erwin's adm'r, 598

17. In such a case, the parties entitled to to the fund are not bound to proceed against the commissioner and his sureties in the bond he executed, but which the clerk disapproved, before proceeding against the land, to have it subjected to the payment of the purchase money misapplied by the commissioner. Idem, 598

LACHES AND LAPSE OF TIME.

See Trusts and Trustees, No. 9, and

Rowe *v.* Bently & als., 756

LEGACIES AND LEGATEES.

1. Testator, by his will, gives to his widow four slaves by name during her life; and he emancipates them at her death, and gives to each of them by name a legacy. The widow lives until 1875. Though the slaves were emancipated by the results of the war years before the death of the widow, yet the legacies having been, not to a class, but to the legatees by name, they are entitled to the legacies.

Simmerman *v.* Sanger & als., 9

2. L dies in 1840, and by his will says, "I give to my niece E, wife of B, the sum of $400, which said sum I wish put to interest, and that paid to E annually during the lifetime of her husband B, and at his death, should she be the longest liver, then I wish the principal paid over to her, said E" S, the executor of L, paid the interest to E until 1862, when he died. B, the administrator of S, in April, *1863, paid to the administrator de bonis non of L, the $400 and interest in Confederate money. E died in 1866, leaving her husband surviving her—HELD:

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1. E took an absolute estate in the legacy, to which, on her death in the lifetime or her husband B, he was entitled.

Stark & als. *v.* Lipscomb, 322

2. The payment by B to the administrator de bonis non of L was no satisfaction of the legacy as to the husband B, but the estate of S is liable to pay it, principal and interest, and B being the only child of S, and having ample assets, the decree may be against him personally. Idem, 322

LICENSES.

1. § 106 of ch. 206 of the acts of 1874–75, is not repealed by the act of March 30, 1877, in relation to the sale of wine, &c, and therefore the judge of the hustings court of the city of Richmond has authority to revoke a license given for keeping a bar for the sale of wine, &c.

Hogan *v.* Guigon, judge, 705
Moll *v.* Same, 705

LIENS.

1. Land is sold under a decree to satisfy liens upon it, and a receiver is appointed and directed to collect the purchase money and pay it to the parties entitled. If the purchaser pays to the receiver, the parties entitled have no lien on the land in the hands of the purchaser for their money.

Robinson *v.* Shacklett, 99

2. When a judgment will be a lien upon land in the hands of a purchaser for value. See Judgments, No. 3, and

Eidson *v.* Huff & al., 338

3. Upon a bill by A, the holder of notes against T as an absent defendant, to attach a house and lot for the payment of the notes, A has no lien on the house and lot until the filing of his bill.

Alex. Savings Inst. & als. *v.* Thomas & als, 483

LIMITATION OF ESTATES.

1. By a deed made on the 28th of July, 1821, certain land in said deed described, was granted by D to his grandson R, his executors, administrators and assigns, from and after the grantor's death, for and during his life only; and after his death the said piece of land to go to such person or persons as shall at that time answer the description of heir or heirs at law of the said R, and such person or persons shall take the said land under that description as purchasers under and by virtue of this deed, and not by inheritance as heirs of R—HELD:

1. R took but a life estate in the land; and the persons who at the time of R's death answered the description of his heirs at law took as purchasers under the deed.

Taylor *v.* Cleary & als., 443

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2. By the act of 1785 dispensing with the word "heirs" in the grant of an estate in fee simple, the grant to the remaindermen is a fee; but that act does not therefore extend the rule in Shelly's case to the estate given to R so as to enlarge it into a fee. Idem, 448

LIMITATIONS—STATUTES OF.

1. The court cannot take judicial notice of the military orders extending the time for a stay of execution on judgments.

Johnston, trustee, &c. *v.* Wilson's adm'r & als., 379

2. The object of the said orders was to extend only those provisions of the law which related to the stay of executions and the forced sales of property; and therefore, if they had any validity, they did not operate to suspend the running of the statute of limitations. Idem, 379

3. The statute of limitations, Code of 1849, ch. 149, § 9, is a legislative declaration that all the provisions of that chapter in regard to the limitation of actions shall apply in favor of the testator's debts, although there is a devise of real estate for their payment, unless it plainly appears that the testator otherwise intended. The devise is not 879 of itself sufficient evidence *of the intent. It must appear from some provision or phrase independent of the devise, which indicates the intention of the testator. Idem, 379

4. A devise of real estate for the payment of debts will not affect the operation of the statute of limitations upon such debts, whether they be barred at the testator's death or not, unless the contrary intention on his part plainly appears. Idem, 379

5. When the statute is no bar to a claim against a trustee. See Trusts and Trustees, No. 9, and Rowe *v.* Bentley & als., 756

MALICIOUS PROSECUTION.

1. In an action for slander, malicious prosecution and false imprisonment, the plaintiff, in order to show the wealth and influence of the defendant, offered in evidence certified abstracts from the books containing the returns of the assessments for taxation of the land and personal property belonging to the defendant in the year 1876, the year of the trial of the cause. There being no objection to the form of the abstracts, or that they did not truly state what they purported, the evidence was admissible.

Womack *v.* Circle, 192

2. In such an action, what the defendant did after making his complaint to the justice to have the plaintiff arrested, is not evidence in his behalf. Idem, 192

3. The officer having returned the warrant executed, and the plaintiff having appeared before the justice in obedience to it, that is a sufficient service of it, though he did not take the plaintiff into his custody, but only read it to her and requested her to appear. And any instruction of the justice to the constable as to not taking her into custody was wholly immaterial. Idem, 192

4. The defendant asks the court to instruct the jury that if they shall be satisfied from the evidence that A informed him that C, the plaintiff, had attempted to bribe H to burn defendant's wheat stacks, and that believing the information to be true, he went before O, a justice of B, and made complaint that C did attempt to bribe H to burn his wheat, and that said O caused C and witnesses to be brought before him and examined into the truth of the complaint, and decided that C was guilty, as charged, and required her on account thereof to enter into a bond and recognizance for her good behavior, this was a sufficient proof of probable cause for the proceeding of the defendant; and the plaintiff cannot recover on account of said complaint, or on account of the arrest and imprisonment of the plaintiff in pursuance thereof, though they should find that the complaint was subsequently dismissed by the county court, the plaintiff discharged and the said bond and recognizance quashed; unless they shall be satisfied from the evidence that the defendant knew the testimony before the justice was false. The court refused the instructions—HELD:

1. Quære: Whether the judgment of the justice, though reversed, was or was not conclusive evidence of probable cause for the complaint of the defendant. On this question the court was divided. Idem, 192

2. The judgment of the justice, though reversed, was prima facie evidence of such probable cause. Idem, 192

3. The court should have so modified the instruction, and should have given it so modified. Idem, 192

MANDAMUS.

1. Fines collected by the sheriff of a county, or by the sergeant of a city or town, are to be paid by him to the treasurer of his county, city or town, and not to the auditor of accounts of the state; and therefore a mandamus will not lie at the suit of the sheriff or sergeant, to compel the auditor to receive coupons which have been paid to him in discharge of a fine.

Tyler, sergeant, &c., *v.* Taylor, auditor, &c., 765

880 *MARRIAGE SETTLEMENTS.

1. See settlements, No. 2, 3, 4, and Herring & als. *v.* Wickham & wife & als., 628

MOFFETT REGISTERS.

1. The provision of the act of the general assembly of March 30th, 1877, known as the Moffett register law, which directs that the cities of the commonwealth shall be first supplied with the registers, is not unconstitutional, as being an unjust and partial discrimination against liquor dealers in the cities. Helfrick's case, 844

2. A person selling liquor without a license, at a time after the passage of the Moffett register act, but before the registers provided

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for in said act were supplied, is not liable to the punishment of imprisonment imposed by that act, but only to the punishment by fine imposed by former laws.

Marxhausen's case, 853

MORTGAGES.

1. In February, 1841, S conveyed to a trustee a tract of land, in trust to secure a debt of $1,422 he owed to D, with power of sale after four years. In October, 1842, S was taken on two ca. sas., took the insolvent debtor's oath, and conveyed to the sheriff all his right, title and interest in this land. In January, 1843, the sheriff sold the land out and out, when D bought it for $1,500; less than his debt. In December, 1843, S and his wife, the sheriff, and the trustee united in a conveyance of the land to D, and in May, 1845, D and wife conveyed the land to P. P died in 1873; and in 1874 S filed his bill against the heirs of P, claiming that the deed to P was a mortgage to secure money which P had advanced for him to pay D's debt, and asking to be permitted to redeem. It appeared that before D's purchase he agreed with S that if D bought the land for less than his debt, S might redeem it by paying his debt in twelve months; and it was clearly proved by parol testimony, that before the year was out S applied to P, his brother-in-law, to advance the money to pay the debt of D, and it was agreed that the land should be held by P until he was repaid, and he should have possession of the land, except the house and some lots around it, to keep down the interest of the debt. This agreement was carried out. P recognized the rights of S under this agreement until 1859, and did not dispute them until 1869, when he denied the right of S to redeem; but several times afterwards he admitted S's right in conversations with third persons, and he offered to compromise with S, but never could be induced to carry his agreement into effect—HELD:

1. The sale by the sheriff of the land out and out was a nullity, and D acquired no right to it by his purchase.

Snavely v. Pickle & als., 27

2. Though the deed to P was absolute on its face, it was competent to prove by parol evidence that it was intended to be a mortgage or security for a debt; and in this case the proof is full and satisfactory.

Idem, 27

3. Whether a deed absolute on its face is a mortgage or conditional sale, is only to be determined in each case by its own circumstances; but in doubtful cases the courts incline to construe the transaction to be a mortgage rather than a conditional sale. Idem, 27

4. It is essential to a mortgage that there should be a debt to be secured. And the agreement in this case that P should advance for S to D the amount of his debt and interest, and the actual payment of the same by P under the agreement, created a debt and made S the debtor of P for the amount so advanced. Idem, 27

5. For the circumstances which will be looked to to determine whether a mortgage or conditional sale is intended, see the opinion of Burks, J. Idem, 27

6. The presumption from lapse of time that will bar the right to enforce a mortgage, when the mortgagor is in possession, or will bar the right to redeem where the mortgagee is in possession, is a mere presumption, which may be repelled by
881 *any circumstances sufficient to satisfy the mind that in the particular case it is ill-founded; and in this case the circumstances repel the presumption.

Idem, 27

7. An account should be settled; S to be charged with the amount paid for him by P to D, and P charged with rents and any timber cut by him, to be credited at the end of each year, first upon the interest, and if more than that, then upon the principal of the debt. Idem, 27

8. The administrator of P is a necessary party in the suit, and plaintiff must make him a defendant before any further proceedings in the court below. Idem, 27

MUNICIPAL CORPORATIONS.

1. The common and select councils of the city of N having granted leave to C, who was then erecting a building on a lot owned by him to extend the steps of said building out upon the public street, afterwards ordered the removal of said steps. Upon a bill filed by C to enjoin such removal—HELD:

1. Streets in a city or town, though generally subjected to the supervision and control of the municipality, are public highways, the use whereof is for the public at large.

Norfolk City v. Chamberlaine. 534

2. The common and select councils of N had no authority to grant permission to C to occupy any portion of the public highway. Idem, 534

3. The common and select councils of N having the general control over the streets, and power to abate nuisances thereon, and remove obstructions therefrom, the order for the removal of the steps of C's building was within their lawful authority.

Idem, 534

4. Inasmuch as the original permission to C to place the steps of his building on the public street was beyond the powers of the municipal authorities of N, they are not estopped to order their removal.

Idem, 534

5. The order for the removal of the steps of C's building was not void as being a partial and unjust discrimination against him. Idem, 5 4

MUTUAL ASSURANCE SOCIETY OF VIRGINIA.

1. M leases to F a lot in Norfolk for ten years, renewable every ten years until M

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shall elect to take the buildings which may be put upon it, and pay for them at valuation. F builds, and then M, as owner of the land, and F as owner of the buildings, join in a declaration for insurance in the Mutual Assurance Society of Virginia; which was granted—HELD:

1. The land is not insurable, and M is not liable to the assurance society for the quotas on the insurance.

Mut. Assur. Society of Va. v. Holt & als., 612

2. As F did not have the fee in the land or a perpetual lease, and M may take the buildings at the end of any ten years, it seems that F did not have such an interest in the property as was insurable in the Mutual Assurance Society, according to its constitution. Idem, 612

2. The lease and buildings having been sold to W, and he dying, one of his nine children, for himself and his co-heirs, insured the property in the society; and this continued until 1864, when it was insured in other insurance companies—HELD:

1. By insuring in other insurance companies without complying with the regulations of the assurance society, the insurance in that society, according to its express rules, became null aad void. And as the society was no longer liable for loss, the assured is only liable for the quotas due at the time the insurance became null and void; and is not liable for any quotas assessed after that time. Idem, 612

NEGLIGENCE.

1. For what negligence a railroad company will be liable in an action under
882 the statute, Code of 1873, ch. *145, § 7, 9, by the administrator of a party killed on a railroad train, see Railroad Companies, No. 7, 8, 9, 10, 11, and

Balt. & Ohio R. R. Co. v. Wightman's adm'r, 431

NEGOTIABLE NOTES.

See Promissory Notes.

NOTICE.

1. A notice to correct a judgment by default, or to quash an execution, need not be in writing. All that is required is, that there should be reasonable notice.

Dillard v. Thornton, 392

2. It is too late to make an objection in the appellate court that the notice was insufficient, when the parties appeared and made no such objection in the court below.

Idem, 392

3. What is not sufficient notice of protest of a negotiable note to bind the endorser, see Promissory Notes, No. 2, 3, 4, and

Bank of Old Dominion v. McVeigh, 546
McVeigh & al. v. Allen, 588

OATHS.

1. The act, Code of 1873, ch. 159, § 13, authorizes the clerk of a county or corporation court, when an application is made to him for a marriage license, to require evidence that the female to be married is over the age of twenty-one years, and to administer an oath to the person giving the testimony.

Maybush's case, 857

PARTIES IN EQUITY.

1. In a bill by a mortgagor out of possession against the heirs of the mortgagee to redeem the mortgage, the personal representative of the mortgagee is a necessary party.

Snavely v. Pickle & als., 27

PARTNERS.

1. The law is well settled that one partner is not entitled to claim compensation for his services in the business, without a special contract for such compensation. And although one partner attended almost exclusively to a very large partnership business, from 1844 to 1865, there having been no agreement for compensation to him, he is not, under the circumstances, entitled to compensation.

Forrer v. Forrer's ex'ors & als., 134

2. Partners buy a tract of land for partnership purposes, and it is conveyed to them. After the death of one of them, it is ascertained that the title to one-third of the land is defective, and the surviving partner purchases this one-third interest and takes the conveyance to himself. He has purchased for the joint benefit of himself and the heirs of the deceased partner, and they are entitled to claim it upon paying their share of the expense of the purchase. This principle applies equally to joint tenants, tenants in common, co-partners and all others having a common title and interest. Idem, 134

3. When partners as such are declared bankrupt, their property, both partnership and individual, is to be administered under section 36 of the bankrupt act of 1867 in the bankrupt court; and every creditor, whether individual or social, must prosecute his claim in that court.

Lindsey v. Corkery & Milward & als., 650

4. Where a partnership is dissolved and the individual partners are declared bankrupts in different bankrupt courts in different states, each with his own assignee, and in their schedules make no mention of partnership debts due to them or by them, a creditor of the partnership may proceed in a state court to subject the partnership effects to the payment of the partnership debts.

Idem, 650

5. In such case one creditor of a partnership cannot attach the partnership effects so as to obtain a preference over the other partnership creditors; but his bill, though proceeding only for his own debt, may be treated as for the benefit of all the partnership creditors, and an account of the creditor's
883 debts and the partnership *effects may be taken and the effects distributed among the creditors who establish their debts. Idem, 650

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PAYMENTS.

1. When payment of good debts in Confederate currency will be held to be invalid, and the debts still due, see Trusts and Trustees, No. 2 and No. 3,

Pilson, trustee, & als. v. Bushong & als., 229
Patterson & wife & als. v. Horsley, trustee, & als., 263

2. When payment of legacy in Confederate money will be no discharge, see Legacies and Legatees, No. 2, and

Stark & als. v. Lipscomb, 322

3. When payment in Confederate money by a purchaser at a judicial sale, valid, see Judicial Sales, No. 13, and

Dickinson's adm'r v. Helms & als., 462

4. As to presumption of payment of a bond from lapse of time, see Bonds, No. 5, 6, and

Booker's adm'r v. Booker's rep., 605

PERJURY.

1. A party may not be convicted of subornation of perjury when the principal has been tried for the perjury and acquitted.

Maybush's case, 857

PETERSBURG RAILROAD COMPANY.

1. The 17th section of the charter of the Petersburg Railroad Company, which exempted the property of the company from taxation, has been repealed by the act of April 2d, 1853, which united it with the Greenesville and Roanoke railroad company; which act was accepted by the company, and the property of said company is now subject to taxation.

City of Petersburg v. Petersburg R. R. Co. & als., 773

PLEADING AT LAW.

1. In an action of trespass on the case, counts in case and counts in trespass vi et armis may be joined in the declaration. Code of 1873, ch. 145, § 6.

Womack v. Circle, 192

2. In an action under ch. 145, § 7, 9, Code of 1873, it is not necessary to aver in the declaration for whose benefit the suit is prosecuted.

Balt. & Ohio R. R. Co. v. Wightman's adm'r, 431
Matthew v. Warner's adm'r, 570

PLEADING IN EQUITY.

1. Where a bill in equity seeks relief on one subject on which relief may be given in the case, and seeks relief on another subject on which no relief can be given in the case, the court will consider the case as if this last part of the bill was not in it; and the bill is not liable to demurrer for multifariousness.

Snavely v. Harkrader & als., 112

PRACTICE - AT COMMON LAW.

1. Plaintiff introduces a witness who is examined, but the court, after hearing the evidence, excludes it without objection by the plaintiff. The defendant cannot introduce evidence to rebut the evidence so excluded.

Womack v. Circle, 192

2. The court is not bound, on the motion of one of the parties, to instruct the jury generally on the law of the case.

Idem, 192

3. Though an instruction as asked is not correct, yet if the refusal to give it, without more, may mislead the jury, the court should modify it so as to make it correct, and give it as modified. Idem, 192

4. On Septmber 30th, 1867, a summons in debt on a single bill was sued out, returnable to the succeeding October rules, to which rules it was returned executed on the 3d of October; and the plaintiff filed his declaration, and the defendant not appearing, a conditional judgment was entered against him, which was confirmed at the succeeding rules held October 28, 1867; and final judgment was entered against the defendant on the last day of the succeeding term of the circuit court, which was October 31, 1867, which was 884 less than one month after *the service of process on the defendant—HELD:

1. The entry of final judgment against the defendant within one month after he was served with process was erroneous. Code 1873, ch. 166, § 6.

Dillard v. Thornton, 392

2. According to the true construction of our statutes, where less than one month has elapsed between the service of process and the end of the succeeding term, the conditional judgment will become final at the term next succeeding the expiration of one month after service of process.

Idem, 392

3. The aforesaid judgment of October 31, 1867, having been set aside in the court below on the motion of the defendant, the court should have reinstated the cause upon the docket, with liberty to the defendant to plead, and to set aside the office judgment upon the usual terms, the said judgment to become final in case of his failure to set it aside. Idem, 392

4. Where under such a judgment a fi. fa. is issued, and there is a proceeding by suggestion against persons indebted to the defendant, such defendant may, upon proper notice, appear in such proceeding and have the judgment vacated, and all proceedings thereunder quashed.

Idem, 392

5. A notice to reverse or correct a judgment by default, or to quash an execution, need not be in writing. All that is requisite is that there should be reasonable notice. Idem, 392

6. It is too late to make the objection in the appellate court that the notice was insufficient, when the parties appeared and made no such objection in the court below.

Idem, 392

7. The court below having vacated the judgment of October 31st, 1867, upon a motion of the defendant, where all parties

appeared by their counsel, if had no jurisdiction to correct its action in that regard under § 5, ch. 177, of Code of 1873; but the proper remedy was by appeal.
Idem, 392

5. In order to entitle a party to a continuance on the ground of the absence of a material witness, it is necessary for him to show that he has used due diligence to procure the attendance or deposition of such witness, and upon such a matter the appellate court will not disturb the action of the court below, unless such action was plainly erroneous.
Baltimore & Ohio R. R. Co. *v.* Wightman's adm'r, 413
Matthews *v.* Warner's adm'r, 570

6. When it is not necessary to prove plaintiff is a corporation, see Corporations, No. 4, and
Gillett *v.* The American Stove and Hollow-ware Co., 565

7. Where neither party requires a jury, and the whole matter of law and fact are heard, and determined and judgment given by the court, and the whole evidence is certified by the court in the bill of exceptions, the bill must be regarded as a demurrer to evidence.
Backhouse's ex'x *v.* Selden, 581

PRACTICE—IN CHANCERY.

1. As to commissioners to sell land, how and when they may file amended or additional reports, and how these reports may be treated, see Judicial Sales, No. 2, 3, 4, and
Crockett *v.* Sexton & als., 46

2. For the mode of saving objection to evidence on the trial of an issue devisint vel non, see Issues, No. 1, and
Lamberts *v.* Cooper's ex'or & als., 61

3. How to avoid a future contest with a person not a party to the suit, the plaintiff may proceed in his case, see Judicial Sales, No. 6, and
Robinson *v.* Shacklett, 99

4. For removal of personal estate of infants out of the state, see Guardian and Ward, No. 5, and
Snavely *v.* Harkrader & als., 112

5. When a personal decree may be made against an administrator for a legacy for which his intestate's estate is responsible, see Legacies and Legatees, No. 2, and
Stark & als. *v.* Lipscomb, 322

885 *6. It is error to direct an inquiry as to the action of an administrator de bonis non, who is not a party in the suit.
Idem, 322

7. When plaintiff coming into equity for an injunction and relief, should not be required to confess a judgment in the action at law, see equity Jurisdiction and Relief, No. 3, and
Staples *v.* Turner, adm'r, & als., 330

8. How land shall be resold for failure of purchaser to pay the purchase money, see Judicial Sales, No. 11, 12, and
Long & al. *v.* Weller's ex'or & als., 347

9. When though original bill dismissed, a cross-bill may be proceeded in, and the questions involved decided, see Circuit Court of Richmond, No. 3, and
Ragland *v.* Broadnax & als., 401

10. In a suit for the sale of land to satisfy liens upon it, there was an order for an account of the liens and their priorities, and in 1860 the account was returned arranging the debts in twenty-four classes, of which the 2d, 3d and 13th were debts reported to be due to S. In 1866, the report was confirmed, and there was a decree for the sale of the land, one-tenth cash, and the balance at one and two years. The sale was made to J and confirmed, and J directed to pay the money to the receiver. In 1870, T filed his petition in the cause, claiming that the debts mentioned in said 2d, 3d and 13th classes were his, acquired in 1864, and asking that the receiver might be required to report how much of the purchase money he had received, and what he ihad done with it; and if it had not been pafd, for a resale of the land. The case was reerred to the commissioner, and J appeared before him, claiming that said debts were his, and contesting the claim of T. S did not claim them—HELD:

1. That it was competent for T, though not a party to the suit, but who had acquired subsequently the liens of one who was a party, by petition or motion to require a report from the receiver showing the amount of the purchase money in his hands, and to have it applied to the satisfaction of the liens according to their priorities, and to direct a resale of the land for the balance of the purchase money due pursuant to the decree of sale.
Thornton *v.* Fairfax & als., 669

2. It was not necessary that he should have proceeded by bill for that purpose, or to have made the purchaser a party defendant to his petition, or to have required him to answer. Idem, 669

3. If S had disputed the claim of T, then it would have been proper for T to have asserted his claim by supplemental bill, or by an original bill in the nature of a supplemental bill. Idem, 669

4. Before there could be a decree for a resale of the property, it was proper and necessary that the purchaser should have notice of the proceeding. The approved practice has been to proceed by the service of a rule upon the purchaser, to show cause why the lands should not be resold.
Idem, 669

5. Though no rule was served on the purchaser in this case, he had notice of the proceeding, and came forward to show cause in his own chosen way. There was no need, therefore, for a rule.
Idem, 669

6. The purchaser might have moved the court for leave to answer the petition of T; or he might have filed a supplemental bill, or an original bill in the nature of a supplemental bill, and put the matters in issue on which he relied. Idem, 669

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11. An attorney employed in a cause is not a competent commissioner to take an account in the cause.

Bowers' adm'r *v.* Bowers & als., 697

12. When a bill does not specify errors in the accounts of a trustee regularly settled by the county court and confirmed, but only charges generally that there are errors in them, the court will not direct a settlement of the accounts.

Preston *v.* Stewart & als., 289

888 *PRINCIPAL AND AGENT.

1. When an agent was authorized to collect a good debt in Confederate money, and when the party paying agent or trustee will be held to be liable for debts paid to the agent or trustee, see Trusts and Trustees, No. 2 and 3, al'

Pils n, trustee, & als. *v.* Bushong & als., 229

Patteson & ewif & als. *v.* Horsley, trustee, &a 263

2. When a trustee is also agent, and may sell property encumbered without a proceeding to ascertain encumbrances and fix priorities of debts, see Trusts and Trustees, No. 4, and

Preson *v.* Stuart & als., 289

3. A contract of agency made between parties, all of whom are sui juris capable of contracting, where there is no fiduciary relation between the parties, and no fraud or mistake, however speculative or even unequal it may be, is legal and valid.

Nielson & als. *v.* Bowman & als., 732

4. But after the agency has commenced, and a fiduciary relation has been established, a modification of the contract at the instance of the agent, and for his benefit, unless attended by the utmost good faith on his part, will be invalid; and any misrepresentation by the agent as to the subject of the agency, to induce the principals to modify the contract in his favor, or any undertaking by the agent with a person with whom he is dealing in respect to the subject of the agency to get for him the most favorable terms from his principals, is bad faith. Idem, 732

5. Though the second contract is illegal and void, the first is valid; and the agency will be adjusted according to its terms.

Idem, 732

PROHIBITION.

1. For the doctrine in relation to prohibition and its use, see the opinion of Burks, J., and cases cited in note.

Hogan *v.* Guigon, judge, 705

Moll *v.* Same, 705

PROMISSORY NOTES.

1. Payment of a note made by partners is received by an agent in Confederate currency, upon condition that if the principal refuses to receive it, it is to be returned; and a receipt is endorsed on the note and delivered to one of the partners The principal declines to receive it, and the agent returns the currency to another partner, who gives the partnership promise to pay the amount of the note in the new issue of Confederate notes, which the principal was willing to receive, and this is received by the principal—HELD;

1. The delivery of this second promise and its reception by the principal, is not a discharge of the note, unless it was so intended and agreed by the principal; and this must be clearly shown by the makers of the note.

Lewis & al. *v.* Davisson's ex'or, 216

2. The delivery of the note by the agent to one of the partners, and its cancellation and possession by him, will not prevent an action upon it by the principal.

Idem, 216

2. In an action by a bank against an endorser of negotiable notes, which were discounted in Alexandria, and fell due during the war, when the endorser was within the Confederate lines, to prove notice of protest to the endorser within a reasonable time after the war ceased, the plaintiff offered in evidence a resolution of the stockholders adopted at a meeting held on the 18th of July, 1865, at which the endorser was present at a previous period of the meeting, though it did not appear he was present when the resolution was adopted, by which these notes and others paid by the maker at a branch of the plaintiff's bank within the Confederate lines, are declared still to be due to the bank—HELD:

1. There being no proof that the endorser had any knowledge of the resolution, it was not due notice to him of the dishonor of the notes.

Bank of Old Dominion *v.* McVeigh, 546

887 *2. The knowledge of non-payment of a protested note is not sufficient to bind the endorser. He must have notice that he is looked to for payment.

Idem, 546

3. The resolution having been adopted July 18th, 1865, at least two months after communication had been opened between the bank and the endorser, it was not in time, if it had been sufficient as a notice

Idem, 546

3. In an action against an accommodation endorser of a negotiable note, the fact that the endorser resided at the time in Alexandria, where the note was discounted, and before the note became due he went into the Confederate lines, and was there when the note was protested, and at the time of such protest he had no known agent in Alexandria to receive notice of the dishonor of the note, is not of itself sufficient to render the endorser liable.

McVeigh & al. *v.* Allen, 588

4. And in such a case, the fact that the endorser had a residence in Alexandria at the time the note was protested, and that a written notice of said protest was left at his residence, is not sufficient to render the endorser liable. Idem, 588

5. In such a case the plaintiff having pur-

chased the note after maturity and dishonor, by purchase at a sale of the effects of a bank which had discounted it, he is not thereby prevented from recovering from the endorser the whole amount of the note, though he paid for it much less than the nominal amount.
Idem, 588

PUBLIC HIGHWAYS.

1. Streets in a city or town are public highways, and the authorities of the city or town have no power to authorize any person to place a permanent obstruction in any part of such street.
Norfolk City *v.* Chamberlaine, 534

2. Though an obstruction has been placed in a street by the consent of the city authorities, these authorities may afterwards have it removed. Idem, 534

3. On an indictment for obstructing a street in the city of Manchester, the indictment is the appropriate remedy in such case; and it was proper in the court to refuse to continue the case until the question of the right of the defendants to the use of that part of the street occupied by them could be decided in a chancery suit brought by them in the same court in which their claim was set up.
Taylor & als. case, 780

4. The report of a case in a printed volume of reports of decisions of the court of appeals of Virginia, the original record of the case having been destroyed, held admissible evidence to show that such a map as that mentioned in the report as Watkins' map, actually existed, and was in the papers in said cause; and thereby to lay a foundation for the introduction, as further evidence in the cause, of a map purporting to be certified as a map of Manchester by the clerk of the superior court of chancery of the Richmond district. Idem, 780

5. Copies of two maps attached to two deeds for lots in Manchester, recorded in the clerk's office of Chesterfield county, one dated August 10th, 1816, and the other January 3d, 1847, held to be admissible for the purpose of ascertaining the scale and verifying the map of Manchester certified by the clerk of the superior court of chancery for the Richmond district, which had been previously admitted as evidence; but for this purpose only. Idem, 780

6. S. Taylor, under whom the defendants claimed the house and lot, was a member of the council of Manchester, 1865—HELD: That certain proceedings of the council at that time when he was present, in regard to what is called the Percival survey of the said town, were admissible in evidence for the purpose of showing said S. Taylor's connection with said survey. Idem, 780

7. William Byrd having laid off the land comprised within certain limits of the town of Manchester into lots and streets, and made a map of the town so laid off, showing the lots and streets, and having sold lots with reference to said map, all the streets
888 *designated on said map were thereby irrevocably devoted to the public; and the public have a right to have the streets, as designated on that map, throughout their entire length and width, thrown open forever, and kept free from any and all encroachments and obstructions. Idem, 780

8. The act of the house of burgesses passed November, 1769, establishing the town of Manchester as laid off into lots and streets, was an acceptance on the part of the colony of Virginia of the streets thus dedicated to the public. Idem, 780

9. The streets of the city of Manchester having been dedicated to the public by William Byrd, when he laid off the town, and this dedication having been accepted by the act of the house of burgesses in November, 1769, the streets are public highways; and any occupation of a street, or a part of a street by the owner of an adjoining lot, however long continued, cannot give such occupant a right to hold it, or bar the right of the public to the use of the street to its full width and extent. Idem, 780

RAILROAD COMPANIES.

1. Where a railroad company which was incorporated in another state, leases a railroad lying in this state, and operates the same as owner thereof, and an injury occurs on said railroad, the person having a right of action for such injury, may sue the railroad company in the courts of this state, and such company has no right to remove the suit to the federal court.
Balt. & Ohio R. R. Co. *v.* Wightman's adm'r, 431

2. In an action under ch. 145, §§ 7, 9, Code of 1873, it is not necessary to aver in the declaration for whose benefit the suit is prosecuted. Idem, 431

3. In such an action against a railroad corporation for the killing of a person, evidence is admissible to show the condition and circumstances of the family of the deceased, his business qualifications, the condition of his health, the amount he was realizing annually from his employments, the value of his services to his family, and the damage suffered by them in the loss of his care, nurture and instruction. Idem, 431

4. In such an action, where the deceased has left a wife and children, the jury, in ascertaining the damages, may properly assess the same with reference to the pecuniary loss sustained by the wife and children—first, by fixing the same at such a sum as would be equal to the probable earnings of the deceased during the probable period of his life if he had not been killed, taking into consideration his age, business capacity, experience, habits, health, energy and perseverance; and second, by adding thereto the value of his services in the attention to and superintendence and care of his family, and in the education of his children, whereof they are deprived by his death.
Idem, 431

5. Quære: Whether in such an action the jury, in ascertaining the damages, are limited to the pecuniary loss sustained by the family of the deceased; or whether they may

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consider the physical pain of the deceased, or the mental suffering of the surviving family, or the loss to them of the parent's moral and intellectual training. Idem, 431

6. In such an action it is not competent for the defendant to show that the deceased held policies of insurance on his life for the benefit of his wife and children, and that since his death the amounts called for by such policies have been paid over to them. Idem, 431

7. When injury or damage happens to a passenger by the breaking down or overturning of a railroad train, or the breaking down of a bridge, or wheel, or axle, or by any other accident occurring on the road, the presumption prima facie is, that it occurred by the negligence of the railroad company; and the burden of proof is on the railroad company to establish that there has been no negligence whatever, and that the damage has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent. Idem, 431

8. The law, in tenderness to human life and limbs, holds railroad companies
889 *liable for the slightest negligence, and compels them to repel by satisfactory proofs, every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such case will make such carriers liable in damages under the statute. Idem, 431

9. The Baltimore & Ohio railroad company, as a common carrier of passengers, was bound to exercise the utmost degree of diligence and care in safely transporting the intestate of the plaintiff on his journey. Idem, 431

10. The slightest neglect, against which human prudence and foresight might have guarded, and by which his death may have been occasioned, renders such company liable in damages for such death. Idem, 431

11. The said railroad company is held by the law to the utmost care, not only in the management of its trains and cars, but also in the structure and repair and care of the tracks and bridges, and all other arrangements necessary to the safety of the passengers. Idem, 431

RAPE.

1. To carnally know a female child under twelve years of age, whether with or without her consent, is rape. Givens' case, 830

2. To attempt to carnally know a female child under twelve years of age, whether with or without her consent, is an offence embraced in the statute, Code of 1873, ch. 195, § 10, and is punishable by confinement in the penitentiary for a period not less than one nor more than eighteen years Idem, 830

3. The statute provides that the offence charged may be, at the discretion of the jury, punished with death or confinement in the penitentiary. This is a death penalty, and the attempt to do the act forbid is embraced in the statute, Code of 1873, ch. 195, § 10. Idem, 830

4. In a prosecution for carnally knowing a female child under twelve years of age, the jury find the prisoner not guilty of the act, but guilty of the attempt to commit it. The only witness as to the act was the child, who was proved by her mother to be between ten and eleven years old. The court below having refused to set aside the verdict, and grant a new trial, the appellate court will not reverse the judgment. Idem, 830

REMOVAL OF CAUSES.

1. Where a railroad company which was incorporated in another state leases a railroad lying in this state, and operates the same as owner thereof, and an injury occurs on said railroad, the person having the right of action for such injury may sue the railroad company in the courts of this state; and such company has no right to remove the suit to the federal court.

Balt. & Ohio R. R. Co. *v.* Wightman's adm'r, 431

SETTLEMENTS.

1. When a settlement by a husband on his wife and children vests a separate life estate in the wife, see Trusts and Trustees, No. 1, and

Leake, trustee *v.* Benson & als., 153

2. Marriage is a valuable consideration, sufficient to support a conveyance of property, even against creditors; and in such a case the wife is deemed a purchaser of the property settled on her in consideration of the marriage, and is entitled to hold it against all the world.

Herring & als. *v.* Wickham and wife and als., 628

3. However much a man may be indebted, an ante-nuptial settlement made by him in consideration of marriage, is good against all creditors, unless it appears the intended wife was cognizant of the fraud. And even though it conveys his whole estate, it is not simply on that account void: and when a settlement is made in contemplation of marriage, the law presumes it was an inducement to it, and the courts cannot assume the contrary to be the fact. Idem, 628
890 *4. The fact of the cohabitation of the parties and the birth of children before the marriage will not avoid the conveyance. Idem, 628

5. Coutts *v.* Greenhow, 2 Munf. 363, examined and followed. Idem, 628

SHERIFFS.

1. A debtor is taken on a ca. sa., and surrenders his interest in a tract of land on which he had previously given a deed of trust to secure a debt. The sheriff sells the land out and out. The sale is a nullity, and the purchaser acquires no right to it by his purchase.

Snavely *v.* Pickle & als., 27

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SHIP-BROKER.

1. What acts do not constitute action as a ship-broker, so as to require a license as such.
Wooddy's case, 837

SLAVES.

1. The emancipation of slaves by will, which did not provide for or direct their removal from the state, was valid.
Simmerman v. Songer & als., 9

2. Testator gives by his will to his widow four slaves by name, during her life; and he emancipates them at her death, and gives to each of them by name a legacy. The widow lives until 1875. Though the slaves were emancipated by the results of the war, before the death of the widow, yet the legacies having been not to a class, but to the legatees by name, they are entitled to the legacies.
Idem, 9

SPECIFIC EXECUTION.

1. In a case for specific execution of a contract for the sale of land, though it appears that the price contracted to be given for the land was more than double its value, yet as the purchaser was fully competent to contract, and there was no fiduciary relation between him and the vendor, and a very brief acquaintance, and the purchaser made his own examination of the land, though it was mostly covered by snow; in the absence of all fraudulent representations on the part of the vendor, the contract will be enforced.
White & wife v. McGannon & al., 511

STATUTES.

1. The act, Code of 1873, ch. 118, § 9, as to wills revoked, construed in
Rudisill's ex'or v. Rodes & wife, 147

2. The act, Code of 1873, ch. 145, § 6, as to counts in case and trespass, construed in
Womack v. Circle. 192

3. The act of April 2d, 1873, Code of 1873, ch. 173, § 14, in relation to the war interest, construed in
Pretlow v. Bailey's ex'x & als., 212

4. The act of March 5th, 1863, acts of 1862-63, ch. 46, p. 81, in relation to fiduciary investments, construed in
Crawford v. Shover & als., 69

5. The act of congress of March 7th, 1867, §§ 32 and 33, in relation to the debts of a bankrupt, commented on in
Cromer v. Cromer's adm'rs, 280

6. The act, Code of 1849, ch. 149, § 9, in relation to the effect of a charge by devise upon real estate, upon the operation of the statute of limitations, construed in
Johnston, trustee, &c., v. Wilson's adm'r & als., 379

7. The act, Code of 1873, ch. 166, § 6, in relation to judgments by default, construed in Dillard v. Thornton, 392

8. The act, Code of 1873, ch. 145, §§ 7 and 9, in relation to actions for injuries, construed in
Balt. & Ohio R. R. Co. v. Wightman's adm'r, 431
Matthews v. Warner's adm'r, 570

9. The act, Sess. Acts 1869-70, pp. 42, 43, in relation to the jurisdiction of the circuit court of the city of Richmond in cases in which certain officers of the state are proper parties, construed in
Ragland v. Broadnax & als., 401

891 *10. The act Code of 1860, ch. 149, §§ 5 and 19, in relation to limitation upon bonds, construed in
Booker's adm'r v. Booker's rep., 605

11. The act, Code of 1873, ch. 167, § 40, in relation to suits by corporations, construed in
Gillett v. American Stove & Hollow-ware Co., 565

12. The 3d exception to the 1st section of article xi of the constitution of the state, construed in
Commonwealth, by, &c., v. Ford & als., 683

13. A statute will not be repealed by implication, unless the latter statute is so inconsistent with the first that they cannot stand together, or the latter statute embraces the whole subject matter of the first. See opinion of Burks, J.
Hogan v. Guigon, judge, 705
Moll v. Same, 705

14. The act, Code of 1873, ch. 183, § 3, in relation to the waiver of homestead exemption, held not unconstitutional in
Reed & als. v. Union Bank of Winchester & als., 719

15. The act of April 2, 1853, Sess. Acts of 1852-53, p. 142, § 3, in relation to the Petersburg Railroad Company, construed in
City of Petersburg v. Petersburg R. R. Co., 773

16. The act, Code of 1873, ch. 195, § 9, in relation to the punishment for attempt to commit an offense, construed in
Givens' case, 830

17. The act of March 30th, 1877, known as the Moffett register law, construed in
Helfrick's case, 844

18. The act, Code of 1873, ch. 159, § 13, in relation to the administering of oaths by clerks of courts, construed in
Maybush's case, 857

SUBSTITUTION.

1. A bond on which the principal and surety are both bound, once paid by the surety in the lifetime of the principal, without assignment, or agreement to assign, is forever dead as a security, as well in equity as at law. There can be no substitution in such a case.
Cromer v. Cromer's adm'rs, 280

2. A surety paying a judgment against his principal and himself will be substituted

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to the lien of a judgment upon land in the hands of a bona fide purchaser.

Eidson *v.* Huff & al., 338

3. A surety in an injunction bond for the second endorser of a negotiable note, who has been compelled to pay said note, is entitled to recourse against the first endorser to recover the amount so paid.

Chrisman's adm'x *v.* Harman & al., 494

SURETIES.

1. A contract by M, the obligee in a bond, to purchase from C, the principal obligor, a tract of land, the whole purchase money to be due the 1st of September next, when possession was to be delivered, with the privilege of M to pay off all liens on the land, and his own claim to be taken in part of the purchase money. Before the 1st of September M, from apprehension that C will go or be put into bankruptcy, declines to take the land—HELD: The contract did not bind M not to sue on the bond until the 1st of September, nor was he bound under the circumstances, to carry out the contract; and the sureties in the bond are not released.

Coffman & als. *v.* Moore's ex'ors, 244

2. A bond on which the principal and surety are both bound, once paid by the surety in the life time of the principal, without assignment by the creditor, or agreement to assign, is forever dead as a security, as well in equity as at law. There can be no subrogation in such a case.

Cromer *v.* Cromer's adm'rs, 280

3. A surety paying a judgment against his principal and himself will be substituted to the lien of the judgment upon land in the hands of a bona fide purchaser. See Judgments, No. 3, and

Eidson *v.* Huff & al., 338

4. A surety in an injunction bond for the second endorser of a negotiable
892 *note, who has been compelled to pay said note, is entitled to recourse against the first endorser to recover the amount so paid.

Chrisman's adm'x *v.* Harman & al., 494

5. Such surety is not barred from such recourse by the fact that in a suit in equity brought by the holder of such note against the maker and endorsers, a decree was rendered in favor of the first endorser.

Idem, 494

6. Nor is the surety barred of such recourse by the fact, that in another suit in equity, brought by the second endorser, to establish the liability to him of the first endorser, the bill was dismissed upon answer and demurrer, there being set out several causes of demurrer, of which some went to the merits of the controversy and others did not, and it not appearing for what cause the bill was dismissed. Idem, 494

7. Sureties of a collector of taxes are not entitled to a homestead exemption as against the commonwealth for the amount of taxes for which their principal fails to account.

Commonwealth by, &c., *v.* Ford & als., 683

TAXES AND TAXATION.

1. The 17th section of the charter of the Petersburg R. R. Co., which exempted the property of the company from taxation, has been repealed by the act of April 2d, 1853, which united it with the Greenesville and Roanoke railroad company; which act was accepted by the company; and the property of said company is now subject to taxation.

City of Petersburg *v.* Petersburg R. R. Co & als., 773

TRESPASS ON THE CASE.

1. In an action of trespass on the case, counts in case and counts in trespass vi et armis may be joined in the declaration. Code of 1873, ch. 145, § 6.

Womack *v.* Circle, 192

2. In an action on the case, the count, without any special averments, charges that the defendant falsely and maliciously charged that the plaintiff attempted to bribe H (a negro woman) to burn the wheat stacked on his land—HELD: The statute, Code of 1873, ch. 188, § 5, makes the malicious burning of a stack of wheat a felony. To solicit another to commit a felony, though the felony may be not afterwards committed, is a misdemeanor at common law, indictable and punishable; and the count avers a good cause of action. Idem, 192

TRUSTS AND TRUSTEES.

1. By deed bearing date August 8, 1854, A, in consideration of his affection for his wife M, and of his children born or to be born of his said wife M, conveyed to L all his property after payment of the debts he then owed, "In trust for the benefit of my wife and children aforesaid, giving, granting and conveying for my wife an estate for life, and at her death for my children an estate in fee simple, the whole of what belongs to me over and above my just debts being in trust conveyed to the aforesaid L." And he directed that none of the principal of the trust property should be expended during the life of his wife, unless L should think it necessary for the support of his wife and children. During A's life he executed bonds in which his wife joined, and after his death she gave her bonds or notes for debts contracted by her. Upon a bill by these creditors to subject the life estate of M in the trust property—HELD: M took a life estate in the property which may be subjected to satisfy the debts in which she joined, either as surety or principal.

Leake, trustee, *v.* Benson & als., 153

2. P, as trustee of L and wife, would have in his hands about $5,000, coming in in 1860-'61-'62 and '63; and with their concurrence he, in 1860, purchased of J, agent of B's heirs, a tract of land for about $5,000, payable one-fourth in cash and the balance

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on the 1st of September, 1861-'62-'63. 893 He paid the cash payment and *gave his own bonds for the deferred payments, and B's heirs, of whom there were eleven, conveyed the land to P in trust for L and wife. Two of these heirs lived in Indiana, one of whom was paid in full his share of the purchase money in the spring of 1861. At that time M and P, two of the heirs, went on a visit to Indiana, and before they went they informed J they would return in the fall, and instructed him to collect the money due them in September, and have it ready for them. He did collect it, but they did not return during the war. J objected to receiving the payment of the bonds due in 1862 and 1863 in Confederate currency, but P told him it was liable to confiscation, and if he did not receive it he would have it confiscated. J then received it and invested it in Confederate bonds, making no use of the money himself. Upon the question of who should bear the loss upon the three bonds—HELD:

1. J was justified by the direction of M and P in receiving payment of the bond due in 1861, and they must bear the loss on that bond.

Pilson, trustee, & als. *v.* Bushong & als., 229

2. J having been induced by the threat of P to receive payment of the second and third bonds, and acting in good faith, he is not to be held liable for the loss on these bonds. Idem, 329

3. P having induced J to receive the payment of these two bonds by his threat of having the debts confiscated, he is to bear the loss. Idem, 229

4. P having made the purchase of the land and given his own bonds for the deferred payments, he must make good the loss to M and P out of his own estate. Whatever equity he may have as against L and wife, must be adjusted between them. Idem, 229

3. In 1857, M conveyed to H, with other property, $9,000 of the Virginia and Tennessee railroad company bonds, secured by mortgage and guaranteed by the city of Lynchburg, for the use and benefit of Mrs. M and her husband N and their children, in trust: 1. During the life of Mrs. M and her husband N and of the survivor of them, the said property and money to be held and the income thereof applied to the support of them and the survivor of them and their children 2. At the death of the survivor the property and its increase to be divided among the issue of M and N per stirpes 3. During the life of M any of the property may be exchanged for other property by the trustee, by and with the written consent of M, and after her death, by and with the written consent of N. In 1859, H, without the written consent of M, sold these bonds to G for $8,280, for which G gave his bond, payable in July, 1863, and interest payable semi-annually, and a deed of trust on the land to secure it. In 1863, when the bond fell due, G proposed to pay it in Confederate money, and M having given her written consent, H accepted the money; and P having been in 1864 substituted as trustee, H transferred the money to him. Upon a bill filed by the children of M and N against H and G—HELD:

1. Under the trusts of this deed, the property could only be sold or exchanged by a decree of a court of equity, or with the written consent of M given at the time, or previous to the sale or exchange.

Patteson & wife & als. *v.* Horsley, trustee, & als., 263

2. Even the written consent or request of M would not be sufficient to authorize and justify a sale of the property; but the trustee must have the sanction of his own judgment in it. Idem, 263

3. The bonds being a permanent investment, well secured, and paying interest regularly on the par value, it was a breach of trust in H to sell them and take a bond having only four years to run; and especially to sell them without the written consent of M. Idem, 263

4. As G knew, or might have known if he had inquired, that H was committing a breach of the trust in the sale to him without the written consent of M, and he 894 was a *party to that act, both H and G are liable to the cestuis qui trust for any loss which accrued to the trust fund by the said sale. Idem, 263

5. Even if by said sale the bond of G had become a part of the trust fund, it was a breach of trust in H to receive payment of it in Confederate money in July, 1863, when it had depreciated in value as nine to one of gold; though M did consent in writing to receive it; and G participated in such breach of trust; and they are jointly liable to indemnify the beneficiaries in the deed against all loss and damage sustained by such breach. Idem, 263

6. H and G are chargeable in account with said beneficiaries, with the price of the bonds sold by H to G, viz: $8,280, with interest thereon from the date of said sale, payable semi-annually, subject to all credits to which they, the said H and G, are properly entitled on account of the same. Idem, 263

7. In the settlement of the trust account H is to be credited with the scaled value of the Confederate money paid by him to P as at the time of such payment; and P will be chargeable in his trust account with that amount. Idem, 263

8. As between H and G, G is primarily liable for the value of said bonds, except so much thereof, or of his bond therefor, as has been actually paid by him to H in good money; and to that extent G is entitled to credit in his account with H; but not in the account of said H and G with the beneficiaries of the trust fund. Idem, 263

4. P conveys to G a large amount of property, real and personal, some of it covered by prior liens to secure specific debts, other part

of it an undivided interest, with full power to sell when and how G shall think best, and out of the proceeds of the trust fund to pay the debts of P, which are very numerous and some of them large. The principle that the prior liens must be ascertained and the priorities of debts fixed before sales can be made by a trustee, does not apply to the case. G is the agent of P, as well as trustee, and as P could sell without having the liens ascertained and the priorities fixed, he may authorize G to do so.

Preston *v.* Stuart & als., 289

5. A charge of fraud in G in making a sale to S, in which S participated, must be clearly sustained by proof to authorize the setting aside the sale. And in this case the evidence fails to sustain the charge. Idem, 289

6. Where a bill does not specify errors in the accounts of a trustee regularly settled by the commissioner of the county court and confirmed, but only charges generally that there are errors in them, the court will not direct a re-settlement of the accounts.

Idem, 289

7. In January, 1856, by deed which was duly recorded, T and wife conveyed to D a house and lot in trust to secure W, of Philadelphia, against any loss or damage which he might sustain by his acceptance of any drafts or bills which might thereafter be drawn by T upon W, which acceptances W had agreed to make for the accommodation of T. W accordingly, from the date of the deed to January, 1861, accepted drafts of T to a large amount, and T was indebted to him much more than the house and lot was worth. In 1871, the A. Savings Bank, being the holder of three notes of T, given in renewal of notes which were due before the date of the deed, filed a bill against T as an absent defendant, to attach the said house and lot, insisting that the deed having been given for future advances, was null and void as to the creditors of T—HELD:

1. Though W was under no liabilities for T when the deed was executed, it was a valid security for all his acceptances for T g ven before some other creditor had acquired a lien on the house and lot.

Alex. Savings Inst. & als. *v.* Thomas & als., 483

2. The Savings Bank had no lien on the house and lot until the filing of its bill.

Idem, 483

3. Though the acceptances were in the name of W. & Co., the deed is a valid security for acceptances by W in that name.

Idem, 483

895 *8. By what conveyance or contract of or in relation to property held by her trustee, a feme covert is not bound. See Husband & Wife, No. 4, 5, and

Hawley *v.* Twyman, trustee, & als., 728

9. In 1851 R was appointed trustee in a deed for R, a married woman, and her children, she taking for her life and they in remainder. In 1855 R was removed and T appointed in his place. Of the trust property there was $400 which R had lent to a firm of which his brother was a member, and R directed W to settle for it with T. W transferred to T the bond of H, and received from T a receipt for the $400. In a few months after H died, and T sued his administrator and recovered a judgment; but the execution upon it was returned "no effects." In 1871, B, still under coverture, by her next friend, and her children, sued R and T for a settlement of their accounts as trustees—HELD:

1. Both R and T were guilty of a breach of trust in the transfer and receipt of the bond of H, and are liable for the amount to the cestuis que trust.

Rowe *v.* Bentley & als., 756

2. The statute of limitations is not a bar to the claim as to either of the trustees.

Idem, 756

3. Under the circumstances—the coverture of B, the life tenant, the suspension of legal proceedings during the war in that county, the subsequent stay laws, and the ignorance of the facts by the cestuis que trust—the lapse of time is not a bar to the recovery of the claim. Idem, 756

4. A decree against R for the amount, leaving him to assert any claim he may have against T, is not erroneous.

Idem, 756

USURY.

1. Where a bond dated in Texas, signed by the principal obligor, a resident of Texas, and by two sureties, residents of Virginia, payable to a resident of Virginia, where the drafts, which were the consideration of the bond, were sent to and received in Texas, and the money borrowed used in Texas by the principal obligor—HELD: To be a contract governed by the laws of Texas, and not affected by the laws of usury in Virginia.

Backhouse's ex'x *v.* Selden, 581

WILLS.

1. The intention of a testator is not to be collected from any isolated clause, but from the whole will. Nor can clear and unambiguous provisions in one part of the instrument be controlled by mere inference and argument from general or ambiguous provisions in other parts of the instrument.

Summerman *v.* Sanger & als., 9

2. For what is meant by the phrase "undue influence," see the opinion of Staples, J.

Idem, 9

3. The attesting witnesses of a will who are introduced to prove the will was not properly executed, or the incapacity of the testator, will not be excluded; but their evidence will be received with much suspicion.

Lambert's *v.* Cooper's ex'or & als., 61

4. Though the statute requires at least two witnesses to a will, it may be proved by one of them, he proving the attestation of the other. Idem, 61

5. Where a will which revokes a former will is destroyed by the testator animo revo-

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candi, with intention that the former will shall be his will, but he does not re-execute it, or make a codicil reviving it, though he retains it uncancelled, it is not revived by the destruction of the last will.

Rudisill's ex'or *v.* Rodes & wife, 147

WITNESSES.

1. Where a party to a cause is examined in his own behalf, and cross-examined at length by the other party, without objection to his competency, the objection cannot be made in the appellate court.

Neilson & als. *v.* Bowman & als., 732

2. But where an objection to the competency of a party as a witness is written 896 at the commencement of the *deposition, the objection is not waived by the cross-examination. Idem, 732

WRONGFUL ACTS, NEGLECTS, &c.

1. When a railroad company is liable under the act, Code of 1873, ch. 145, § 7, 9, for its wrongful acts, neglects and defaults, see Railroad Companies, No. 2 to 11, inclusive and

Baltimore & Ohio R. R. Co. *v.* Wightman's adm'r, 431

2. In an action under ch. 145, § 7, 9, Code of 1873, to recover damages for the death of a person, caused by the wrongful act, &c., of another, it is not necessary to aver in the declaration for whose benefit the action is brought. Idem, 431

Matthews *v.* Warner's adm'r, 570

3. In such an action the jury in assessing the damages are not confined to the mere pecuniary loss and injury, but may give such damages as to them "may seem fair and just." Idem, 570

4. Where in such an action the death was caused by the wrongful act of the defendant, it is no defence that the death was the result of the misconduct or neglect of the deceased; but that circumstance may affect the quantum of damages. Idem, 570

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